Decolonial Constitutionalism

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Abstract

The American Declaration of Independence kindled the first successful decolonial movement in the modern world, culminating in the enactment of the United States Constitution. From colony to sovereign state to great power, the United States modeled for subordinated peoples abroad how to win their own battles for sovereignty. Since the end of the Second World War, however, America's eighteenth-century precedent of revolutionary self-determination is no longer the prevailing path to decolonization. The traditional warmaking toolkit for winning independence—revolution, illegality, and violence—has been replaced by more orderly tactics consonant with the rule of law. Evolution, lawfulness, and continuity are the touchstones in the new global model of decolonial constitutionalism that now lights the path to self-determination.

Decolonial constitutionalism is the use of legal, legitimate, and non-violent means to assert sovereignty, to secure rights, or to achieve recognition for a people, nation, or state that is legally or politically subordinate to domestic or foreign actors. In contrast to the American model of revolutionary self-determination, this new global model of decolonial constitutionalism has pluralized actors and sites of contestation, though the decisive objective of decolonization remains the same. Once won in the theatre of war, decolonization is now prosecuted in parliaments, courts of law, and the public square. The protagonists are no longer soldiers and generals; they are politicians, lawyers, judges, and civil society. Nor does self-determination today necessarily entail establishing a new state in the international order and taking a seat among equals alongside the countries of the world. In our new era of non-violent claims to sovereignty, decolonial movements choose instead to write new constitutions for existing states, to amend enduring constitutions, to enforce treaty rights, to promulgate multilateral agreements, or to pursue analogous courses of

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disruptive constitutional activity well short of declarations of independence. Decolonial constitutionalism therefore refers to a suite of strategies to exercise self-determination, defined expansively to comprise a broad scope of decolonial objectives consistent with the rule of law.

In this Article, I introduce, illustrate, and theorize decolonial constitutionalism as the modern form of self-determination. Drawing from historical and modern decolonial movements, I show how subordinated peoples have seized the levers of law and politics to innovate new paths to self-determination without taking up arms, in the process showing similarly situated peoples how to achieve their own goals of independence, nationhood, or constitution-making in a manner that reinforces rather than undermines the rule of law. These strategies have proven ultimately more productive for decolonial movements to free their peoples from bondage in law or politics, to attract ideologically aligned partners at home and abroad, and to more effectively communicate to internal and external audiences the moral legitimacy of their claims to self-determination.

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I. INTRODUCTION—THE NEW GLOBAL MODEL OF DECOLONIAL CONSTITUTIONALISM

The American Declaration of Independence kindled the first successful decolonial movement in the modern world.[1] From colony to sovereign state to great power, the United States modeled for subordinated peoples abroad how to launch and win their own battles for sovereignty. Since the end of the Second World War, however, America's eighteenth-century precedent of revolutionary self-determination is no longer the prevailing path to decolonization. The traditional warmaking toolkit for independence—revolution, illegality, and violence—has been replaced by more orderly methods consonant with the rule of law. Evolution, lawfulness, and continuity are the touchstones in the new global model of decolonial constitutionalism that now lights the path to self-determination. The tactics in decolonial constitutionalism are legal and legitimate levers of constitutional power available in all jurisdictions to liberate peoples subordinated in law or politics.

It is commonly but incorrectly thought that constitutionalism and decolonization sit in an irreconcilable tension, on the theory that constitutionalism is a western concept that must itself be decolonized.[2] But the modern history of decolonization is a history of modern constitution-making. In the second half of the twentieth century, more than twenty new republics sprouted in Sub-Saharan Africa alone.[3] The demise of colonial empires coincided with the multiplication of new nations, each with its own new constitution.[4] Often but not always enacted contemporaneously to declarations of independence,[5] decolonial constitutions

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1 Scholars mark the beginning of the modern era of constitutionalism in the late 18th Century. *See* Horst Dippel, *Modern Constitutionalism, an Introduction to a History in Need of Writing*, 73 LEG. HIST. REV. 153, 153 (2005); Akhil Amar describes this period as the "hinge of human history." *See* Monica Schreiber, *Constitution Day 2024: A Lesson in History From an Originalist Liberal*, STANFORD LAW SCHOOL, (Oct. 14, 2024), https://perma.cc/J4EY-RB5W.

2 *See, e.g.*, BOAVENTURA DE SOUSA SANTOS, SARA ARAÚJO & ORLANDO ARAGÓN ANDRADE, DECOLONIZING CONSTITUTIONALISM: BEYOND FALSE OR IMPOSSIBLE PROMISES 1, 3–5 (Boaventura de Sousa Santos et al. eds., 2024); José-Manuel Barreto, *Decolonial Thinking and the Quest for Decolonizing Human Rights*, 46 ASIAN J. SOC. SCI. 484, 495–99 (2018); Dante Gatmaytan, *Legal Transfers as Colonization: Initial Thoughts on Decoloniality and the Constitution*, 93 PHILIPPINE L.J. 276, 289 (2020); Giulia Parola et al., *Is a Decolonial Law Possible? Epistemologies of the South and Constitutional Law*, 2 REVISTA JURÍDICA 665, 662–63 (2022); James Tully, *Modern Constitutional Democracy and Imperialism*, 46 OSGOODE HALL L.J. 461, 488 (2008); Maartje De Visser & Andrew Harding, *Monarchical Constitutional Guardianship and Legal Métissage in Asia*, 9 ASIAN J. L. & SOC'Y 345, 359 (2022).

3 RAYMOND F. BETTS, DECOLONIZATION 111 (1998).

4 *See* Dietmar Rothermund, *Constitution Making and Decolonization*, 53 DIOGENES 9, 9–10 (2006).

5 Declarations of independence can fulfill many functions, including expressing grievances, establishing legal and political institutions, and committing to a new state. *See* Aleksandar Pavković & Argyro Kartsonaki, *Declarations of Independence: Their Objectives and Their Sub-Genres*, ACADEMIA | LETTERS, 1, 2–3 (2021).

perform the actions of constituting a people, nation, or legal system.[6] The difference between breaking from a colonial arrangement in the present day versus the age of revolution two centuries ago highlights the essential teaching of decolonial constitutionalism: what was once achievable by revolutionary means alone is today won with non-violent systems and lawyerly care.

Decolonial constitutionalism is the use of legal, legitimate, and non-violent means to assert sovereignty, to secure rights, or to achieve recognition for a people, nation, or state that is legally or politically subordinate to domestic or foreign actors. In contrast to the American model of revolutionary self-determination, this new global model of decolonial constitutionalism has pluralized actors and sites of contestation, though the objective of decolonization remains the same. Once won in the theatre of war, decolonization is now prosecuted in parliaments, courts of law, and the public square. The protagonists are no longer soldiers and generals; they are politicians, lawyers, judges, and civil society. Nor does self-determination today necessarily entail establishing a new state in the international order and taking a seat among equals alongside the countries of the world. In our new era of non-violent claims to sovereignty, decolonial movements choose instead to write new constitutions for existing states, to amend enduring constitutions, to enforce treaty rights, to promulgate multilateral agreements, or to pursue analogous courses of disruptive constitutional activity short of a declaration of independence. Decolonial constitutionalism therefore refers to a suite of strategies to win self-determination, defined expansively to comprise a broad scope of decolonization objectives consistent with the rule of law.

In this Article, I introduce, illustrate, and theorize decolonial constitutionalism as the modern form of self-determination. Drawing from historical and modern decolonial movements located in every single region of the world—Africa, Asia, Europe, Oceania, and the Americas—I show how subordinated peoples have seized the levers of law and politics to innovate new paths to self-determination without taking up arms. I demonstrate also that subordinated peoples have shown similarly situated groups how to achieve their own goals of independence, nationhood, or constitution-making in a manner that reinforces rather than undermines the rule of law. Although it is ultimately an empirical question to be answered, these strategies may have proven ultimately more productive than traditional revolutionary means for decolonial movements to free their peoples from bondage in law or politics, to attract ideologically aligned partners at home and abroad, and to more effectively communicate to internal and external audiences the moral legitimacy of their claims to self-determination.

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6 JUDITH PRYOR, CONSTITUTIONS: WRITING NATIONS, READING DIFFERENCE 4–6 (2008).

Decolonial constitutionalism takes many forms. I highlight three major categories of strategies in this Article, each driven by a different constellation of political actors endeavoring to advance the decolonial project in different forums for constitutional politics. I begin, in Part I, with decolonial constitution-making, a broad category capturing all forms of constitutional reform—including enacting and changing constitutions—whose objective is to decolonize the state apparatus in whole or in part. I introduce a typology of models of decolonial recognition in constitutional design, drawing from representative constitutional rules in Angola, Bolivia, Botswana, Kiribati, Mexico, Nicaragua, Slovenia, Vanuatu, Venezuela, and Zimbabwe. I proceed next to illustrate three major fault lines in constitutional decolonization, drawing from constitutional battles fought and either won or lost by Indigenous Peoples in Australia, Greenland, and Guatemala. Then, I illustrate an increasingly politically salient case of decolonial constitution-making with reference to Barbados, Jamaica, and Mauritius: transforming the system of government from the colonial inheritance of constitutional monarchy to modern republicanism.

In Part II, I shift our field of sight from decolonial constitution-making to decolonial judicial enforcement. As I demonstrate, many courts around the world have become reliable allies for decolonizing constitutions, though some remain resistant to it, believing that they lack either the legal, moral, or sociological legitimacy to act, even for what they believe to be right. I begin by highlighting three creative strategies courts have deployed to apply and interpret Indigenous rights treaties in the U.S., Canada, and Colombia. Next, I explain how courts have successfully protected the constitutional rights of Indigenous Peoples in Sweden, Taiwan, and Uganda, sometimes in the face of incomplete constitutional texts that require creative readings. Then, I examine how courts have interpreted constitutions to chart a path to self-governance for peoples who consider themselves subordinated in law or politics in Canada, Ecuador, and France.

While Parts I and II concern principally domestic actors at the state level—constitutional reformers and constitutional interpreters—Part III is oriented simultaneously above the state and below it, focusing on efforts at the multilateral supranational level and the micro-constitutional sub-state level. The most important institution to advance the decolonial project at the supranational level is the United Nations, whose potentially transformative Declaration of the Rights of Indigenous Peoples has been applied around the world, with important cases in Belize and Japan. Still at the supraconstitutional level, I explore how and whether decolonial constitutionalism can occur at the regional level, namely with regard to the Organization of African Unity, the Arab-Asian Bloc, and the Caribbean Court of Justice. Part III closes with an analytical inquiry into decolonial constitutionalism at the sub-state level, with focus on reconciliation in the City of Vancouver, truth-telling in the State of Queensland, and constitution-making in the Territory of the U.S. Virgin Islands. The result is a 360-degree view

of the innovative ways, both supranational and sub-state, to decolonize constitutions beyond the conventional approaches at the domestic state level.

I close with reflections on the paradox of the American model of revolutionary decolonial self-determination, which is evident in the words that open the doors to the U.S. Constitution: "We the People."[7] Over two centuries later, the promise of this unifying preambular call for community and belonging remains unfulfilled in the United States. But it has inspired disempowered populations elsewhere to seize the reins of self-determination for a new beginning. Here, then, is the paradox: the emancipatory meaning of the words in America's constitutional preamble may have borne greater fruit for subordinated peoples abroad than at home in the United States.

II. DECOLONIAL CONSTITUTION-MAKING

The modern vanguard of decolonial constitution-making offers a bundle of strategies for constitutional actors in their quest for self-determination. I begin this Section with a novel typology of the primary constitutional design strategies codified in constitutional texts to protect and promote the decolonial project, with a focus on Indigenous rights and recognition. I illustrate and compare these major strategies with reference to constitutions in the Americas, Africa, Europe, and Oceania. Next, I shine a light on decolonial failures in Australia, Greenland, and Guatemala to expose collateral fault lines on the path to constitutional decolonization involving Indigenous Peoples and other subordinated persons. Then, I examine a common form of decolonial constitutionalism evident in Barbados, Jamaica, and Mauritius: transforming the system of government from a constitutional monarchy to a republic.

A. Models of Recognition

Constitutions now regularly codify rules to protect and promote the decolonial project. These rules take both specific and general forms. Some constitutionalize agreements in a high degree of detail while others are written in broad terms that leave ample room for interpretation. We can classify many of these rules into three major models of constitutional recognition: (1) rules guaranteeing minimum political representation; (2) rules constitutionalizing autonomy; and (3) rules establishing a requirement of consultation on matters affecting certain prerogatives, rights, and territory. In this Section, I illustrate these three models of recognition with reference to Indigenous Peoples. But each could be designed to recognize rights for any group of subordinated persons.

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7 U.S. CONST. pmbl.

1. Minimum political representation

The right to serve in government is fundamental to democracy.[8] It is a key pillar in decolonial constitutionalism. Creating space for Indigenous representation in government is an effective way to help heal a state in recovery from the wounds of colonialism. Some constitutions take a minimalist approach to codifying rules for Indigenous political representation. They declare plainly this right of representation extends to Indigenous persons, while leaving further particularities about numbers and procedures to ordinary law. For instance, the Venezuelan Constitution states that "Native peoples have the right to participate in politics. The State shall guarantee native representation in the National Assembly and the deliberating organs of federal and local entities with a native population, in accordance with law."[9] The Constitution of Slovenia takes a similar approach, referring to special rights for autochthonous communities.[10]

Other constitutions go further than a simple declaration of a right to Indigenous political representation. They codify a more comprehensive statutory scheme that details the ins and outs of Indigenous political representation well beyond a mere declaration of the right to Indigenous participation in government. For instance, the Constitution of Kiribati retains one seat in the House of Assembly for a nominated representative of the Banaban community.[11] The candidate must be nominated to the role by the Rabi Council,[12] the long-standing group of leaders representing the Banaban people"[13] The Constitution specifies who qualifies as a Banaban and who can serve as a member of the Rabi Council: a Banaban refers to "the former indigenous inhabitants of Banaba and such other persons one of whose ancestors was born in Kiribati before 1900 as may now or hereafter be accepted as members of the Banaban community in accordance with customs."[14]

We find a similar illustration of this statutory model of Indigenous political representation in Zimbabwe. The Constitution commands that the Senate shall consist of eighty senators, with sixteen of them being local chiefs "of whom two are elected by the provincial assembly of Chiefs from each of the provinces, other

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8 *See* International Covenant on Civil and Political Rights art. 25, Dec. 19, 1966, 999 U.N.T.S. 171.

9 CONSTITUCION DE LA REPUBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] Dec. 15, 1999, art. CXXV (Venez.).

10 USTAVA REPUBLIKE SLOVENIJE [CONSTITUTION] Dec. 23, 1991, art. LXIV (Slovn.) (stating that the autochthonous Italian and Hungarian communities in the country "shall be directly represented in representative bodies of local self-government and in the National Assembly").

11 CONSTITUTION OF KIRIBATI [CONSTITUTION] July 12, 1979, art. CXVII, § 1 (Kiribati).

12 *Id.* art. CXVII, § 2.

13 *Id.* art. CXXV.

14 *Id.*

than the metropolitan provinces, in which Zimbabwe is divided."[15] In addition, the President and the Deputy President of the National Council of Chiefs must also be seated as members of the Senate.[16] These are a few illustrations of constitutional design strategies to guarantee Indigenous Peoples a minimum amount of political representation in government bodies.

2. Constitutionalizing autonomy

One step further along the spectrum of constitutional recognition is to codify the right to self-governance. The right of Indigenous Peoples to govern themselves is deeply rooted in international law and acknowledged in instruments ranging from the United Nations Declaration on the Rights of Indigenous People (UNDRIP), the International Convention on the Elimination of All Forms of Racial Discrimination, and the International Covenant on Civil and Political Rights.[17] National constitutions have followed suit by entrenching various forms of autonomy for Indigenous Peoples. For instance, the Angolan Constitution codifies the right of Indigenous Peoples—against both public and private actors—to govern themselves according to their traditional norms, values, and institutions as long as they do not violate the Constitution or the dignitarian values of personhood.[18]

A more detailed model for constitutionalizing Indigenous autonomy is found in the Mexican Constitution.[19] It defines an Indigenous community as one "that constitutes a cultural, economic and social unit settled in a territory and that recognizes its own authorities, according to their customs."[20] The Constitution aspires to foster the involvement of Indigenous Peoples in government, specifically to "strengthen[] indigenous peoples' participation and political representation, in accordance with their traditions and regulations."[21] The Constitution also recognizes the right of Indigenous Peoples to administer their own legal system, to enforce their own laws, and to resolve their conflicts internally, on the condition that these rules and procedures conform to the standards set by the Constitution.[22] In addition, the Constitution guarantees

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15 CONSTITUTION OF ZIMBABWE [CONSTITUTION] Dec. 21, 1979, art. CXX, § 1, cl. B (Zim.).

16 *Id.* art. CXX, § 1, cl. c.

17 Victoria Tauli-Corpuz (Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples), *Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples*, U.N Doc. A/73/176, at 9/23–10/23 (July 17, 2018).

18 CONSTITUTION OF THE REPUBLIC OF ANGOLA [CONSTITUTION] Jan. 21, 2010, art. CCXXIII, § 1; *id.* art. CCXXIII, § 2 (Angl.).

19 CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [CONSTITUTION] Feb. 15, 1917, art. II (Mex.).

20 *Id.*

21 *Id.* art. II, § A, cl. 7.

22 *Id.* art. II, § A, cl. 2.

Indigenous Peoples' autonomy in internal governance and elections,[23] provided that Indigenous women and men are equally eligible to vote and be elected, and moreover that no practices otherwise restrict electoral or political rights in relation to municipalities.[24] The Constitution acknowledges that even this degree of detail does not amount to a full framework for self-governance; it specifies that further enactments, at the level of ordinary law, must follow to complete the package of protections for Indigenous autonomy.[25]

The Bolivian Constitution enacts the most detailed instance of the strategy to constitutionalize Indigenous autonomy. It proclaims that "[r]ural native Indigenous autonomy consists in self-government as an exercise of free determination of the nations and rural native Indigenous peoples, the population of which shares territory, culture, history, languages, and their own juridical, political, social and economic organizations or institutions."[26] The Constitution furthermore ensures that self-government "is exercised according to their norms, institutions, authorities and procedures, in accordance with their authority and competences, and in harmony with the Constitution and the law."[27] The Constitution also guarantees an automatic transfer of funds from the State to Indigenous communities to aid in carrying out their own internal responsibilities of self-governance.[28] Self-governance in Bolivia also comes with the obligation to enact a set of laws, namely that "each rural, native, or Indigenous autonomy shall draft its Statute according to its own norms and procedures, in conformity with the Constitution and the law."[29]

The Constitution recognizes Indigenous self-governance on matters involving dispute resolution, political representation, and territorial rights. For instance, the Constitution entrenches a special jurisdiction to be exercised by Indigenous authorities.[30] This jurisdiction is "based on the specific connection between the persons who are members of the respective nation or rural native Indigenous people."[31] The jurisdictional reach is vast, as it extends to all persons in Indigenous communities "whether they act as plaintiffs or defendants, claimants or accusers, whether they are persons who are denounced or accused,

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23 *Id.* -art. II, § A, cl. 3.

24 *Id.*

25 CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [CONSTITUTION] Feb. 15, 1917, art. II, § A, cl. 2 (Mex.).

26 CONSTITUCIÓN POLÍTICA DEL ESTADO [CONSTITUTION] Feb 7, 2009, art. CCLXXXIX (Bol.).

27 *Id.* art. CCXV, § 2.

28 *Id.* art. CCCIV, § 4.

29 *Id.* art. CCXCII.

30 *Id.* art. CXCI.

31 *Id.* art. CXCI, § 1.

or are appellants or respondents."[32] The jurisdictional effect is moreover quite strong: the decisions of the special jurisdictional authorities are binding on both public and private actors,[33] the State may be asked to deploy its own authorities "to secure compliance with the decisions of the rural native Indigenous jurisdiction,"[34] and the State is constitutionally required to "promote and strengthen rural native Indigenous justice."[35]

The Constitution also recognizes a broad and robust right to Indigenous self-governance in political representation.[36] Indigenous Peoples "may elect their political representatives whenever required, in accordance with their own forms of election,"[37] and the State "shall assure that the norms of those peoples and nations will be complied with strictly in the elections of authorities, representatives and candidates of the nations and rural Indigenous peoples, using their own norms and procedures."[38] The Constitution also codifies a list of two dozen governmental powers each Indigenous community is entitled exclusively to exercise,[39] ranging from defining "their own forms of economic, social, political, organizational and cultural development, in accord with their identity and the vision of each village,"[40] to administering taxes,[41] to planning and approving their own programs and budget.[42] There are two other lists of governmental powers: one enumerating shared powers and another identifying concurrent powers. This is a carefully drawn separation of powers between the State and autonomous Indigenous communities, making clear the autonomy Indigenous Peoples enjoy under the Constitution—and entrenching it in higher law.

3. A requirement of consultation

In addition to guaranteeing minimum political representation and constitutionalizing autonomy, constitutions codify a third model of recognition: they impose an obligation on political actors at least to consult with Indigenous Peoples on matters of relevance to them. At a minimum, this creates a constitutional right to be consulted, though not directly to decide. This model can therefore be less robustly protective of Indigenous rights than other strategies

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32 CONSTITUCIÓN POLÍTICA DEL ESTADO [CONSTITUTION] Feb 7, 2009, art. CXCI, § 2 (Bol.).

33 *Id.* art. CXCII, § 1.

34 *Id.* art. CXCII, § 2.

35 *Id.* art. CXCII, § 3.

36 *Id.* art. CCIX–CCXII.

37 *Id.* art. CCXI, § 1.

38 CONSTITUCIÓN POLÍTICA DEL ESTADO [CONSTITUTION] Feb 7, 2009, art. CCXI, § 2 (Bol.).

39 *Id.* art. CCCIV.

40 *Id.* art. CCCIV, § 1, cl. 2.

41 *Id.* art. CCCIV, § 1, cl. 13.

42 *Id.* art. CCCIV, § 1, cl. 14.

available to constitution-makers. Yet this model can be designed to do less or more than require consultation; it can be designed to demand fewer or greater protections for Indigenous Peoples, as I will show below.

Consider the Constitution of Vanuatu. It creates the Malvatumauri, a special council of chiefs elected by their peers.[43] The Malvatumauri may establish its own rules,[44] it may meet on its own schedule at least once per year,[45] and it has the constitutional authority to "make recommendations for the preservation and promotion of ni-Vanuatu culture and languages."[46] The Constitution moreover requires that the Malvatumauri be consulted on "any question relating to land, tradition and custom, in connection with any bill before Parliament."[47] Yet this obligation on the government to consult with the Malvatumauri has not resulted in much influence; on the contrary, legislation is rarely submitted to it and it has not been a significant policy player.[48]

There are stronger and weaker variations of this model. The Botswanan Constitution offers a weaker version. It creates a house of chiefs called the Nylo ya Dikgosi, consisting of thirty-three to thirty-five persons and including a combination of representatives from the country's districts, appointees chosen by the President, and others selected by election.[49] The body may make its own rules as to how it will choose who will lead it, when it will meet, and how to keep its records of proceedings.[50] Its functions include advising the government on matters it believes to be "in the interests of the tribes and tribal organizations it represents"[51] and consulting with any minister of the government upon request.[52] But the advice from this body is just that: advisory, and not binding.[53]

A stronger variation on the obligation to consult is evident in the Constitution of Nicaragua.[54] The Constitution goes beyond only recognizing Indigenous Peoples and their rights to maintain and develop their identity and

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43 CONSTITUTION OF THE REPUBLIC OF VANUATU [CONSTITUTION] JULY 30, 1980, art. XXIX, § 1 (Vanuatu).

44 *Id.* art. XXIX, § 2.

45 *Id.* art. XXIX, § 3.

46 *Id.* art. XXX, § 1.

47 *Id.* art. XXX, § 2.

48 MIRANDA FORSYTH, A BIRD THAT FLIES WITH TWO WINGS: KASTOM AND STATE JUSTICE SYSTEMS IN VANUATU 162 (2009).

49 CONSTITUTION OF BOTSWANA [CONSTITUTION] Sept. 30,1966, art. LXXVII, § 1, cl. a–c (Bots.).

50 *Id.* art. LXXXIII.

51 *Id.* art. LXXXV, § 5.

52 *Id.* art. LXXXV, § 4.

53 Khunou Samuelson Freddie, *Traditional Leadership: Some Reflections on Morphology of Constitutionalism and Politics of Democracy in Botswana*, 1 INT'L J. HUM. & SOC. SCI. 85, 93 (2011).

54 *See* ASAMBLEA NACIONAL DE NICARAGUA [CONSTITUTION] Jan. 9, 1987, arts. V, LXXXIX, CLXXX, CLXXI (Nicar.).

culture, to administer their own local affairs, and to preserve their communal forms of property.[55] It also goes beyond codifying the "inalienable right to live and develop themselves under the forms of political-administrative, social and cultural organization that correspond to their historic and cultural traditions,"[56] the right to elect their own representatives, and to enjoy "the benefits of their natural resources."[57] The Nicaraguan Constitution requires the approval of these autonomous communities for any "concessions and contracts of rational exploitation of the natural resources" that is to occur on their territories.[58] This is stronger than the basic requirement of consultation; the Constitution demands consent. These three variations on consultation—the weak-form model, the intermediate model, and the strong-form model—illustrate the broad range of recognition strategies available to constitution-makers.

B. Fault Lines in Constitutional Decolonization

Constitutional reformers seek to achieve some or all of these three forms of constitutional recognition—a guarantee of minimum political representation, the constitutionalization of autonomy rights, and a requirement of prior consultation—when they mount a campaign for constitutional change. Their efforts sometimes succeed, as they have in Canada,[59] India,[60] Mexico,[61] and Norway.[62] But they fail, too, sometimes dramatically in ways that reveal fault lines on the path to constitutional decolonization. In Australia, for example, the failure of the Voice to Parliament reform is largely attributable to the extraordinarily high threshold for formal amendment.[63] In Greenland, the political economy of secession makes it financially untenable for the former colony to break free from Denmark, despite strong popular support for independence. And in Guatemala, an ideal opportunity for Indigenous recognition failed in part due to procedural miscalculations that foiled a potentially transformative constitutional reform. I

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55 *Id.* arts. V, LXXXIX.

56 *Id.* art. CLXXX.

57 *Id.*

58 *Id.* art. CLXXXI.

59 *See* Kent McNeil, *The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments*, 7 W. LEG. HIST. 113, 122–23 (1994).

60 *See* Pratyusna Patnaik, *Does Political Representation Ensure Empowerment? Scheduled Tribes in Decentralised Local Governments of India*, 8 J. S. ASIAN DEV. 27, 32–33 (2013).

61 *See* Andrea Pozas-Loyo et al., *When More Leads to More: Constitutional Amendments and Interpretation in Mexico 1917-2020*, LAW & SOC. INQUIRY 1, 17 (2022).

62 *See* Elin Hofverberg, *Norway: Parliament Includes Indigenous People Designation in Constitution*, LIBRARY OF CONGRESS (June 8, 2023), https://perma.cc/YCM8-TP4H.

63 *See infra* text accompanying notes 68–70.

explain each of these three cases of failure on the march toward constitutional decolonization.

1. Constitutional rigidity in Australia and the decolonial project

Decolonial constitutionalism is hard enough as it is without having to contend with an onerous amendment procedure. In Australia, the recent failure of the Voice to Parliament reform can be traced to two main sources: as a formal matter to the rigidity of the Constitution, and as a political matter to partisan disagreement on whether to ratify the reform.[64] Many were convinced the reform was a just, necessary cause. But as high as the stakes were, the battle for reconciliation was fought always through law, not arms, consistent with the modern model of decolonization.

The Voice to Parliament would have created a permanent constitutional body called the Aboriginal and Torres Strait Islander Voice, recognizing the Aboriginal and Torres Strait Islander Peoples as the First Peoples of Australia.[65] The short form of the amendment in public discourse became the "Voice to Parliament," or simply the "Voice," referring to the advisory role of this body and the audience of its submissions. This body was to advise Parliament and the Government of Australia "on matters relating to Aboriginal and Torres Strait Islander peoples."[66] Specifications about the composition of the body, as well as its functions, powers, and procedures were to be left for Parliament to decide.[67] The entire amendment proposal was short, both in length and on detail. This may be one reason why, in the void, widespread public misinformation and disinformation played a key role in defeating the reform.[68]

The path to enactment is far from easy for any amendment in Australia. The Voice to Parliament had to successfully navigate the labyrinth of amendment procedures in the Australian Constitution, one of the world's most difficult to

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64 Following the defeat of the referendum, observers suggested outright racism as an additional reason for amendment failure. *See* Sarah Basford Canales, *Indigenous Groups Say Referendum Loss Proves Australia is a "Country that Does Not Know Itself"*, THE GUARDIAN (Oct. 21, 2023), https://perma.cc/DHC6-5GRX; Chin Tan, *Whatever the Voice Vote's Result, Australia Has a Racism Problem We Must Tackle*, THE GUARDIAN (Oct. 5, 2023), https://perma.cc/8V2T-JPVB; Ian Anderson et al., *Racism and the 2023 Australian Constitutional Referendum*, 402 THE LANCET 1400 (2023).

65 A Bill for an Act to Alter the Constitution to Recognise the First Peoples of Australia by Establishing an Aboriginal and Torres Strait Islander Voice, 2023 § 129(i) (Austl.).

66 *Id.* § 129(ii).

67 *Id.* § 129(iii).

68 ANDREA CARSON ET AL., INFLUENCERS AND MESSAGES: ANALYSING THE 2023 VOICE TO PARLIAMENT REFERENDUM CAMPAIGN iv (2024); Victoria Fielding, *Failing Democracy: The Voice Referendum Shows a Media Inquiry is Needed*, 95 AUSTRALIAN Q. 12, 12 (2024).

amend.[69] A proposal to amend the Constitution must successfully pass through three steps to win enactment: first, it must be approved by an absolute majority of each House of Parliament; then, it must be approved in a national referendum by a majority of voters representing popular majorities in four of the six states; and finally given Royal Assent by the Governor-General.[70] It is perhaps not surprising, then, that many more amendment proposals have failed than succeeded. There have been 45 constitutional referendums in Australia, but only eight have passed, yielding a low success rate of 17.8 percent.[71]

What made formal ratification even more difficult was the lack of bipartisan support for the Voice to Parliament. Bipartisan support for a referendum is crucial for an affirmative vote, as voters rely on their leaders to guide their decision-making, especially on complex questions that propose to change the status quo.[72] Accordingly, in Australia, constitutional referendums have historically been approved only with bipartisan support.[73] Reflecting this historical practice, public support for the Voice to Parliament plummeted after the Leader of the Opposition publicly rejected it.[74] He argued that the reform would "re-racialise" the country, take Australia "backwards, not forwards," and "permanently divide us by race."[75] The Liberal and National Parties both campaigned against the reform,[76] denying the Voice to Parliament the needed political unity that has been essential to success in prior Australian constitutional referendums.[77]

When the votes were counted, the Voice to Parliament had been rejected by a majority of the national electorate as well as a majority of voters in each of

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69 Australia ranks fourth in amendment difficulty in the most referenced ranking of constitutions. *See* DONALD LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 170 (2006). For a critical discussion of indices of amendment difficulty, *see* RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 95–138 (2019).

70 THE CONSTITUTION OF AUSTRALIA [CONSTITUTION] 1900, art. CXXVIII (Austl.). There are exceptions to approval in each House of Parliament that allow the amendment proposal to advance to the referendum stage in the event of delay or disagreement by one House..

71 *See* Kerryn Baker et al., *Referendums in Oceania*, *in* REFERENDUMS AROUND THE WORLD 122–23 (Matt Qvortrup ed., 2024).

72 Ian McAllister & Nicholas Biddle, *Safety or Change? The 2023 Australian Voice Referendum*, 59 AUSTRALIAN J. POL. SCI. 141, 155 (2024).

73 *See* NICHOLAS BIDDLE ET AL., DETAILED ANALYSIS OF THE 2023 VOICE TO PARLIAMENT REFERENDUM AND RELATED SOCIAL AND POLITICAL ATTITUDES (2023) (noting that all eight successful constitutional referendums in Australia have enjoyed bipartisan support).

74 Andrea Carson et al., *Why Did the Voice Referendum Fail? We Crunched the Data and Found Six Reasons*, THE CONVERSATION (May 1, 2024), https://perma.cc/A6C3-C48R.

75 Audrey Courty, *Peter Dutton Says Indigenous Voice Will "Re-Racialise" the Country in a Speech Linda Burney Describes as "Disinformation"*, ABC NEWS (May 22, 2023) https://perma.cc/ULH4-RVCD.

76 Andrew Brown, *Voice Success Without Bipartisanship "Unprecedented"*, NAT'L INDIGENOUS TIMES (Oct. 2, 2023), https://perma.cc/2UGN-PLWC.

77 Praveen Menon, *"Reconciliation is Dead": Indigenous Australians Vow Silence After Referendum Fails*, REUTERS (Oct. 15, 2023), https://perma.cc/T9SJ-AP8L.

Australia's six states. The national tally was overwhelming: 60.06 percent voted to reject, while 39.94 percent voted to ratify.[78] Similar results followed in the states, with 68.21 percent voting no in Queensland, 64.17 percent in South Australia, 63.27 percent in Western Australia, 58.96 percent in New South Wales, 58.94 percent in Tasmania, and 54.15 percent in Victoria.[79] Only the two territories—the Northern Territory and the Australian Capital Territory—returned majority "'Yes" votes,[80] but their votes count toward the national majority only, not toward the requirement for subnational majority votes.[81]

There was good faith and great hope in the reconciliatory potential of the Voice to Parliament.[82] Now, in the aftermath of the failed referendum, an alternative for decolonial constitutionalism has taken on greater salience: treaty-making. The Prime Minister has reaffirmed his support for treaty efforts, even as they might require time and patience.[83] The failed referendum has had at least two substantial impacts on the treaty option. First, as some Members of Parliament have remarked, treaties may now be best concluded by individual states not the national government.[84] Second, public support for the treaty option declined from 58 percent just ahead of the vote to 33 percent the following month.[85] What is more, a counter-movement in opposition to treaty-making appears to be gaining momentum, buoyed by the defeat of the Voice to Parliament.[86]

Treaty-making to achieve the promise of decolonization is not a new suggestion in Australia, as it was a key pillar in the Uluru Statement that gave birth to the Voice to Parliament reform proposal.[87] The Government had moreover pledged millions of dollars in the last election to establish a commission that would oversee treaty-making, but its work was not to begin until after the referendum.[88] Treaty-making is now more urgent given the referendum result. The six Australian

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78 AUSTRALIAN ELECTORAL COMMISSION, REFERENDUM REPORT 2023, 8 (2023).

79 *Id.*

80 *Id.*

81 THE CONSTITUTION OF AUSTRALIA [CONSTITUTION] 1900, art. CXXVIII (Austl.).

82 *See* Noel Pearson, *A Failed Voice Referendum Will Kill Hopes of Reconciliation for Good*, SYDNEY MORNING HERALD (Jan. 26, 2023), https://perma.cc/VF45-Q2T6.

83 James Massola & Olivia Ireland, *Albanese Commits to Treaty and Truth-Telling as Indigenous Children Fail to Thrive*, SYDNEY MORNING HERALD (Feb. 13, 2024), https://perma.cc/U82E-864N.

84 Paul Karp et al., *Voters Rejected Voice Not Truth Telling and Treaty at Referendum, Labor MPs Say*, THE GUARDIAN (Oct. 17, 2023), https://perma.cc/PYB6-SW5B.

85 Dechlan Brennan, *New Poll Shows Decline in Support for Treaty and Truth-Telling, Despite Victoria Moving Forward with the Process*, NAT'L INDIGENOUS TIMES (Nov. 20, 2023), https://perma.cc/UGG8-QJNJ.

86 Dechlan Brennan, *After 2023 Voice Disappointment, Is There Hope for Treaty in Australia?*, THE DIPLOMAT (Jan. 2, 2024), https://perma.cc/NU7B-TQBR.

87 *The Uluru Statement from the Heart*, THE ULURU STATEMENT (2017), https://perma.cc/YTN4-AF9B.

88 Josh Butler, *Makarrata Commission in Limbo After Failure of Indigenous Voice Referendum*, THE GUARDIAN (Dec. 21, 2023), https://perma.cc/5TL7-MKFJ.

states are not proceeding in unison to conclude their own treaties with Indigenous Peoples in Australia.[89] Some are further along than others.[90] This decentralized strategy may have the benefit of achieving piecemeal state-level progress at their own pace without the burden of risking delays in uniting the entire political landscape behind a single proposal. The move from constitutional reform to treaty-making is consistent with the modern approach to decolonization: the process occurs through the law in conformity with the constitutionally established procedures for reform and reconciliation.

2. The political economy of Greenlandic independence

Greenland's journey from colony to territory has traveled through legal avenues from the start. The most recent step occurred in 2023 when an official Constitutional Commission published a draft constitution for the territory and its people, signaling that preparations are underway for a declaration of independence from the Kingdom of Denmark.[91] The draft constitution was received as a peaceful non-revolutionary step toward a sovereign Greenlandic state.[92] Yet there is a substantial, perhaps even dispositive, barrier standing in the way of that decolonial victory; Greenland depends on Denmark for a significant annual block grant without which the local economy would likely collapse.[93] Greenland therefore finds itself in the unenviable position of choosing to become an independent state without the means to thrive or to remain an appendage of a constitutional monarchy that has severely mistreated its people.[94] The prospect for republicanism in Greenland is therefore dim despite the popular will to disentangle from Denmark.

The formal colonial relationship between Greenland and Denmark ended in 1953,[95] the year Denmark enacted its modern constitution.[96] Just four years after the end of the Second World War, "the status of colony could hardly survive" the

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89 Neve Brissenden, *Treaty Talks Emerge from Ashes of Referendum Failure*, NAT'L INDIGENOUS TIMES (Jan. 28, 2024), https://perma.cc/HL6Z-FHK7.

90 Tony Denholder et al., *Path to Treaty is Less Clear in Wake of Failed Voice Referendum*, ASHURST (May 27, 2024), https://perma.cc/XL3T-NHVD.

91 Kevin McGwin, *Draft Constitution Provides Prelude to Independent Greenland*, POLAR J. (May 8, 2023), https://perma.cc/HKG6-DSJ7.

92 Agence France-Presse, *Greenland Unveils Draft Constitution for Future Independence*, VOICE OF AMERICA (Apr. 28, 2023), https://perma.cc/64C9-XTP6.

93 The annual block grant represents two-thirds of Greenland's annual budget. *See* Adam Kočí & Vladimír Baar, *Greenland and the Faroe Islands: Denmark's Autonomous Territories from Postcolonial Perspectives*, 75 NORWEGIAN J. GEOGRAPHY 189, 195 (2021).

94 *See* Stefan Hedlund, *Greenland Moves Slowly Toward Independence*, GEOPOLITICAL INTEL. SERV. (Aug. 10, 2023), https://perma.cc/SWV6-9PZ9.

95 Sune Klinge et al., *The Evolving Constitution of Greenland*, *in* THE ROUTLEDGE HANDBOOK OF POLAR LAW 459, 463 (Yoshifumi Tanaka et al. eds., 2023).

96 DANMARKS RIGES GRUNDLOV [CONSTITUTION] May 28, 1953 (Den.).

new global reality that brought with it new expectations for self-governance.[97] Denmark integrated Greenland into the Danish political system, afforded it status similar to other Danish counties, and granted it two seats in the Parliament.[98] The path toward greater autonomy for Greenland continued with the introduction of home rule in 1979, on the strength of a 70.1 percent supermajority support for the new status in a referendum.[99] Home rule entailed recognizing that Greenland "is a distinct community within the Kingdom of Denmark."[100] It also created the Greenland Parliament, to be constituted by local elections, as well as an executive administration to be elected by Parliament.[101] Home rule also recognized Greenland's fundamental rights over the natural resources in the territory,[102] established Greenlandic as the principal language,[103] and created an intricate framework to govern relations between Greenland and the central authorities of the Kingdom of Denmark.[104]

A further leap forward came in 2009 when 75 percent of Greenlanders voted for self-government.[105] The Danish Parliament heeded their call by enacting a law on a measure of autonomy for Greenland, recognizing that "the people of Greenland is a people pursuant to international law with the right of self-determination"[106] and expressing a desire "to foster equality and mutual respect in the partnership between Denmark and Greenland."[107] The law transferred legal responsibility from Denmark to Greenland in matters relating to property, health care, criminal law, copyright, financial regulation, the administration of justice, among many others.[108] Greenland took over its own foreign affairs (with some important exceptions),[109] Greenlandic was promoted to the official language of

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97 *See* Isi Foighel, *Home Rule in Greenland 1979*, 48 NORDISK TIDSSKRIFT FOR INT'L RET 4, 4 (1979).

98 Thorsten Borring Olesen, *Between Facts and Fiction: Greenland and the Question of Sovereignty 1945-1954*, 7 NEW GLOB. STUD. 117, 124 (2013); DANMARKS RIGES GRUNDLOV [CONSTITUTION] May 28, 1953, art. 28 (Den.). (establishing the size of the Parliament and guaranteeing that two Members will be from Greenland).

99 Hans Christian Gulløv, *Home Rule in Greenland*, 3 ÉTUDES/INUIT/STUD. 131, 138 (1979).

100 Greenland Home Rule Act, Act no. 577 of 29 November 1978, art. I, § 1 (Den.).

101 *Id.* art. I, § 2, cl. 2, 3.

102 *Id.* art. VIII.

103 *Id.* § IX.

104 *Id.* at ch. 3.

105 Maria Ackrén, *Referendums in Greenland - From Home Rule to Self-Government*, 19 FÉDÉRALISME RÉGIONALISME 1, 5–6 (2019).

106 Act on Greenland Self-Government, Act no. 473 of 12 June 2009, prmbl (Den.).

107 *Id.*

108 *Id.* § 3; Schedule List I and List II.

109 *Id.* at ch. 4. Some exceptions include responsibility for foreign, international and security matters. *See id.* § 11(3).

the territory,[110] and Greenland was given the right to comment on any government bill affecting the territory before its introduction in the Danish Parliament.[111]

Most important of all, the new law charted a lawful path to full independence for Greenland as a sovereign state. To remove doubt about what independence entails, the law made clear that "independence for Greenland shall imply that Greenland assumes sovereignty over the Greenland territory."[112] The law on self-government confirmed that any "decision regarding Greenland's independence shall be taken by the people of Greenland."[113] The law moreover confirmed that a decision to opt for independence must be followed by negotiations between Greenland and Denmark on the terms of final separation.[114] The road to republicanism is therefore paved in law.

Let us return now to the draft Greenlandic constitution. It came on the heels of decades of an intensifying movement for independence.[115] The draft, intended to prepare for the next step in Greenland's evolution toward statehood, took many years of work.[116] The Parliament of Greenland established the constitutional commission in 2017 with the task of drafting "a constitution based on the concept of a free association or some other form of intergovernmental cooperation with another state."[117] The draft reflects a mission captured crisply by Mute Egede, the Prime Minister of Greenland: "decisions concerning Greenland and the Arctic must be made by us, the indigenous people and people who have the Arctic as their home."[118] The draft constitution is comprehensive, detailed, and equipped with all trappings for a modern state.[119] It spans forty-nine sections on subjects ranging from legislative power to national identity.[120] Notably, the draft replaces the current system of government with a parliamentary republic.[121]

Greenland's draft constitution augurs well for its independent future. But the territory's financial reliance on Denmark makes it unlikely that an official

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110 Act on Greenland Self-Government, Act no. 473 of 12 June 2009, § 20 (Den.).

111 *Id.* at ch. 5.

112 *Id.* § 21(4).

113 *Id.* § 21(1).

114 *Id.* § 21(2)–(3).

115 Joseph Wehmeyer, *What Would Greenland's Independence Mean for the Arctic?*, COUNCIL ON FOR. REL. (Aug. 10, 2023), https://perma.cc/S9G7-DKUD.

116 Neil Murphy, *Greenland Unveils Draft Constitution for Future Independence*, THE NATIONAL (Apr. 28, 2023), https://perma.cc/J64N-WBG3.

117 Ellen Margrethe Basse, *Why Greenland is Not for Sale*, 4 J. COMP. URB. L. & POL'Y 327, 337–38 (2020).

118 Malcolm Brabant, *Greenland Unveils Draft Constitution in Push for Complete Independence from Danish Control*, PBS NEWS (June 2, 2023), https://perma.cc/64C9-XTP6.

119 INATSIT TUNNGAVIUSUSSAMUT SIUNNERSUUT [DRAFT CONSTITUTION] 2023 (Green.).

120 *Id.* at 51–66.

121 Martin Breum, *Greenland Drafts Constitution for its Ultimate Independence*, ARCTIC TODAY (May 17, 2023), https://perma.cc/8FK3-FEQZ.

separation will come in the near-term. The numbers paint an ominous portrait: Greenland receives an annual grant of 3.5 billion DKK from Denmark, amounting to 60 percent of Greenland's total revenue; in addition, Denmark makes approximately 1.2 billion DKK worth of state expenses in support of Greenland.[122] Greenland would have to forego these sizeable transfers were it to strike out on its own. And it is not clear where replacement funds would come from.[123] But one thing is for certain: Denmark does appear unlikely to keep sending money to an independent Greenland, given the Government of Denmark's warning that the Arctic island risks losing its annual subsidy if its independence constitution is inconsistent with Danish higher law.[124] Greenland's financial dependence on Denmark is not lost on Greenlanders. Although 68 percent of Greenlanders favor independence from Denmark,[125] a recent study has shown that voters are 43 percent more likely to oppose independence when primed with information about the economic consequences of sovereignty.[126] The political economy of independence in Greenland therefore bends popular support for sovereignty downward.

3. Amendment overload in Guatemala

After a 36-year war, the state of Guatemala signed a peace agreement in 1996 with the *Unidad Revolucionaria Nacional Guatemalteca* (URNG), an umbrella political party for four guerrilla groups.[127] The terms of peace included new laws, avenues for truth and reconciliation, criminal amnesty, and opportunities for health care, housing, and educational opportunities.[128] The peace agreement was conditioned on the implementation of an Indigenous rights agreement signed the year prior.[129]

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122 MARK NUTTALL, THE SHAPING OF GREENLAND'S RESOURCE SPACES: ENVIRONMENT, TERRITORY, GEO-SECURITY 67 (2024).

123 There were hopes to replace the Danish block grant with revenues from natural resource development, but those have yet to bear fruit. *See* Charles E. Morrison & Mark Nuttall, *New US Policies toward Greenland*, EAST-WEST CENTER (Sept. 27, 2019), https://perma.cc/68HM-EGFW. A partnership with the United States is another potential but as-yet defined option. *See* Martin Breum, *Greenland's New Leadership Will be Challenged by a Push for Faster Independence*, ARCTIC BUS. J. (Apr. 9, 2021), https://perma.cc/8Z5T-TPF7.

124 Uffe Jakobsen & Henrik Larsen, *The Development of Greenland's Self-Government and Independence in the Shadow of the Unitary State*, 14 POLAR J. 9, 24 (2024).

125 Christian Wenande, *Most Greenlanders Want Independence at Some Point in the Future*, COPENHAGEN POST (Jan. 4, 2019), https://perma.cc/7Z7A-8BQH.

126 *See* Gustav Agneman, *How Economic Expectations Shape Preferences for National Independence: Evidence from Greenland*, 72 EUR. J. POL. ECON. 1 (2022).

127 Carlos Ramos-Cortez & Timothy MacNeill, *Truth Processes and Decolonial Transformation: A Comparative View of Guatemala, Peru, Chile and Colombia*, 45 THIRD WORLD Q. 208, 213 (2024).

128 Agreement on the Basis for the Legal Integration of the Unidad Revolucionaria Nacional Guatemalteca, URNG-Guat., U.N. Doc. A/51/776, at 19–23 (Dec. 12, 1996).

129 *Id.* at 24.

Under the terms of this Indigenous rights agreement,[130] the state was to enact a menu of constitutional reforms protecting Indigenous equality rights,[131] cultural rights,[132] and civil, political, social, and economic rights.[133] One of its key pledges was to recognize under the Guatemalan Constitution the right to be subject to customary law.[134] These agreements on peace and Indigenous rights were linked by violence: during the decades-long war, there were 200,000 deaths and 1.5 million internal displacements; 83 percent of the victims were Indigenous People.[135]

Guatemala held a national referendum in 1999 to ratify the peace agreement, to incorporate it into the Constitution, and to vote on the reforms agreed to in the Indigenous rights agreement.[136] Voters were to answer four questions involving 47 different constitutional reforms.[137] Each question required a "Yes" or "'No" vote on separate packages of reforms affecting the legislative assembly, the executive branch, rights, and the administration of justice.[138] Perhaps understandably, these reforms were confusing to voters, insofar as the peace articles were entangled with Indigenous rights in complex packages of changes that were difficult to explain.[139] The result, from the perspectives of voters, was amendment overload: too much in a single reform. A prominent 'No' campaign capitalized on the confusion to breed uncertainty about it.[140] And a private-sector lobby argued that recognizing Indigenous law would "balkanize" the country.[141]

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130 Agreement on the Identity and Rights of Indigenous Peoples, URNG-Guat., U.N. Doc. A/49/882, at I.4 (Mar. 31, 1995).

131 *Id.* at II.

132 *Id.* at III.

133 *Id.* at IV.

134 Rachel Sieder, *The Judiciary and Indigenous Rights in Guatemala*, 5 INT'L J. CONST. L. 211, 218 (2007); *see also* Agreement on the Identity and Rights of Indigenous Peoples, *supra* note 130, at IV.E.

135 Diane M. Nelson, *Reckoning the After/Math of War in Guatemala*, 10 ANTHRO. THEORY 87, 88 (2010).

136 Susanne Jonas, *Democratization Through Peace: The Difficult Case of Guatemala*, 42 J. INTERAM. STUD. & WORLD AFF. 9, 30 (2000); *see also* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA DE 1985 [CONSTITUTION] 1985, art. 280 (Guat.) (specifying the referendum requirement).

137 LADB Staff, *Guatemalan Voters Reject Referendum on Constitutional Reforms*, LATIN AMERICA DATA BASE, May 20, 1999.

138 Jim Handy, *Democratizing What? Some Reflections on Nation, State, Ethnicity, Modernity, Community and Democracy in Guatemala*, 27 CAN. J. LAT. AM. & CARIB. STUD. 35, 47–48 (2002).

139 Roddy Brett & Antonia Delgado, *The Role of Constitution-Building Processes in Democratization—Case Study: Guatemala*, INT'L IDEA 28 (2005).

140 Julie Davies & Luis Mogollon, *Dissonant Voices: Understanding Guatemala's Failure to Amend Its Constitution to Recognize Indigenous Law*, 25 U.C. DAVIS J. INT'L L. & POL'Y 69, 71–72 n.9 (2018).

141 Rachel Sieder, *Indigenous Sovereignties in Guatemala: Between Criminalization and Revitalization*, 49 NACLA REP. ON THE AM. 370, 371 (2017).

The referendum failed by a large margin.[142] Only 19 percent of the population cast a ballot, and of those only 44 percent voted to approve the reforms.[143] The peace agreement was not the only casualty of the referendum loss: the decolonial effort to entrench Indigenous customary law failed too, as it had been paired with the terms of peace.[144]

The multi-part referendum, had it been successful, could have established Guatemala as a multiethnic, multicultural, and multilingual country with strong protections for Indigenous Peoples.[145] Three factors conspired to defeat the referendum: lack of popular consultation prior to the referendum, lack of voter education on the referendum itself, and the general context of fear and mistrust in the aftermath of the civil war.[146] The confusion and complexity of the referendum questions themselves exacerbated these conditions.[147] In addition, an omnibus reform bill may prove more efficient than separate votes on individual reforms but it heightens the risk of defeat: some voters in the 1999 referendum supported the majority of reforms but their opposition to a few caused them to abstain, depriving the 'Yes' side of needed votes.[148] This Guatemalan case highlights the importance of process—how to conduct and design the referendum—to achieve the substantive goal of decolonization.

C. From Constitutional Monarchy to Republic

There are, still today, binational legal arrangements that subordinate one country to another. Perhaps the most familiar is the British Commonwealth system. Led by a monarch who presides over its member states, the Commonwealth was once ruled by force and coercion, but it is now a "voluntary association."[149] King Charles III leads the Commonwealth, and fourteen of its

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142 Anita Isaacs, *Trouble in Central America: Guatemala on the Brink*, 21 J. DEMOCRACY 108, 111 (2010).

143 Susan Burgerman, *Making Peace Perform in War-Transition Countries: El Salvador, Guatemala, and Nicaragua*, *in* SHORT OF THE GOAL: U.S. POLICY AND POORLY PERFORMING STATES 245, 260 (Nancy Birdsall et al. eds., 2006).

144 RACHEL SIEDER ET AL., WHO GOVERNS: GUATEMALA FIVE YEARS AFTER THE PEACE ACCORDS 35 (2002).

145 David Carey Jr., *Maya Perspectives on the 1999 Referendum in Guatemala*, 139 LAT. AM. PERSPECTIVES 69, 69 (2004).

146 Sung Yong Lee & Roger Mac Ginty, *Context and Postconflict Referendums*, 18 NATIONALISM & ETHNIC POL. 43, 50–58 (2012).

147 Hilde Salvesen, *Guatemala: Five Years After the Peace Accords: The Challenge of Implementing Peace*, INTERNATIONAL PEACE RESEARCH INSTITUTE 21–22 (March 2002).

148 Kay B. Warren, *Voting Against Indigenous Rights in Guatemala: Lessons from the 1999 Referendum*, *in* INDIGENOUS MOVEMENTS, SELF-REPRESENTATION, AND THE STATE IN LATIN AMERICA 149, 169-70 (Kay B. Warren & Jean E. Jackson eds., 2003).

149 The Commonwealth, *About Us*, THE COMMONWEALTH, https://perma.cc/FH2M-LMK7 (last accessed Nov. 4, 2024).

member countries as Head of State,[150] an office described as an "important symbolic one."[151] Yet his role in relation to these fourteen Commonwealth realms is more than symbolic. The King possesses authority that extends beyond pomp and circumstance: he or his delegate may approve or deny bills, prorogue and dissolve Parliament, and dismiss a government in any of these states.[152] These are reserve powers rarely ever used, but they remain lawfully exercisable in these countries.

The decolonial project seeks to remove the vestiges of colonialism embedded in the DNA of the Commonwealth. But for a Commonwealth realm to remove King Charles III as Head of State requires constitutional heroics that are more easily imagined than achieved. The reason why involves constitutional design: the British imposed constitutional rules on their Commonwealth cousins that keep them tied to the monarch, and it is extraordinarily difficult to unlock these constitutional handcuffs.[153] Republican movements have nonetheless emerged across the Commonwealth to replace the monarch with a local Head of State.[154] The sentiment is understandable: a subordinative legal arrangement and the dispiriting symbolism of a foreign Head of State are good reasons for Commonwealth realms to detach themselves from the King. Barbados and Jamaica, for instance, are two recent examples of the transition from constitutional monarchy to republic. The former was successful, and the latter is underway. Each is following the path of Mauritius, a Commonwealth realm that transitioned to a republican form of government in 1992.

1. The legal machinery of decolonization in Mauritius

Mauritius secured independence and became a republic in the same way: with a legal enactment in Great Britain, its former imperial overseer. It was on March 12, 1968 that Mauritius stood on its own as an independent state. Mauritian independence did not come from a war of resistance to the Crown and its forces.[155] Instead, it was the outcome of an order from Buckingham Palace earlier

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150 *Id.*

151 *Id.*

152 David Torrance, *The Crown and the Constitution*, CBP-8885, HOUSE OF COMMONS, (Nov.14, 2023), at 21.

153 For instance, most of the Commonwealth realms in the Caribbean Commonwealth may become republics only with a constitutional amendment requiring approval by parliamentary supermajorities and the people in a referendum. *See* Cynthia Barrow-Giles & Ronnie R. F. Yearwood, *Mandatory Constitutional Referendums in Commonwealth Caribbean Constitutions?*, 34 KING'S L.J. 215, 230 (2023).

154 *See, e.g.*, DAVID JOHNSON, BATTLE ROYAL: MONARCHISTS VS. REPUBLICANS AND THE CROWN OF CANADA (2018); Noel Cox, *Republican Sentiment in the Realms of the Queen: The New Zealand Perspective*, 29 MAN. L.J. 121 (2002); Geoff Gallop, Manning Clark Lecture, *A Republican History of Australia*, Canberra, Mar. 3, 2014; Patrick Robinson, *The Monarchy, Republicanism and the Privy Council: The Enduring Cry for Freedom*, 101 COMMONWEALTH J. INT'L AFF. 447 (2012).

155 Jean Houbert, *Mauritius: Independence and Dependence*, 19 J. MOD. AFR. STUD. 75, 104 (1981).

that month on March 4.[156] That order, issued by Queen Elizabeth II, set out the framework within which Mauritius would no longer operate as a colony. The order revoked earlier inconsistent orders,[157] enacted transitional provisions to enable the smooth transition from formal dependence to independence,[158] and authorized Parliament to make any changes to the order that might later become required.[159] The order was as detailed as a statute can be, full of sections and subsections, reflecting the careful construction of the legal machinery built to execute this historic transition.[160]

Yet Mauritius remained tied to Great Britain even after this grant of independence for two reasons. Both are legal with strong political implications. And both reinforce the point that an independent Mauritius was still not quite a constitutional equal to Great Britain. First, as a matter of Mauritian law, ultimate executive authority resided in the Queen in her capacity as Head of State, given that Mauritius entered independence as a constitutional monarchy and more specifically as a Commonwealth realm.[161] The second point is just as telling. Mauritian independence entailed the adoption of a new constitution for the former colony turned country, but the new Constitution of Mauritius was not enacted by Mauritians themselves through their own local Mauritian political institutions. The new Mauritian Constitution was a product of Great Britain, appended as a schedule to the order issued at Buckingham Place.[162] Mauritius, then, had become a formally independent country in the community of states around the world, but vestiges of its former colonial status endured in law and politics.

The 1968 Constitution of Mauritius declared the country "a sovereign democratic state."[163] Yet it weaved the British monarch deeply into the fabric of the state. The Constitution conferred executive power on the Queen.[164] Her authority was to be exercised by her chosen representative, a Governor-General who would serve at her pleasure as Commander-in-Chief.[165] The Governor-

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156 Buckingham Palace, Mauritius Independence Order 1968 (Mar. 4, 1968).

157 *Id.* § 3

158 *Id.* § 14.

159 *Id.* § 17.

160 The Parliament of the United Kingdom enacted the Mauritius Independence Act to confirm that "Her Majesty's Government in the United Kingdom shall have no responsibility for the government of Mauritius." Mauritius Independence Act 1968, c. 8 § 1(1) (U.K.).

161 Sarah Gray, *Colonial Continuities in Independent Mauritius: Parliamentary Democracy, the British Crown, and State Repression*, 7 J. INDIAN OCEAN WORLD STUD. 36, 46 (2023).

162 Mauritius Independence Order 1968, *supra* note 156.

163 LA CONSTITUTION DE MAURICE [CONSTITUTION] Mar. 12, 1968, § 1 (Mauritius).

164 *Id.* § 58(1).

165 *Id.* § 28–30.

General was to appoint the Head of Government in Mauritius, the Prime Minister.[166] Beyond the executive authority, Parliament was to consist "of Her Majesty and a Legislative Assembly,"[167] and no bill could become law without the Governor-General's approval in the name of the Queen.[168] Judges, too, were to be appointed by the Governor-General, some after consultation with the Prime Minister,[169] others on the advice of the Chief Justice,[170] and still others on the advice of a specially-constituted commission.[171] The Governor-General also had the power to grant pardons, respites, and remissions for punishment, all in the name of the Queen and on her behalf.[172] What is more, all of these actors had to pledge allegiance to the Queen and her successors.[173]

Mauritius lived under this quasi-colonial constitutional arrangement for nearly 25 years until 1992, when it became a republic, at last replacing the foreign Queen with a local president and extricating the monarchy from its constitutional architecture.[174] This process, too, was rooted in law, not in a violent break, and again it was completed far outside the borders of Mauritius. It began, however, in Mauritius with an amendment to the Constitution that had been enacted for Mauritians at Buckingham Palace. That Constitution specified a reform procedure for replacing the Queen as Head of State and transitioning the country to a republican form of government.[175]

Buckingham Palace did not make it easy to replace the Queen. It set an onerous requirement for constitutional amendment to all rules involving the monarchy, her representatives, and her powers in relation to Mauritius: no amendment would be valid unless supported by three-quarters of all members of the legislature.[176] This was a much higher threshold than the two-thirds supermajority voting rule for most other amendments to the Constitution.[177] After two failed attempts at constitutional sovereignty,[178] Mauritians managed to cross this high constitutional bar in their third attempt in a historic vote recorded in

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166 *Id.* § 59.

167 *Id.* § 31(1).

168 *Id.* § 46.

169 LA CONSTITUTION DE MAURICE [CONSTITUTION] Mar. 12, 1968, § 77(1) (Mauritius).

170 *Id.* § 77(2).

171 *Id.* § 77(3).

172 *Id.* § 75.

173 *Id.* at Schedule 3.

174Roukaya Kasenally, *Mauritius: Paradise Reconsidered*, 22 J. DEMOCRACY 160, 164 (2011).

175 LA CONSTITUTION DE MAURICE [CONSTITUTION] Mar. 12, 1968, § 47(2) (Mauritius).

176 *Id.*

177 *Id.* § 47(3).

178 Iqbal Ahmed Khan, *SAJ (1930-2021): The Struggle to Turn Mauritius into a Republic*, L'EXPRESS (June 6, 2021), https://perma.cc/JVJ5-D2LL.

December 1991.[179] The amendment bill approved the transition from constitutional monarchy to republic, with effect on March 12, 1992—twenty-four years to the day after the country had gained its independence from Great Britain.[180]

The amendment bill left no doubt about its intention. It amended the Constitution by proclaiming that the country would henceforth "be known as the Republic of Mauritius."[181] It repealed the entirety of the Constitution's section on the Governor-General and replaced it with the Offices of President and Vice-President,[182] both of whom must be citizens and residents of Mauritius.[183] The amendment bill changed the text of the Constitution where it spoke of "Her Majesty" to "the President,"[184] and did the same for "Legislative Assembly," replacing it with "National Assembly,"[185] in addition to replacements including "Her Majesty's Government of Mauritius" with "the Government of the Republic of Mauritius."[186] The bill also took great care to specify where in the body of ordinary law changes were needed to reflect the country's new republican status: "Governor-General" would be deleted and replaced by "President,"[187] the same being true for "Crown" and "State,"[188] "Her Majesty the Queen" and "the State,"[189] and other consequential revisions occasioned by removing the monarch from Mauritius.[190] And importantly, the amendment bill revised the oath of allegiance to require officers no longer to pledge loyalty to the Queen but now instead to "be faithful and bear true allegiance to Mauritius according to law."[191]

But the decolonial project did not end with this amendment alone. It required an Act of the Parliament of the United Kingdom to make it final for both legal and political reasons.[192] It was necessary for legal continuity to ensure that

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179 Iqbal Ahmed Khan, *History: How the 1991 Vote to Turn Mauritius into a Republic Came About*, L'EXPRESS (May 1, 2023), https://perma.cc/5RWW-RU4C.

180 Letuku Elias Phaahla, Development with Social Justice? Social Democracy in Mauritius, 35 (March 2010) (Thesis, Stellenbosch University).

181 Constitution of Mauritius (Amendment No. 3) Act 1991, (Act No. 48/1991) § 3 (Mauritius).

182 *Id.* § 5.

183 *Id.*

184 *Id.* § 12(a).

185 *Id.* § 19(b).

186 *Id.* § 19(c).

187 Constitution of Mauritius (Amendment No. 3) Act 1991, (Act No. 48/1991) § 23(2)(a) (Mauritius).

188 *Id.* § 23(2)(b).

189 *Id.* § 23(2)(d).

190 *See, e.g.*, *id.* § 23–24; *id.* at Fourth Schedule.

191 *Id.* at Third Schedule.

192 Mauritius Republic Act 1992, c. 45 (U.K.).

any Act of Parliament in force prior to Mauritius becoming a republic would continue to operate until any intervening change.[193]

Today, Mauritius is a sovereign, independent, democratic republic with its own local Head of State. Still, one might well wonder whether the Constitution of Mauritius should not be replaced by a Mauritian instrument, designed and enacted by and for the people of Mauritius, asserting their sovereign constitution-making authority through local Mauritian institutions. As it stands, the Constitution of Mauritius remains, in its origins, an order issued at Buckingham Palace in 1968.

2. A homegrown head of state in Barbados

Barbados has chosen to go one step further than Mauritius. It has replaced its foreign Head of State with a president, born and resident in Barbados, just as Mauritius did. But where Mauritius chose to end its decolonial project—with a constitutional amendment to transform the government from a constitutional monarchy to a parliamentary republic—Barbados is endeavoring now to replace the constitution Buckingham Palace issued on its behalf with one it will adopt for itself.

The Parliament of the United Kingdom enacted the Barbados Independence Act on November 17, 1966, authorizing the Queen to issue a constitution for Barbados.[194] Five days later, the Queen issued the Barbados Independence Order, simultaneously recognizing the independence of Barbados and promulgating a new constitution in its name.[195] In addition to the twin objectives of independence and constitution, the Order had the practical purpose of ensuring legal continuity in the transition from colony to state.[196] The Constitution of Barbados is a schedule appended to the Order issued by the Queen, just like the Constitution of Mauritius.[197] It is constructed similarly to the Mauritian Constitution, with virtually identical institutional arrangements and many of the same rights and freedoms.[198] This ought not come as a surprise, since, like Mauritius, Barbados inherited its governmental institutions from its heritage as a colony of the U.K. The Constitution vests executive authority in the Queen,[199] who is represented in the country by her chosen Governor-General.[200] The legislative authority of Barbados consists of two houses and the Queen, together comprising

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193 *Id.* at § 1(1).

194 Barbados Independence Act 1966, c.37, § 5(1) (U.K.).

195 Buckingham Palace, The Barbados Independence Order 1966, 1966 No. 1455 (Nov. 22, 1966).

196 *Id.* at § 2.1.

197 *Id.* at Schedule to the Order.

198 *Compare* THE CONSTITUTION OF BARBADOS [CONSTITUTION] Nov. 22, 1966, ch. III (Barb.), to LA CONSTITUTION DE MAURICE [CONSTITUTION] Mar. 12, 1968, ch. II (Mauritius).

199 THE CONSTITUTION OF BARBADOS [CONSTITUTION] Nov. 22, 1966, § 63(1) (Barb.).

200 *Id.* at ch. IV.

Parliament.[201] No bill becomes law without the Governor-General assenting to it on behalf of the Queen.[202] The Queen is again central to the oath of office, which requires officers of Barbados to "swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, Her Heirs and Successors, according to law."[203]

One notable difference between the two colonial constitutions of Mauritius and Barbados reveals why the decolonial process was relatively easy, as a legal matter, for Barbados. The amendment procedure for removing the Queen as Head of State in Barbados required a lower threshold of approval than in Mauritius: two-thirds approval in both houses of Parliament versus three-quarters in Mauritius.[204] It was not easy politically, however, for Barbados to detach itself from the monarchy. The first major national self-reflection took the form of a high-level government commission in 1979 to examine the Constitution and to make recommendations on what, if anything, required revision.[205] That commission recommended keeping the status quo in the executive branch—not to replace the foreign Queen with a domestic Head of State.[206] Two decades later in 1998, a second commission concluded the contrary, recommending that the country replace the Queen with a locally selected Head of State.[207] It took another two decades to bridge the divide between monarchists and republicans in Barbados, as it was not until 2020 that the new Government of Barbados announced its plans to create the Republic of Barbados.[208]

When at last the Government of Barbados was ready to proceed with its decolonial constitutional reform, it enacted an amendment to the Constitution, replacing the Queen with a homegrown Head of State.[209] The amendment revoked the Independence Order but not the Constitution enacted as a schedule to the Order.[210] The amendment made sweeping changes across the body of laws in Barbados, ordering that any reference to "Her Majesty the Queen" or to the "Crown or to the Sovereign" in any law must be read as a reference to "the

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201 *Id.* at § 35.

202 *Id.* at § 58(1).

203 *Id.* at First Schedule.

204 *Compare* THE CONSTITUTION OF BARBADOS [CONSTITUTION] Nov. 22, 1966, § 49(2) (Barb.), *with* LA CONSTITUTION DE MAURICE [CONSTITUTION] Mar. 12, 1968, § 47(2) (Mauritius).

205 REPORT OF THE COMMISSION APPOINTED TO REVIEW THE CONSTITUTION, AND TO CONSIDER A SYSTEM OF NATIONAL HONOURS AND A NATIONAL TABLE OF PRECEDENCE, 1 (Mar. 1979).

206 *Id.* at 14–19.

207 REPORT OF THE CONSTITUTION REVIEW COMMISSION, 41–45 (1998).

208 The Honorable Sandra Mason GCMG, DA, QC, Speech from the Throne by her Excellency (Sept. 15, 2020), at 11–12.

209 Constitution (Amendment) Act, 2021 (Act. No. 2/2021) § 21 (Barb.).

210 *Id.* at § 4.

State."[211] The same applied to references to the Governor-General, which would now be read as a reference to the President.[212] The amendment also transferred the Queen's prerogatives and privileges to the State,[213] and those of the Governor-General to the President.[214] It vested all Crown property in the State,[215] changed the oath of office,[216] and set the rules for the Presidency by repealing and replacing the colonial Constitution's chapter on executive power.[217] The amendment is a careful exercise in legal drafting that removes all traces of the regime under the Queen as Head of State.

Barbados became a republic with its own Barbadian Head of State on November 30, 2021, fifty-five years to the day after its formal independence from Great Britain.[218] But the project of decolonization did not stop there. The Government of Barbados convened a Constitutional Reform Commission in June 2022 to engage in nationwide popular consultation to enact a new Constitution for Barbados, one that would be written and enacted by Barbadians in Barbados.[219] The Commission has urged the people of Barbados to share their views on what they wish to see in their new constitution.[220] The chair of the Commission has insisted that "the involvement of Barbadians in this process of drafting a Constitution is critical. It is something that all Barbadians bear the responsibility for."[221] Drawing from these public consultations and its own deliberations, the Commission is to recommend a draft constitution to the Government.[222] When the new Constitution of Barbados is enacted, the decolonial project will have been accomplished.

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211 *Id.* at § 5(6)(a).

212 *Id.* at § 5(6)(b).

213 *Id.* at § 6(1).

214 *Id.* at § 6(2).

215 Constitution (Amendment) Act, 2021 (Act No. 2/2021) § 8(1) (Barb.).

216 *Id.* at First Schedule.

217 *Id.* at §§ 14, 21.

218 Dánica Coto, *Barbados Becomes a Republic After Bidding Farewell to British Monarchy*, PBS (Nov. 30, 2021), https://perma.cc/5AT3-YWM5.

219 *See* Cynthia Barrow-Giles & Rico Yearwood, *The Constitutional Reform Commission of Barbados: Much Expectation, Great Skepticism*, CONSTITUTIONNET (Aug. 12, 2022), https://perma.cc/9ZZT-LQNZ.

220 *Constitutional Reform Commission Members Sworn-In*, LOOP NEWS (June 21, 2022), https://perma.cc/8T5D-WT77.

221 Emmanuel Joseph, *The Making of a New Constitution*, BARBADOS TODAY (Dec. 1, 2022), https://perma.cc/HP9P-DKAN.

222 Emmanuel Joseph, *Report of the Constitutional Reform Commission Delayed Until 2024*, BARBADOS TODAY (Aug. 23, 2023), https://perma.cc/8F6N-KW4L.

3. The challenge of constitutional reform in Jamaica

Jamaica has embarked on its own path toward decolonizing its constitution. But the task will be significantly harder than it was in Mauritius and Barbados. Transforming the system of government in Jamaica from constitutional monarchy to parliamentary republic requires both supermajority approval in the legislature as well as popular majority approval in a referendum.[223] The challenge will be to win the referendum. Even in the best of times, amendment referendums are difficult to ratify: while referendums have historically succeeded in 94 percent of attempts when used to enact a new constitution in the world, they fail 40 percent of the time when used to enact a constitutional amendment.[224] Undeterred by the high threshold to enact this constitutional reform, the Government of Jamaica has initiated an ambitious effort to remove King Charles III as the country's Head of State.[225]

The Government established a Constitutional Reform Committee in March 2023 to provide "expert guidance and oversight to the Government and People of Jamaica during the constitutional reform process and implement recommendations on the consensuses reached."[226] Constitutional reform in Jamaica is to follow an innovative three-phase process designed to achieve the prime directive of creating the Republic of Jamaica and to pursue additional constitutional reform objectives that will jointly produce "a modern and new Constitution which reflects an appreciation and understanding of Jamaica's cultural heritage, governance challenges and development aspirations, and which embodies the will of the people of Jamaica."[227] Phase one of the process focuses on patriating the Constitution, abolishing the constitutional monarchy, establishing a republican form of government, and making other necessary or convenient changes for which a referendum is required.[228] In phase two, the Constitutional Reform Committee is to consider other reforms that may be desired or required, including those related to the Charter of Fundamental Rights and Freedoms.[229] Phase three will entail a comprehensive review of the country's

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223 JAMAICA (CONSTITUTION) ORDER IN COUNCIL, 1962 [CONSTITUTION] July 24, 1962 § 49(3) (Jam.).

224 *See* Zachary Elkins & Alexander Hudson, *The Strange Case of the Package Deal: Amendments and Replacements in Constitutional Reform*, *in* THE LIMITS AND LEGITIMACY OF REFERENDUMS 37, 47 (Richard Albert & Richard Stacey eds., 2022).

225 Latonya Linton, *Constitutional Reform Committee Established*, JAMAICA INFORMATION SERVICE (Mar. 2, 2023), https://perma.cc/G4J6-3FUJ.

226 Chris Patterson, *PM Announces Members of Constitutional Reform Committee*, JAMAICA INFORMATION SERVICE (Mar. 23, 2023), https://perma.cc/XGQ4-SUVJ.

227 MINISTRY OF LEGAL & CONSTITUTIONAL AFFAIRS, TERMS OF REFERENCE FOR THE CONSTITUTIONAL REFORM COMMITTEE 4 (Mar. 2023).

228 *Id.*

229 *Id.*

legal and constitutional framework in order to enact a new Constitution for Jamaica.[230] This carefully-constructed sequence is designed to prioritize the main objective Jamaicans have for themselves and their country: to replace the foreign monarch with a homegrown Head of State.[231]

The Constitutional Reform Committee recently issued its first set of recommendations.[232] The report urges the country to take an historic step in the project of constitutional decolonization. A constitution, observes the Committee, "should be a reflection of the collective will and vision of the people it serves."[233] Drawing from this people-centric understanding of a constitution, the Committee affirms the need "to Jamaicanise our Constitution." The Committee moreover insists that "the reformed Constitution must be deeply grounded in the cultural fabric of the nation," and lays the foundation for the new constitution to embody "the unique identity, values and aspirations of Jamaica, thus reflecting a truly home-grown document."[234] In line with this decolonial vision of a constitution, the Committee recommends that a new higher law—enacted by the Parliament of Jamaica and approved by the people of Jamaica—should repeal and replace the British imperial instrument that brought the Constitution of Jamaica into force as an Order in Council at Buckingham Palace.[235] The Committee pairs this recommendation with a call to abolish the monarchy and to create a republican form of government, with a Jamaican citizen residing in Jamaica as Head of State.[236]

Jamaica has not held a constitutional referendum since its independence in 1962.[237] The only referendum experience in the country occurred the year prior, in 1961, asking Jamaicans whether they wished to remain in the Federation of the West Indies; they answered no.[238] But that referendum did not involve a reform to the Jamaican Constitution, nor did it occur under the current Constitution of Jamaica.[239] If a referendum is held on becoming a republic, the deep void in

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230 *Id.*

231 *See* Will Grant, *Will Jamaica Now Seek to 'Move On' from Royals as a Republic?*, BBC NEWS (Sept. 13, 2022), https://perma.cc/4LE8-TW37.

232 *See* MINISTRY OF LEGAL & CONSTITUTIONAL AFFAIRS, REPORT OF THE CONSTITUTIONAL REFORM COMMITTEE ON THE TRANSITION TO THE REPUBLIC OF JAMAICA AND OTHER MATTERS (May 2024).

233 *Id.* at 11.

234 *Id.*

235 *Id.*

236 *Id.* at 17–20.

237 Lloyd B. Smith, *A Rocky Road to the Republic*, JAMAICA OBSERVER (May 3, 2024), https://perma.cc/X5FN-7NDG.

238 *Id.*

239 *See* Michele A. Johnson, *The Beginning and the End: The Montego Bay Conference and the Jamaican Referendum on West Indian Federation*, 48 SOC. & ECON. STUD. 117 (1999) (accounting of the referendum).

institutional and popular referendum memory must be filled by easily-understandable and readily-available information on what a referendum is, how it works, and what it takes to pass. Even if the referendum fails in the end, these efforts should yield salutary benefits for the country: Jamaicans will have learned about their Constitution, weighed a collective constitutional decision for the first time since independence, and flexed their referendum muscles after a long period risking atrophy. This would be the first time Jamaicans have a hand in shaping their shared future, given that the current constitution was enacted with little opportunity for public consultation and debate.[240] No exercise of the power of decolonial constitutionalism can be more compelling than replacing the monarchy through a vote of the people in accordance to the onerous self-entrenching rules established by the monarchy itself with the aim of discouraging and frustrating the project of decolonization.

III. DECOLONIAL JUDICIAL ENFORCEMENT

Decolonial constitutionalism can occur through constitutional reform, whether by creating a new constitution or amending an existing one. It can also occur in courts, as judges interpret and enforce a constitution, statute, or regulation. In this Section I show that courts around the world have been allies in the mission of decolonial constitutionalism. I examine in particular how courts have applied and interpreted treaties affecting the interests of Indigenous Peoples, recognized and protected Indigenous rights, and paved the road to self-determination for peoples subordinated in law or politics. Along the way, we travel through Africa, Asia, Europe and the Americas, revealing the prevalence of decolonial constitutionalism by judicial interpretation and enforcement.

A. Applying and Interpreting Treaties

In this Subsection, I examine three creative strategies courts have deployed to apply and interpret treaties involving Indigenous rights. I begin with the constitutional block doctrine in Colombia, then explore the doctrine of explicit repeal in the United States, and conclude with the use of extrinsic evidence in Canada. These strategies may well be transferable beyond their domestic borders to advance the project of decolonial constitutionalism by judicial enforcement.

1. The constitutional block doctrine in Colombia

The Colombian Constitution reflects a special solicitude for Indigenous rights. For instance, it establishes special representation for Indigenous Peoples in

240 *See* Derek O'Brien, *Jamaica's Transition to a Republic: Process Matters*, CONSTITUTIONNET (Apr. 28, 2023), https://perma.cc/HW3Y-EA9S.

both the Senate and House of Representatives.[241] In the Senate, two seats are held for election by "a special national constituency for indigenous communities."[242] The Constitution requires that those elected to fill these seats "must have exercised a position of traditional authority in their respective community or have been leaders of an indigenous organization, which qualification shall be verified by a certificate from the respective organization, endorsed by the Minister of the Government."[243] In the House, one seat is held for a special constituency to represent Indigenous communities.[244] The Constitution moreover requires that territorial boundaries of Indigenous grounds must be drawn with the participation of Indigenous Peoples.[245] And it insists that Indigenous territories are to be "governed by the councils formed and regulated according to the uses and customs of their communities."[246]

Building on the Constitution's protections for Indigenous rights and recognition, the Constitutional Court of Colombia has adopted the French doctrine of the "bloc de constitutionnalité"[247] into its domestic legal system.[248] According to this block doctrine, the Constitution consists of equally binding and supreme laws beyond those codified in the constitutional text.[249] In Colombia, the Court has interpreted international human rights agreements ratified by the Congress as forming part of this constitutional block, making them equally supreme to the constitutional text itself and lawfully part of the Constitution.[250] This judicial transformation of the form of the Colombian Constitution has had important implications for Indigenous rights.

One of those international agreements automatically incorporated into the Colombian Constitution by virtue of the constitutional block doctrine is Convention 169 of the International Labour Organization, which Colombia ratified in 1991.[251] Convention 169 commits governments to protecting and

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241 CONSTITUCIÓN POLÍTICA DE COLOMBIA DE 1991 [CONSTITUTION] July 6, 1991, art. 176 (Colom.)

242 *Id.* at art. 171.

243 *Id.*

244 *Id.* at art. 176.

245 *Id.* at art. 329.

246 *Id.* at art. 330.

247 *See* Jean-Sébastien Boda, *Bloc de Constitutionnalité ou Désordre Constitutionnel?*, 130 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 393, 396–405 (2022) (detailing the intellectual origins and evolution of the term).

248 *See* Alejandro Gómez-Velásquez, *The Constitutional Framework for Transitional Justice in Colombia*, 14 OPINIÓN JURÍDICA 21, 37–40 (2015).

249 *See* ÉLISABETH ZOLLER & WANDA MASTOR, DROIT CONSTITUTIONNEL 241 (3d ed. 2021).

250 Alejandro Gómez-Velásquez, *The "Constitutionalization" Process of the International Environmental Law in Colombia*, 45 REVISTA DE DERECHO, UNIVERSIDAD DEL NORTE 1, 15–16 (2016).

251 JULIE HERNÁNDEZ ET AL., PRIOR CONSULTATION IN COLOMBIA: PROGRESS & CHALLENGES 12 (2015)

promoting the rights of Indigenous Peoples in relation to education, health, land, employment, and beyond.[252] Articles 6 and 7 of Part I are worth highlighting in particular because they create a judicially enforceable framework for Indigenous rights to participation in government administration and decision-making, to be consulted on matters that affect them, and to choose their own priorities for their development.[253] The constitutionality block doctrine has bolstered a constitution that was already inclined towards Indigenous rights. For constitutions that are not similarly designed, this judicial strategy holds promise for advancing the decolonial project.

2. The "explicit repeal" doctrine in the U.S.

"Bombshell" is how scholars have described a recent U.S. Supreme Court ruling on Indigenous sovereignty.[254] In what could be "the most important reservation boundary case in the history of the United States Supreme Court,"[255] the Creek Nation prevailed over the state of Oklahoma in a dispute about the status of a 19th-century treaty.[256] The Court ruled in favor of the Creek Nation, upholding their sovereignty and jurisdiction against contrary claims.[257]

In 1832, the Creek Nation agreed on a treaty with the U.S. Government guaranteeing them new lands west of the Mississippi river in exchange for their existing lands east of the river.[258] The treaty also memorialized a promise from the Government that "[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves."[259] The new lands were located in, what is now, the state of Oklahoma.[260] The dispute was triggered by a criminal conviction in an Oklahoma state court. The accused challenged the conviction on grounds that he is a member of the Seminole Nation of Oklahoma, his crimes occurred on Creek lands, and as

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252 International Labour Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Parts II–III, V–VI, June 27, 1989, U.N.T.S. 1777, A-28383.

253 Convention Concerning Indigenous and Tribal Peoples in Independent Countries 283 *supra* note, 252 at arts. 6–7. For an excellent overview and translation of Colombian Constitutional Court cases applying and interpreting Convention 169 to Indigenous rights claims, *see* MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES 257–70 (2017).

254 Robert J. Miller & Torey Dolan, *The Indian Law Bombshell: McGirt v. Oklahoma*, 101 B.U. L. REV. 2049, 2051 (2021).

255 Bethany R. Berger, *McGirt v. Oklahoma and the Past, Present, and Future of Reservation Boundaries*, 169 U. PA. L. REV. ONLINE 250, 252 (2021).

256 McGirt v. Oklahoma, 591 U.S. 894 (2020)

257 *Id.*

258 *Id.* at 897.

259 *Id.* (*quoting* 1832 Treaty, Art. XIV, 7 Stat. 368).

260 *Id.*

a result Oklahoma lacks jurisdiction to prosecute him.[261] The Creek Nation sided with the accused as *amicus curiae*, arguing that the state of Oklahoma lacked the authority to prosecute Indigenous Peoples for crimes committed on their lands; only the federal government and the Creek Nation possess that authority.[262] The question was whether the treaty promise of lands to the Creek Nation included those lands on which the crime occurred.

Four treaties were relevant to resolving this question.[263] The first, the 1832 Treaty, memorialized the territorial exchange.[264] The second, approved the following year in 1833, established the boundaries of what was to become "'a permanent home to the whole Creek nation of Indians.'"[265] The third was ratified just over two decades later, in 1856: Congress and the Creek Nation agreed that "'no portion' of the Creek Reservation 'shall ever be embraced or included within, or annexed to, any Territory or State.'"[266] The fourth, ten years later in 1866, preserved an agreement between the federal government and the Creek Nation to decrease the amount of land guaranteed to the Creek Nation, with compensation for the accompanying reduction valued at 30 cents per acre.[267] The 1866 Treaty also reaffirmed that the Creek lands would "'be forever set apart as a home for said Creek Nation,' which it now referred to as 'the reduced Creek reservation.'"[268]

After entering into these treaties with the Creek Nation, Congress over the years took intervening actions that led Oklahoma to claim that the Creek Nation no longer held the lands they were promised.[269] Congress, for example, enlisted the Dawes Commission to either convince the Creek to give up their territory or to agree to allot their lands to their members.[270] Congress, moreover, abolished Creek courts and imposed a requirement of presidential approval for any Creek ordinances affecting the lands of the Creek Nation.[271] In addition, Congress adopted a law in 1906 severely impinging on the powers of the Creek Nation, including on their leaders, funds, and schools.[272]

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261 *Id.* at 898.

262 McGirt v. Oklahoma, 591 U.S. 894, 899 (2020).

263 *Id.* at 899–902.

264 *Id.* at 900.

265 *Id.*

266 *Id.* at 902 (*quoting* 1856 Treaty, Art. IV, 11 Stat. 700).

267 *Id.* at 901.

268 McGirt v. Oklahoma, 591 U.S. 894, 901 (*quoting* Treaty Between the United States and the Creek Nation of Indians, Arts. III, IX, June 14, 1866, 14 Stat. 786, 786, 788).

269 *Id.* at 904–07.

270 *Id.* at 905.

271 *Id.* at 909.

272 *Id.* at 910–11.

Yet, for the Court, one fact of law above all was more important than others: "in all this history there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation."[273] The Court emphasized its understanding that "the federal government promised the Creek a reservation in perpetuity,"[274] acknowledged that "over time, Congress has diminished that reservation,"[275] but underscored that "Congress has never withdrawn the promised reservation."[276] As a result, the Court insisted that Congress is bound to honor its promise until it decides otherwise: "If Congress wishes to withdraw its promises, it must say so."[277] The Court therefore upheld these treaties between the U.S. government and the Creek Nation, and affirmed the sovereignty of the Creek Nation and criminal jurisdiction over its own lands.

3. Extrinsic evidence in treaty interpretation in Canada

Should Indigenous treaty rights be interpreted strictly according to their written terms alone, or should extrinsic evidence be admissible in their interpretation? In a landmark ruling, the Canadian Supreme Court confronted this question when reading a key part of the 1760 Treaty of Peace and Friendship in which the Mi'kmaq People agreed to trade with the British Crown on these terms: "[a]nd I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor at Lunenbourg or Elsewhere in Nova Scotia or Accadia."[278] Of the two interpretative routes—strictly textual or broadly contextual—the Supreme Court chose the latter, resulting in a more just interpretation of Indigenous rights.[279]

The treaty focused on "truck houses," a particular type of trading post.[280] These promised trading posts had vanished a few years after the 1760 treaty came into force, and by 1780 the arrangements made to provide an alternative for the Mi'kmaq People were no longer in operation.[281] The question for the Court was whether the trading terms promised by the British Crown to the Mi'kmaq People had expired upon the disappearance of truck houses, or whether the right nonetheless survived.

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273 *Id.* at 913.

274 McGirt v. Oklahoma, 591 U.S. 894, 937.

275 *Id.*

276 *Id.*

277 *Id.*

278 R. v. Marshall, [1999] 3 S.C.R. 456, at para. 5 (Can.).

279 *Id.* at paras. 9–12, 41, 56

280 *Id.* at para. 6.

281 *See id.* at para. 7.

The lower court had endorsed the strictly textual approach, holding that "while treaties must be interpreted in their historical context, extrinsic evidence cannot be used as an aid to interpretation, in the absence of ambiguity."[282] At the Supreme Court, the majority offered three reasons for rejecting that approach. First, the Court drew a parallel to contract law, observing that "even in a modern commercial context, extrinsic evidence is available to show that a written document does not include all of the terms of an agreement."[283] Second, extrinsic evidence may be useful for recovering the contemporaneous understanding of the parties, even where there is no uncertainty in the text: "even in the context of a treaty document that purports to contain all of the terms, this Court has made clear in recent cases that extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty."[284] Third, in the special case where a treaty is negotiated orally and later memorialized in writing by the government, there is good reason to consider extrinsic evidence: "where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms."[285]

The Court's review of the expert evidence and the historical record of the negotiations established that the written memorialization of the treaty was incomplete.[286] The Court proceeded to examine the objectives of the Mi'kmaq and the British in entering into their agreement.[287] For the Court, this required a return to the law of contract. Given that "[c]ourts will imply a contractual term on the basis of presumed intentions of the parties where it is necessary to assure the efficacy of the contract," the law should require no less for the proper interpretation of treaties involving Indigenous rights.[288] The Court therefore asserted that "if the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations."[289]

The Court ruled that the lower court's strictly textual interpretation had to be reversed. The lower court had "left the Mi'kmaq with an empty shell of a treaty

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282 *Id.* at para. 9.

283 *Id.* at para. 10.

284 R. v. Marshall, [1999] 3 S.C.R. 456, at para. 11 (Can.).

285 *Id.* at para. 12.

286 *Id.* at paras. 22–40.

287 *Id.* at para. 41.

288 *Id.* at para. 43.

289 *Id.*

promise,"[290] turning "a positive Mi'kmaq trade demand into a negative Mi'kmaq covenant"[291] and "denying any treaty protection to Mi'kmaq access to the things that were to be traded."[292] As a result of the extrinsic evidence, the Court found that "the surviving substance of the treaty is not the literal promise of a Truck house, but a treaty right to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified."[293] In response to concerns that this broadly contextual interpretation of the treaty right "would open the floodgates to uncontrollable and excessive exploitation of the natural resources,"[294] the Court stressed that the treaty protected only the right to "necessaries," which means more than "bare subsistence" but less than "the accumulation of wealth."[295] The Mi'kmaq People were therefore entitled by treaty right to trade for what the Court described as a "moderate livelihood," as reflected by the intention of the treaty parties in 1760 to ensure shelter, food, clothing, and a few amenities.[296] According to the Court, "it is fair that it be given this interpretation today."[297]

B. Constitutional Recognition in Court

Courts around the world have recognized the rights of subordinated peoples. Sometimes codified in constitutions and sometimes not, these rights have been foundational to the self-identity of Indigenous Peoples, and often also to their very status as Indigenous Peoples. Without judicial enforcement, many Indigenous Peoples would have a harder path to constitutional recognition, or none at all. In this Section, I examine judicial victories for Indigenous Peoples in Africa, Asia, and Europe, with a focus on favorable court rulings in Uganda, Sweden, and Taiwan.

1. The ancestral lands of the Batwa

Competing claims to Indigenous land rights in Africa have commonly devolved into disorder.[298] It was therefore a positive development, for the rule of law, when the Batwa People recently brought their ancestral land claims to the

290 R. v. Marshall, [1999] 3 S.C.R. 456, at para. 52 (Can.).

291 *Id.*

292 *Id.*

293 *Id.* at para. 56.

294 *Id.* at para. 57.

295 *Id.* at para. 59.

296 R. v. Marshall, [1999] 3 S.C.R. 456, at para. 59 (Can.).

297 *Id.*

298 Matthew I. Mitchell, *Indigenous Land Rights and Contentious Politics in Africa: The Case of Uganda*, 22 ETHNOPOLITICS 353, (2022).

Constitutional Court of Uganda.[299] The Batwa argued that their eviction from lands violated their rights to property, self-determination, and to freely dispose of natural resources, among other rights derived from customary law.[300] Since 1930, according to their suit, the Batwa have been involuntary displaced or dispossessed from their ancestral forest lands due to the Government's creation of forest reserves, national parks, and a sanctuary without either seeking or securing the Batwa's free, prior, and informed consent, nor compensating them for the loss of use of those grounds and resources.[301]

The Constitutional Court of Uganda ruled in favor of the Batwa.[302] The evidence established "that prior to the advent of colonial rule and the establishment of a British Protectorate in Uganda, the Batwa People inhabited the relevant lands."[303] Under colonial rule and thereafter, those lands were declared either reserves or parks,[304] leaving the Batwa "landless" after their eviction.[305] The Government's counterargument was that the Batwa had encroached on the lands that had, long prior, been vested in the Government.[306] The Court emphasized the constitutional obligation on the state to "take affirmative action in favour of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them."[307] The Court interpreted this obligation as a duty on the state to take "remedial action which . . . is required to be done in order to rectify effects of past discrimination or historic injustice."[308] The question for the Court, then, was whether the Batwa could be defined as a marginalized group?[309] The Court answered yes, finding that the "Batwa are a marginalized group" and that "their marginalization has arisen due to their eviction from the relevant lands without payment of compensation or with inadequate compensation, if any was paid."[310] As a result of the Government's actions, "the Batwa are now relegated

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299 United Organisation for Batwa Development in Uganda et al. v. Attorney General et al., Constitutional Petition No. 003 of 2013 [2021] Constitutional Court of Uganda.

300 *Id.* at 15.

301 *Id.* at 18–19.

302 *Id.* at 43.

303 *Id.* at 33.

304 *Id.*

305 United Organisation for Batwa Development in Uganda et al. v. Attorney General et al., Constitutional Petition No. 003 of 2013 [2021] Constitutional Court of Uganda, at 35.

306 *Id.*

307 *Id.* at 17–18 (quoting THE CONSTITUTION OF UGANDA [CONSTITUTION] Sep. 22, 1995, art. 32(1) (Uganda).

308 *Id.* at 18.

309 *Id.* at 38–39.

310 *Id.* at 40.

to a lesser class of citizens, inherently landless and fated to be encroachers on other people's land."[311]

The Court made clear that the Batwa are entitled to a remedy that recognizes them "as human beings equally deserving of concern, respect[,] and consideration."[312] The remedy should redress the injustice that "rendered them landless, and has severely affected not only their livelihoods, but has destroyed their identity, dignity[,] and self-worth as a people and as equal citizens with other Ugandans."[313] Yet the Court could not order a remedy without more evidence to determine what actions would be required to redress the "vulnerable and appalling situation" of the Batwa.[314] The case was therefore sent back to the lower court with instructions "that the most important consideration is that the situation of the Batwa People must improve"[315] and that the remedy should "not expose the Batwa People to further exploitation, [is] practically effective[,] and [is] enjoyed by all the Batwa People."[316] In an environment where violence has been an occasional occurrence in relation to Indigenous land claims,[317] the peaceful resolution was a victory for the rule of law, consistent with the modern model of decolonial constitutionalism.

2. Sámi hunting and fishing rights in Sweden

The Sámi People won recognition as Indigenous Peoples in Sweden in 1977, and that status was codified in the Swedish Constitution in 2011.[318] But their rights in relation to natural resources remained contested.[319] The Supreme Court of Sweden took the occasion of a natural resource dispute between the state and the Sámi to clarify certain rights of the Indigenous Sámi People and, in doing so, to recognize them under law.[320] The case involved fishing and hunting rights in a Sámi village.[321] A 2009 Swedish law had authorized individual landowners to

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311 United Organisation for Batwa Development in Uganda et al. v. Attorney General et al., Constitutional Petition No. 003 of 2013 [2021] Constitutional Court of Uganda, at 40.

312 *Id.* at 41.

313 *Id.* at 43.

314 *Id.* at 45.

315 *Id.*

316 *Id.* at 46.

317 David Meffe, *How Indigenous Communities in Uganda are Trying to Reclaim their Land*, ONE CAMPAIGN (Mar. 28, 2018), https://perma.cc/6EBT-ADGK.

318 Per Axelsson & Christina Storm Mienna, *The Challenge of Indigenous Data in Sweden, in* INDIGENOUS DATA SOVEREIGNTY AND POLICY 99, 101 (Maggie Walter et al. eds., 2020).

319 Patrik Lantto & Ulf Mörkenstam, *Sami Rights and Sami Challenges*, 33 SCANDIVANIAN J. HIST. 26 (2008).

320 Press Release, Supreme Court of Sweden, The "Girjas" Case (Sept. 4, 2020), https://perma.cc/5JRY-W6E7.

321 *Id.*

manage fishing and hunting rights on their land, which later generated an upsurge in exploitation of natural resources in the village.[322] Yet the Sámi argued that they alone could lawfully grant permission to fish and hunt in the village.[323] The state, however, pointed to the 1971 Swedish Reindeer Husbandry Act as evidence to the contrary: the law expressly prohibits the Sámi from giving others permission to fish or hunt.[324] The challenge for the Court was to decide whether a claim of customary Sámi rights to fish and hunt would prevail over a textually explicit restriction on Sámi rights to do the same.[325]

The Court recognized the rights of the Sámi People.[326] It confirmed that the 1971 Swedish Reindeer Husbandry Act does not grant Sámi villages any right to permit fishing or hunting. However, the doctrine of "possession since time immemorial" confers on the Sámi village, in this case, the exclusive right to grant fishing and hunting rights within its boundaries, thus disapplying the 1971 Swedish Reindeer Husbandry Act.[327] According to the Court, the Sámi People had developed a right to determine fishing and hunting rights in the area between the sixteenth and eighteenth century without the state exercising any conflicting claims at the time.[328] By the mid-eighteenth century, the right to fish and hunt in the village, as well to transfer this right to others, had become Sámi rights alone.[329]

The Court's holding entails three major consequences for Sámi rights. First, the Sámi village alone is authorized to grant fishing and hunting rights, without prior approval from the state.[330] Second, the state has no authority to grant those rights.[331] Third, future Sámi claims will be judged using the doctrine of possession since time immemorial rather than customary law, which had until then been the applicable legal standard.[332] This historic case may have a catalytic effect around the country, as the other 50 Sámi villages may seek to assert similar rights within their boundaries.[333]

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322 Richard Orange, *Indigenous Reindeer Herders Win Hunting Rights Battle in Sweden*, THE GUARDIAN (Jan. 23, 2020), https://perma.cc/9EKF-D5VM.

323 Sakshi Aravind, *The Girjas Case and its Implications for the Sámi Hunting and Fishing Rights in Sweden*, 23 ENVIRONMENTAL L. REV. 169, 170–71 (2021).

324 Press Release, Supreme Court of Sweden, *supra* note 320

325 *Id.*

326 *Id.*

327 *Id.*

328 *Id.*

329 *Id.*

330 Press Release, Supreme Court of Sweden, *supra* note 320

331 *Id.*

332 Christina Allard & Malin Brännström, *Girjas Reindeer Herding Community v. Sweden: Analysing the Merits of the Girjas Case*, 12 ARCTIC REV. L. & POL. 56, 66 (2021).

333 Påhl Ruin, *Girjas Sami Village vs. The Swedish State*, 14 BALTIC WORLDS 1, 4-5 (2021).

3. Defining Indigeneity in Taiwan

Who qualifies as an Indigenous Person in Taiwan? The Indigenous Peoples Status Act defined the terms "Indigenous" and "Indigenous person" narrowly to include only Indigenous persons of the mountains or the plains.[334] The former—Mountain Indigenous persons—qualify if they were "resident of the mountain administrative zone before the retrocession of Taiwan, and the household registration record shows the individual or immediate kin of the individual as of Indigenous descent."[335] The latter—Plains Indigenous persons—qualify if they were "resident of the plains administrative zone before the retrocession of Taiwan, and the household registration record shows the individual or immediate kin of the individual as of indigenous descent, and that the individual is registered as a Plains indigenous person in the village (town, city, district) administration office."[336] The Siraya People did not qualify under either category.[337] They filed suit to assert their identity as Indigenous Peoples and to secure constitutional recognition of their status.[338]

The Constitutional Court of Taiwan ruled in favor of the Siraya People, holding that the binary definition of Indigenous persons violates the Constitution.[339] The Court held that the exclusionary legal definition of Indigenous persons denies the Siraya People the right to recognition of Indigenous identity as well as the right to Indigenous culture.[340] The Court issued a temporary suspension of invalidity, declaring the law to be unconstitutional but granting the state a period of three years to update the law into conformity with the Court's ruling.[341] As a result of this judgment, the right to Indigenous identity in Taiwan is now a collective right belonging to Indigenous Peoples and communities, and an individual right belonging to Indigenous persons.[342]

C. The Road to Self-Determination

Domestic courts have enforced treaties in the service of the decolonial project, and they have recognized constitutional rights of subordinated peoples.

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334 Indigenous Peoples Status Act, Presidential decree Hua-tsung-yi-tzu-no. 9000009310, Jan. 17, 2001, art. 2 (Taiwan).

335 *Id.* at art. 2(1).

336 *Id.* at art. 2(2).

337 Constitutional Court R.O.C. (Taiwan) Oct. 28, 2022, Judgment 111-Hsien-Pan-17 (2022) (Case on the Indigenous Peoples Status for the Siraya People) (Taiwan).

338 *Id.*

339 *Id.*

340 *Id.*

341 *Id.*

342 Jau-Yuan Hwang et al., *Taiwan, in* THE 2022 GLOBAL REVIEW OF CONSTITUTIONAL LAW 334, 338 (Richard Albert, David Landau, Pietro Faraguna & Giulia Andrade eds., 2023).

Domestic courts have also helped pave the road to self-determination for peoples endeavoring to assert their independence. In this Section, I show how courts have validated claims to self-determination in Ecuador and Canada, going beyond the constitutional text in their respective rulings. I seek also to temper the view of courts as enthusiastic enforcers of self-determination with reference to a recent case involving France.

1. An Indigenous justice system in plurinational Ecuador

The 2008 Ecuadorean Constitution defines the country as a plurinational state.[343] This declaration answered demands made by Indigenous Peoples since 1990.[344] It was "a way to incorporate Indigenous cosmologies into the governing of the country."[345] Plurinationality entails protections for the rights of all persons, communities, peoples and nations.[346] Plurinationality moreover was "a crucial step toward decolonizing formal democracy and refounding the state in inclusive terms,"[347] and "a model of political organization for the decolonization of our nationalities and peoples and to make reality the principle of a country with unity in diversity."[348]

Decolonization has taken steps forward with the Constitutional Court's judgments on Indigenous self-determination. One in particular involved a constitutional reform proposal to establish a single unified Indigenous justice system that would operate alongside the state system.[349] The reform proposal was driven by the inequitable treatment of Indigenous justice: the state system has a vast infrastructure of resources and personnel, while Indigenous justice is administered by small communities and rules that are not codified in law.[350] The proposal also called for a new career track for judges to serve in the new Indigenous justice system.[351]

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343 CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [CONSTITUTION] July 24, 2008, art. 1 (Ecuador).

344 Kenneth P. Jameson, *The Indigenous Movement in Ecuador: The Struggle for a Plurinational State*, 38 LAT. AM. PERSPECTIVES 63, 64 (2011).

345 Marc Becker, *Building a Plurinational Ecuador: Complications and Contradictions*, 26 SOC. & DEMOCRACY 72, 73 (2012).

346 CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [CONSTITUTION] July 24, 2008, art. 10 (Ecuador).

347 Christine Keating & Amy Lind, *Plural Sovereignty and la Familia Diversa in Ecuador's 2008 Constitution*, 43 FEMINIST STUD. 291, 299 (2017).

348 Philipp Altmann, *Plurinationality and Interculturality in Ecuador: The Indigenous Movement and the Development of Political Concepts*, 43 IBEROAMERICANA: NORDIC J. LAT. AM. & CARIBBEAN STUD. 47, 55 (2013) (*quoting* CONAIE, PROPUESTA DE LA CONAIE FRENTE A LA ASAMBLEA CONSTITUYENTE: PRINCIPIOS Y LINEAMIENTOS PARA LA NUEVA CONSTITUCIÓN DEL ECUADOR, (2007)).

349 Constitutional Court of Ecuador Sept. 4, 2019, Dictamen no. 5-19-RC/19, para. 23 (Ecuador).

350 *Id.* at paras. 23–24.

351 *Id.* at para. 24.

The Court held that the proposed reform would violate the Indigenous right to self-determination.[352] The reason why, the Court explained, is that Indigenous Peoples have a right to their own law. Whether a commune, community or otherwise, Indigenous Peoples may develop and administer their own legal systems and apply their own customary laws to disputes within their domain.[353] They may rely on their own ancestral traditions, customs, and procedures within their distinct forms of social organization using their own sources of authority.[354] The Court noted one restriction on Indigenous rights to self-determination in the administration of justice: there can be no violation of either the Constitution or human rights protected by international instruments.[355]

Therefore, creating a single unified Indigenous justice system would fail to appreciate that Indigenous communes, communities, Peoples and nations have their own practices that may differ among them.[356] Indigenous justice systems, the Court explained, are not homogeneous. They are heterogeneous, full of differences, varieties, and complexities that call for each commune, community, people and nation to have the discretion to act, evaluate, judge, and rule as they must.[357] Each should have the capacity to name their own decision-makers, select and apply their own norms, and issue their own rulings consistent with their own rules.[358] In exercising their self-determination within their own separate justice systems, Indigenous Peoples are entitled to as much latitude as possible in their autonomy and as few restrictions as possible on their authority.[359]

As a consequence of this right to autonomy in the administration of Indigenous justice, it would be illegitimate for the state to intrude into the resolution of disputes in the Indigenous justice system.[360] While the proposed reform—to create a single unified Indigenous justice system—might appear to serve the needs and interests of Indigenous Peoples, the reform would result in the opposite: it would undermine the difference, diversity, and autonomy of Indigenous communes, communities, Peoples and nations as separate self-determined groups entitled to exercise their rights in their own way.[361] This ruling was a historic victory for Indigenous self-determination.

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352 *Id.* at para. 33–35.

353 *Id.* at para. 27.

354 *Id.*

355 *Id.*; CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [CONSTITUTION] July 24,2008, art. 171 (Ecuador).

356 Dictamen no. 5-19-RC/19, *supra* note 349, at para. 28.

357 *Id.* at para. 29

358 *Id.* at para. 28.

359 *Id.*

360 *Id.* at para. 32.

361 *Id.* at para. 33.

2. The Canadian model of secession

Secession is a political decision often accompanied by force of arms. In Canada, however, there exists a legal infrastructure for its peaceful execution. When Quebec threatened to make a unilateral declaration of independence, the Supreme Court outlined the principles that must guide any effort to secede from the country.[362] Secession, the Court explained, is "a legal act as much as a political one" spurred by "the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane."[363] Parliament later relied on the principles articulated by the Court to build a legal framework that binds both federal and provincial governments alike.[364] This legal framework could conceivably be applied also to Nunavut, a Canadian territory where 86 percent of the population identifies as Indigenous,[365] if ever it sought to become independent.

The Clarity Act enumerates six major steps in the secession sequence to authorize a province legally to secure independence: (1) initiation; (2) pre-referendum evaluation; (3) referendum; (4) post-referendum evaluation; (5) negotiation; and (6) constitutional amendment.[366]

The first step in the secession sequence begins in the legislative assembly of a province when the precise language of the secession referendum question is revealed.[367] The second step requires the House of Commons to evaluate whether the referendum question is clear.[368] As part of its evaluation, the House of Commons must consider a multiplicity of views including those of all political parties represented in the legislative assembly, governments or assemblies outside of province, as well as representatives of Indigenous Peoples.[369] The clarity of the question is a necessary condition for the legality of secession. The clarity standard is rooted in the Court's ruling, which insists that the referendum question "must be free of ambiguity."[370]

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362 Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can. Que.).

363 *Id.* at para. 83.

364 An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference ("Clarity Act"), S.C. 2000, c. 26, prmbl (Can.).

365 *Indigenous Population Continues to Grow and is Much Younger than the Non-Indigenous Population, Although the Pace of Growth has Slowed*, STATISTICS CANADA (Sept. 21, 2022), https://perma.cc/GS59-SNMZ.

366 An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference ("Clarity Act"), S.C. 2000, c. 26. (Can.).

367 *Id.* at § 1(1).

368 *Id.* If the official release occurs during a federal general election, the House of Commons has an additional forty days to evaluate the question. *Id.* at § 1(1, 3).

369 *Id.* at § 1(5).

370 Reference re Secession of Quebec, *supra* note 362, at para. 87.

When the House of Commons determines the question is clear, the province may proceed in step three to hold its referendum. Although the Constitution does not recognize the "legal effect" of a referendum,[371] the Court acknowledged that a democratic expression of the will of the people would be compelling.[372] Step four returns to the House of Commons, where the body must at this stage evaluate whether there is a "clear" majority to the "clear" question on secession. As the Court has explained, the clarity of the result is essential to trigger the rest of the secession sequence because "the clear repudiation by the people [of a province] of the existing constitutional order would confer legitimacy on demands for secession and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will."[373]

If the House of Commons approves the clarity of the result, there is no discretion on proceeding to step five: negotiations on secession must begin.[374] These negotiations, the Court stressed, must respect the foundational principles of Canadian constitutionalism, namely federalism, democracy, constitutionalism, the rule of law, and the protection of minorities.[375] The Court conceded that negotiation "would undoubtedly be difficult."[376] Yet the Court insisted that secession would "have to be resolved within the overall framework of the rule of law, therefore assuring Canadians resident in [the seceding jurisdiction] and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty."[377] The sixth and final step requires a constitutional amendment to implement the negotiated terms of secession.[378] This legal process for secession reflects the modern rule of law values in decolonial constitutionalism.

3. The incompatibility of French and Corsican identities

Courts are not always allies on the road to self-determination. They are sometimes antagonists. But whether they are one or the other, the key point is that courts are now a common venue for the settlement of claims that once were prosecuted in war. In France, for example, the Constitutional Council, the rough equivalent of a constitutional court, has adjudicated claims to self-determination for Corsica, an island territory of France that was for long treated much like a

371 *Id.* at para. 87.

372 *Id.* at para. 87.

373 *Id.* at para. 88.

374 *Id.* at para. 88.

375 Reference re Secession of Quebec, *supra* note 362, at para. 90.

376 *Id.* at para. 97.

377 *Id.* at para. 96.

378 *Id.* at para. 84.

colonial island by the French central government.[379] After a period of Corsican nationalist violence,[380] the French Parliament sprang to action by introducing a new law granting concessions, status, and powers to Corsica, all in an interest of bringing peace to the turbulent relationship between the island and the state.[381] The Council, however, invalidated that law on the theory that there can be only one unitary French people.[382]

The law recognized the Corsican people as a distinct society within the French republic, acknowledging their unique cultural and historical specificities, and their rights to preserve their Corsican identity.[383] This part of law, for the Council, conflicted with the French Constitution's affirmation that there exists only one French people.[384] The preamble speaks of the "unity of the French people," Article 2 of the Constitution refers to the indivisibility of the French Republic, and Article 3 endows the people with national sovereignty.[385] Each of these, the Council held, is incompatible with the idea of a separate Corsican people within the larger French people because French identity cannot be divided,[386] nor can any sub-distinctions be made within it.[387]

The Council also invalidated a second part of the law,[388] this one dealing with special legislative rights for Corsican representatives elected to the Assembly of Corsica and separately to the Parliament of France.[389] The law gave the Corsican Assembly the right to be consulted on bills and decrees relating to Corsica, and moreover required Corsican representatives in the French Parliament to "be notified of Government drafts and of the opinions of the Corsican Assembly."[390] Members of the Corsican Assembly were given the power to propose laws and

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379 *See* Robert Aldrich, *France's Colonial Island: Corsica and the Empire*, 3 FRENCH HIST. & CIV. 112 (2009).

380 *See Patrick Hossay*, *Recognizing Corsica: The Drama of Recognition in National Mobilization*, 27 ETHNIC & RACIAL STUD. 403 (2004).

381 Loi 91-428 du 13 mai 1991 portant statut de la collectivité territoriale de Corse [Law 91-428 of May 13, 1991 on the status of the territorial community of Corsica], Conseil Constitutionnel [Constitutional Council] (Fr.).

382 *See* Conseil Constitutionnel [CC] [Constitutional Court] Décision 91-290 DC du 9 mai 1991, Loi portant statut de la collectivité territoriale de Corse, May 9, 1991 (Fr.).

383 *Id.* at para. 10.

384 *Id.* at para. 13.

385 *Id.* at para. 11.

386 *Id.*

387 *Id.* at para. 13.

388 Conseil Constitutionnel [CC] [Constitutional Court] Décision 91-290 DC du 9 mai 1991, Loi portant statut de la collectivité territoriale de Corse, May 9, 1991, paras. 51,55 (Fr.).

389 The French central government created the Corsican Assembly—a unicameral legislature—in 1982. Paul Hainsworth, *Corsica: The Regional Assembly Election of 1982*, 6 W. EUR. POL. 165, 165 (1983).

390 Décision 91-290 , *supra* note 388, at para. 45 (*quoting* Loi 91-428 du 13 mai 1991 portant statut de la collectivité territoriale de Corse).

regulations on administrative, cultural, economic, and social matters in Corsica.[391] Those proposals would ultimately be transmitted to the Prime Minister of France and shared with the Corsican representatives in the French Parliament.[392] The Prime Minister was required by the law to acknowledge receipt within 15 days and notify the Assembly when she would respond.[393] The purpose of this set of related rules in the law was to confer on Corsican elected representatives the rights both to be consulted and to be kept informed on matters affecting Corsica.[394]

The Council declared these rules unconstitutional.[395] These special rules for members of Parliament elected in Corsica violate the constitutional requirements for equal treatment among all parliamentarians,[396] as they grant special rights by virtue of where a parliamentarian is elected.[397] This is impermissible differential treatment.[398] Moreover, the obligation on the Prime Minister to respond to Corsican proposals is likewise unconstitutional; the Parliament does not have the legal authority to compel the Prime Minister to respond to "the deliberative body of a territorial unit."[399]

This law would have been a big step forward for Corsican self-determination. Much of the Parliament of France was behind the idea, as was the Assembly of Corsica. It was the Constitutional Council that stood in the way, finding much of the law unconstitutional. Though Corsicans lost their bid for greater autonomy and rights, they won in another way that may prove more productive: their quest for decolonization has moved from the battlefield of violent tactics to the lawyerly domain of legislatures and courts of law.[400] As it happens, the President of France recently endorsed autonomy for Corsica,[401] and a law is currently being drafted to formalize a new self-determined status for the island.[402] The law will have to survive review by the Council.

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391 *Id.* at para. 46.

392 *Id.*

393 *Id.*

394 *Id.* at para. 47.

395 *Id.* at paras. 51, 55.

396 Décision 91-290 , *supra* note 388, para. 53.

397 *Id.* at para. 54.

398 *Id.* at paras. 53–54.

399 *Id.* at para. 50.

400 *See* Peter Savigear, *Corsica 1975: Politics and Violence*, 31 WORLD TODAY 462 (1975).

401 Jan van der Made, *President Macron Proposes "Autonomy" for French Island of Corsica*, RADIO FRANCE INTERNATIONALE (Sept. 28, 2023), https://perma.cc/QUZ2-FDU3.

402 Benjamin Dodman, *French and Corsican Officials Strike Deal in "Decisive Step" Towards Island's Autonomy*, FRANCE 24 (Mar. 12, 2024), https://perma.cc/HG4F-EJYC.

IV. DECOLONIAL SUPRACONSTITUTIONALISM AND SUBCONSTITUTIONALISM

Decolonial constitutionalism occurs at the level of the state, as we have seen, in domestic constitution-making and judicial enforcement. It occurs also, as I will show in this Section, at levels both above and below the state. Political actors have pulled the levers of supraconstitutional and subconstitutional power to open winning fronts in the battle for decolonization at the international, regional, and sub-state planes of legal and political mobilization. In this Section, I will evaluate how effectively decolonial constitutionalism has been prosecuted at the supranational level in the United Nations, at the regional level with the Organization of African Unity, the Arab-Asian Bloc, and the Caribbean Court of Justice, and at the sub-state level at the City of Vancouver, the State of Queensland, and the Territory of the U.S. Virgin Islands. The principal takeaway from this Section is an appreciation of the possibilities of decolonization beyond the state.

A. UNDRIP: From Aspiration to Implementation

The year 2007 may prove pivotal to the global project of decolonial constitutionalism. It marked the United Nations General Assembly's adoption of the Declaration on the Rights of Indigenous Peoples.[403] Heralded as a historic moment for reconciliation, the chair of the United Nations Permanent Forum on Indigenous Issues observed that "this day will forever be etched in our memories as a significant gain in our peoples' long struggle for our rights as distinct peoples and cultures."[404] It remains to be seen whether UNDRIP will have its intended transformative impact, as too little time has passed since its adoption in the U.N., and too few countries have taken meaningful steps to implement it domestically. But there is some evidence and plenty of hope that UNDRIP could be a springboard toward a more just and equitable future for Indigenous Peoples.

1. The transformative potential of UNDRIP

UNDRIP affirms the right of Indigenous Peoples to self-determination.[405] It is described as laying a "moral imperative upon states" to reconcile with Indigenous Peoples.[406] Spanning 46 detailed articles, UNDRIP memorializes the

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403 United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 (Sept. 13, 2007) [hereinafter UNDRIP].

404 Press Release, United Nations, General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' towards Human Rights for All, Says President (Sept. 13, 2007), https://perma.cc/5TZT-QB4H.

405 UNDRIP, *supra* note 403, at prmbl., art. 3.

406 Emmanuel C. Obikwu, *UNDRIP and Historic Treaties: The Moral Imperative to Legitimize the Human Rights of Indigenous People to Self-Determination*, 6 PETITA 90, 123 (2021).

virtually unanimous international position that Indigenous Peoples "have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources."[407] UNDRIP moreover recognizes "the urgent need to respect and promote the inherent rights of indigenous peoples" and "to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States."[408] UNDRIP was adopted by 144 states, with only 4 voting against and 11 abstaining,[409] though later all four objectors reversed course and signed on.[410]

According to UNDRIP, self-determination for Indigenous Peoples entails the "right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."[411] This right imposes obligations on states, including to "provide effective mechanisms for prevention of, and redress for"[412] acts that have "the aim or effect of depriving"[413] Indigenous Peoples of "their integrity as distinct peoples, or of their cultural values or ethnic identities."[414] Signatories are also obligated to prevent and redress efforts at "dispossessing them of their lands, territories or resources,"[415] as well as any form of "forced population transfer,"[416] "forced assimilation or integration,"[417] and any act of "propaganda designed to promote or incite racial or ethnic discrimination directed against them."[418]

UNDRIP sets fittingly high expectations for how states and Indigenous Peoples are to interact. UNDRIP establishes standards for Indigenous cultural traditions and customs,[419] spiritual and religious practices,[420] education,[421] media

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407 UNDRIP, *supra* note 403, at prmbl.

408 *Id.*

409 S. James Anaya & Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment*, JURIST (Oct. 3, 2007), https://perma.cc/Z54D-9U4T.

410 Corinne Lennox & Damien Short, *Introduction*, *in* HANDBOOK OF INDIGENOUS PEOPLES' RIGHTS 1 at 1 (Corinne Lennox & Damien Short eds., 2016).

411 UNDRIP, *supra* note 403, at art. 4.

412 *Id.* at art. 8(2).

413 *Id.* at art. 8(2)(a).

414 *Id.*

415 *Id.* at art. 8(2)(b).

416 *Id.* at art. 8(2)(c).

417 UNDRIP, *supra* note 403, at art. 8(2)(d).

418 *Id.* at art. 8(2)(e).

419 *Id.* at art. 11.

420 *Id.* at art. 12.

421 *Id.* at art. 14.

and communications,[422] labor and employment,[423] housing, health and social security,[424] and the environment,[425] among other areas of shared and self-governance. It also codifies the right to self-governance, including "the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."[426] This right entails a related obligation on states to secure the free, prior, and informed consent of Indigenous Peoples prior to taking action in ways that might impact them.[427] This amounts to a right to participate in decision-making on matters of concern to Indigenous Peoples, including with respect to dispute resolution,[428] restitution and compensation for injustices related to lands, territories and resources,[429] and cultural heritage.[430]

States and Indigenous Peoples are invited to pursue UNDRIP's goals "in a spirit of partnership and mutual respect."[431] States in particular are urged to take affirmative steps to advance their objectives.[432] Indigenous Peoples are also to be afforded financial and other support to exercise their rights under UNDRIP.[433] In addition, the United Nations and each of the signatory states are expected to "promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration."[434] The United Nations is moreover required to "contribute to the full realization of the provisions of this Declaration through the mobilization, *inter alia*, of financial cooperation and technical assistance."[435]

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422 *Id.* at art. 16,

423 UNDRIP, *supra* note 403, at art. 17.

424 *Id.* at art. 21.

425 *Id.* at art. 29.

426 *Id.* at art. 18.

427 *Id.* at art. 19.

428 *Id.* at art. 27.

429 UNDRIP, *supra* note 403, at art. 28(1).

430 *Id.* at art. 31.

431 *Id.* at prmbl.

432 *Id.* at art. 38.

433 *Id.* at art. 39 (stating that Indigenous Peoples hold the "right to have access to financial assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration").

434 *Id.* at 42.

435 UNDRIP, *supra* note 403, at art. 41.

There is some debate on the legal status of UNDRIP: is it binding or not?[436] In one view, UNDRIP is quasi-legal and therefore not legally binding.[437] In another, UNDRIP reflects general principles of international law backed by "significant normative weight."[438] Yet whether or not UNDRIP is binding under law, its success will ultimately turn on whether the U.N. member states implement it within their own domestic legal systems. UNDRIP standing alone, even with its many state signatories, is not self-executing. It is only local political will, not foreign international law, that can deliver on the commitments to Indigenous rights and recognition enshrined in UNDRIP.

2. Judicial application in Belize

Just one month after the adoption of UNDRIP, the Supreme Court of Belize applied UNDRIP to resolve property claims brought by the Maya People.[439] This historic ruling—the first in the world to invoke UNDRIP to define and enforce Indigenous customary practices[440]—has exposed both the potential and limits of UNDRIP to advance justice and reconciliation. On the one hand, the Court relied on UNDRIP to ground its decolonial order against the Government of Belize. On the other, in the aftermath of the Court's ruling, the Maya People have continued to suffer delays and resistance from the government to implement the judicial order in their favor.

The case consolidated claims from Maya communities in Southern Belize.[441] The Maya communities argued that the Government of Belize failed to honor their customary land rights and customary practices with regard to the use of natural resources, both of which constitute property interests that should enjoy constitutional protection.[442] The Maya moreover argued that the government discriminated by refusing to grant the same legal recognition to Maya customary property rights that are extended to other forms of property.[443] There were two

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436 *See* Megan Davis, *To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On*, 19 AUSTRALIA INT'L L.J. 17, 26 (2012).

437 Richard Healey, *From Individual to Collective Consent: The Case of Indigenous Peoples and UNDRIP*, 27 INT'L J. MINORITY & GROUP RTS. 251, 262 n.25 (2019).

438 S. James Anaya & Luis Rodríguez-Piñero, *The UNDRIP's Relationship to Existing International Law, in* THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY 38, 62 (Jessie Hohmann & Marc Weller eds., 2018).

439 Aurelio Cal et al. v. Attorney General of Belize and Minister of Natural Resources and Environment [2007], Supreme Court of Belize, Claims No. 171 and 172 (Belize) [hereinafter Aurelio Cal et al.].

440 *See* Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 213 (2014); Noah B. Novogrodsky, *All Necessary Means: The Struggle to Protect Communal Property in Belize*, 12 WYO. L. REV. 197, 213 (2012).

441 Aurelio Cal et al., *supra* note 439, at para. 1.

442 *Id.* at paras. 2, 8.

443 *Id.* at para. 3.

other major Maya claims: first, the government has issued or threatened to issue leases, grants, and concessions for Maya lands without respecting the rights of the Maya People;[444] second, the Maya People sought to consult with the government on these claims but received no response to their requests.[445]

The Maya People, in making their claims, did not rely on UNDRIP. They relied instead on the Belizean Constitution. They alleged in particular that the Government of Belize violated the Constitution's protections for fundamental rights, including to "life, liberty, security of the person, and the protection of the law"[446] and "protection from arbitrary deprivation of property."[447] The Maya People furthermore relied on the Constitution's protections against discrimination and deprivations of property.[448] The matter was therefore to be resolved according to Belizean law.

Yet the Court did not limit itself to the Constitution alone. It ultimately referred also to Belize's commitments as a member of the Organization of American States and as a signatory to UNDRIP. The Court found in the constitutional preamble a useful bridge between the country's Constitution and its international commitments. The preamble had then recently been amended to place an onus on the Government to work toward reconciliation with Indigenous Peoples: the amendment requires "policies of state which protect … the identity, dignity and social and cultural values of Belizeans, including Belize's indigenous peoples … with respect for international law and treaty obligations in the dealings among nations."[449] From there, the Court could observe that "Belize, of course, is a member of the international community and has subscribed to commitments in some international humanitarian treaties that impact on this case"[450] and that "a part of this commitment is to recognize and protect indigenous people's rights to land resources."[451]

UNDRIP became relevant to the Court's resolution of Belize's obligations under customary international and general principles of international law.[452] The Court noted that Belize had voted in favor of UNDRIP.[453] The Court then recognized that UNDRIP, as a resolution of the General Assembly of the United

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444 *Id.* at para. 6.

445 *Id.* at paras. 4–5.

446 The Constitution of Belize [Constitution] Sep. 21, 1989, art. 3(a) [Belize].

447 *Id.* at art. 3(d).

448 *Id.* at art. 16, 17.

449 Aurelio Cal et al., *supra* note 439, at para. 96 (*citing* THE CONSTITUTION OF BELIZE [CONSTITUTION] Sep. 21, 1989, prmbl. (Belize)).

450 *Id.* at para. 119.

451 *Id.*

452 *Id.* at para. 127.

453 *Id.* at para. 131.

Nations, is "not ordinarily binding on member states," while observing that "where these resolutions or Declarations contain principles of general international law, states are not expected to disregard them."[454] Especially noteworthy for the Court was UNDRIP's Article 26, which reflects "the growing consensus and the general principles of international law on indigenous peoples and their lands and resources."[455] Article 26 protects the rights of Indigenous Peoples "to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired," as well as "to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired."[456] It requires states to "give legal recognition and protection to these lands, territories and resources . . . with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."[457]

The Court was persuaded both that UNDRIP conveys relevant principles of international law and that the Government of Belize should honor the commitments it made when signing onto UNDRIP just one month earlier.[458] In addition to Article 26, Article 42 proved important to the Court's judgment: Article 42 requires signatory states to promote UNDRIP, over and above the commitment signatory states have made to abide by its terms.[459] For those reasons, the Court ruled in favor of the Maya communities, holding that Belize is obligated under both domestic and international law to respect Maya rights and interests to their lands and resources.[460] The Court declared that the Maya People hold collective and individual property rights, title, and derivative rights in the lands and resources they have used.[461] The Court also ordered the Government to issue official title to the Maya, and that the Government must cease and abstain from any conduct relating to the property of the Maya communities without securing their informed consent.[462]

Despite their resounding victory at the Supreme Court in 2007, the Maya communities in Belize continue to wait for the Government to comply fully with the Court's ruling. Litigation continued after 2007 in relation to other customary

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454 *Id.*

455 Aurelio Cal et al., *supra* note 439, at para. 131.

456 UNDRIP, *supra* note 403, at art. 26.

457 *Id.*

458 Aurelio Cal et al., *supra* note 439, at para. 132.

459 *Id.*

460 *Id.* at para. 134.

461 *Id.* at para. 136(a)–(b).

462 *Id.* at para. 136(c)–(d).

Maya lands and territories,[463] culminating with a consent order between the parties in 2015.[464] The Government then created a Commission to implement the consent order but the Commission is said to have neither consulted with nor secured the consent of the Maya communities in its work.[465] In 2023, the Government of Belize announced that it would move forward with the implementation of the consent order.[466] It is now engaged in public consultations with Maya villages with the intention of implementing the terms of the consent order by 2025.[467] Still, these difficulties and delays highlight the limits of supranational decolonization: no progress is possible without local political will for domestic implementation.

3. Legislative recognition in Japan

Legislatures, too, have taken steps to implement UNDRIP. Spurred to action by Japan's adoption of UNDRIP, the national legislature issued a Resolution urging the government to grant Indigenous recognition to the Ainu,[468] the roughly 20,000 Indigenous People living in what is known today as Hokkaido.[469]This was a landmark moment in the country.[470] The Government had long refused to identify the Ainu as anything but an "ethnic minority."[471] This was consistent with the official policy of insisting on a theory of Japanese ethnic homogeneity.[472] The Resolution—enacted just a few months prior to UNDRIP's one-year anniversary—moved a step closer to recognizing Indigenous status of the Ainu.[473]

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463 *See* Maya Leaders Alliance et al. v. Attorney General of Belize, [2015] CCJ 15 (AJ) (Belize); Attorney General of Belize and Minister of Natural Resources and Environment v. Maya Leaders Alliance et al., [2011] Civil Appeal No. 27 of 2010 (Belize).

464 Alexander Gough, *A Tale of Two 'Others'*, 50 CARIB. STUD. 3, 15–17 (2022).

465 Filiberto Penados et al., *Land, Race, and (Slow) Violence: Indigenous Resistance to Racial Capitalism and the Coloniality of Development in the Caribbean*, 145 GEOFORUM 1, 6 (2023).

466 *Government of Belize Moves Forward with Implementation of Caribbean Court of Justice Consent Order on Maya Land Rights but Stresses Belize Cannot be Divided*, LOVE FM (Nov. 15, 2023), https://perma.cc/S9H8-EQFL.

467 William Ysaguirre, *GOB Explains Draft Toledo Maya Land Tenure Policy*, SAN PEDRO SUN (Feb. 11, 2024), https://perma.cc/Z7XR-EZVP.

468 Kaori Tahara, *The Ainu of Japan: An Indigenous People or an Ethnic Group*, 4 PUB. ARCHEOLOGY 95, 97 (2005).

469 Mashiyat Zaman, *The Ainu and Japan's Colonial Legacy*, TOKYO REV. (Mar. 23, 2020), https://perma.cc/3YH7-8XRF.

470 For background on the Ainu, *see* Hiroshi Maruyama, *Japan's Post-War Ainu Policy*, 49 POLAR RECORD 204 (2013); Mitsuharu Vincent Okada, *The Plight of Ainu, Indigenous People of Japan*, 1 J. INDIGENOUS SOC. DEV. 1 (2012).

471 Richard Siddle, *The Limits to Citizenship in Japan: Multiculturalism, Indigenous Rights and the Ainu*, 7 CITIZENSHIP STUD. 447, 455 (2003).

472 Ryan Masaaki Yokota, *The Okinawan (Uchinānchu) Indigenous Movement and its Implications for Intentional/International Action*, 41 AMERASIA J. 55, 55–56 (2015).

473 Sayuri Umeda, *Japan: Official Recognition of Ainu as Indigeneous (sic) People*, GLOBAL LEGAL MONITOR (Sept. 5, 2008), https://perma.cc/6GPL-PAB7.

The Resolution opens by crediting UNDRIP, noting that Japan voted to approve it and that it reflected the "long-held aspirations of the Ainu people."[474] The Resolution acknowledges also that the United Nations has "been urging Japan to take concrete actions in line with the aims of this document."[475] Japan acknowledges that "in the process of Japan's modernization, countless Ainu persons were discriminated against, and forced to live in great poverty."[476] The Resolution notes the "growing trend of international society that all indigenous peoples be able to maintain their honor and dignity, and transmit their culture and self-respect to the next generation."[477] Yet the heart of the Resolution is its urging that the Government "seize the opportunity" to recognize the Ainu as Indigenous People.[478] The catalytic impact of UNDRIP is evident in the text of the Resolution,[479] as the legislature might not have taken this historic step in the absence of UNDRIP.

Japan took a further step toward strengthening Indigenous rights a decade later when at last the country recognized the Ainu as Indigenous People.[480] The country enacted a law expressly recognizing the Ainu as Indigenous People of the northern region of the Japanese archipelago, in particular Hokkaido.[481] The purpose of the law is "to realize a society in which the Ainu people can live with pride as a people, and in which that pride will be respected, thereby contributing to the realization of a society with harmony in which all citizens respect each other's personality and individuality."[482] It creates a comprehensive framework for promoting and protecting Ainu traditions and culture,[483] while also protecting the Ainu People from discrimination "that infringes upon the rights or interests of an Ainu person for being Ainu."[484] Still, as far as the law has gone, observers note that two things are missing: an apology and a path toward self-determination.[485]

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474 Georgina Stevens, *Resolution Calling for Recognition of the Ainu People as an Indigenous People*, 9 ASIA-PAC. J. HUM. RTS & L. 49, 49 (2008).

475 *Id.*

476 *Id.*

477 *Id.*

478 *Id.* at 50.

479 Takanobu Kiryama, *The Ainu in Japan: The Ainu and International Law*, J. L. & POL. OSAKA CITY U. 1070, 1074 (2017).

480 Sayuri Umeda, *Japan: New Ainu Law Becomes Effective*, GLOBAL LEGAL MONITOR (Aug. 5, 2019), https://perma.cc/SBS9-KXAT.

481 Act on Promoting Measures to Achieve a Society in which the Pride of Ainu People is Respected, Act no. 16 of 2019, Apr. 26, 2019, art. 1 (Japan).

482 *Id.*

483 *Id.* at arts. 3, 5–8, 10.

484 *Id.* at art. 4.

485 *See* Emiko Jozuka, *Japan's 'Vanishing' Ainu Will Finally be Recognized as Indigenous People*, CNN (Apr. 22, 2019), https://perma.cc/7A4Y-ZBST.

Some are concerned that Indigenous recognition in Japan is merely symbolic, with no rights attached.[486] Others have argued that Japan is not compliant with UNDRIP's stipulation that Indigenous Peoples possess land and resource rights rooted in traditional customs or practices.[487] Progress has been slow in Japan, but UNDRIP has helped accelerate constitutional decolonization.

B. Decolonial Regional Supraconstitutionalism

Supranational coordination to further decolonization need not occur on a global scale. It can occur, perhaps just as effectively, on a regional scale. Smaller-scale regional mobilization brings advantages that may elude larger world-level initiatives that seek to strike common cause among all countries on the planet. Regional initiatives are likely to be built on a foundation of familiarity among neighboring countries that can lead to a regional identity among members.[488] They are also well-served by economic and political similarities across borders, setting a strong foundation for regional integration.[489] Regionalism also holds promise for forging unity. In theory, at least, where regional states join together in a shared mission, their interests will converge.[490] Familiarity, similarity, unity—these are three strengths of supraconstitutionalism at the root of regional projects in decolonial constitutionalism in Africa, Asia, and the Caribbean.

1. A continental mission for Africa

The end of the Second World War precipitated a wave of decolonization in Africa, as the number of independent African states grew from single digits to over 30 by the end of 1962.[491] The next year, in 1963, heads of states and government in Africa established the Organization of African Unity (OAU).[492] The OAU was to include all continental African states as well as surrounding Islands.[493] A primary impetus for the Organization of African Unity was to "safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of our States, and to fight against neo-colonialism in all its

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486 *See* Ellie Cobb, *Japan's Forgotten Indigenous People*, BBC NEWS (May 20, 2020), https://perma.cc/698M-BYHG.

487 Motoko Rich & Hikari Hida, *Japan's Native Ainu Fight to Restore a Last Vestige of Their Identity*, N.Y. TIMES (July 2, 2023).

488 *See* Tudi Kernalegenn, *The Region as Cognition: An Alternative Analysis of Regionalism*, 27 J. POL. IDEOLOGIES 127, 139 (2022).

489 *See* Jeanette Edblad, *The Political Economy of Regional Integration in Developing Countries*, Working Paper No. 3, REGIONAL DIMENSIONS 28 (1996).

490 Sonu Trivedi, *African Unity: The Move Forward*, 13 WORLD AFF. 12 (2009).

491 *See* Godfrey L. Binaisa, *Organization of African Unity and Decolonization: Present and Future Trends*, 432 ANNALS AM. ACAD. POL. & SOC. SCI. 52, 55–57 (1977).

492 Charter of the Organisation of African Unity, Sept. 13, 1963, 479 U.N.T.S. 39, 86, 88.

493 *Id.* at art. I(2).

forms."[494] Its purposes were to "promote the unity and solidarity of the African States," to work together "to achieve a better life for the peoples of Africa," to protect sovereignty, territorial integrity and independence, "to promote international cooperation," and "to eradicate all forms of colonialism from Africa."[495] The OAU supported decolonization on the continent, requiring signatory states to express their "absolute dedication to the total emancipation of the African territories which are still dependent."[496]

In its first conference, the OAU agreed to a diplomatic boycott of colonial powers.[497] Signatory states decided to cease diplomatic and consular relations "between all African States and Governments of Portugal and South Africa so long as they persist in their present attitude towards decolonization."[498] They also suggested prohibiting imports from Portugal and South Africa, closing ports and airports to them, and closing African airspace for overflies by both countries.[499] The members of the OAU were "unanimously convinced of the imperious and urgent necessity of co-ordinating and intensifying their efforts to accelerate the unconditional attainment of national independence of all African territories still under foreign domination."[500] They collectively expressed "deep concern that most of the remaining dependent territories in Africa are dominated by foreign settlers" and asserted that "it is the duty of all African Independent States to support dependent peoples in Africa in their struggle for freedom and independence."[501]

The OAU created a Decolonization Committee responsible for giving assistance, including financial, to African liberation movements in their quest for independence.[502] Signatory states would make contributions to a special fund to support liberation movements, and the Committee would manage and allocate those funds toward decolonization efforts.[503] They also proposed to host in their

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494 *Id.* at prmbl.

495 *Id.* at art. II.

496 *Id.* at art. III(6).

497 Organization of African Unity, Resolutions Adopted by the First Conference of Independent African Heads of State and Government, at Agenda Item II, art. 8 (May 22–25, 1963).

498 *Id.* For a discussion of the OAU's position on Portugal and South Africa, *see* Douglas G. Anglin, *Confrontation in Southern Africa: Zambia and Portugal*, 25 INT'L J. 497 (1970); Mohamed A. El-Khawas, *Southern Africa: A Challenge to the OAU*, 24 AFRICA TODAY 25 (1977).

499 Resolutions Adopted by the First Conference of Independent African Heads of State and Government, *supra* note 497, at art. 9.

500 *Id.* at prmbl.

501 *Id.*

502 *Id.* at art. 11; T.O. Elias, *The Charter of the Organization of African Unity*, 59 AM. J. INT'L L. 243, 250 (1965).

503 Resolutions Adopted by the First Conference of Independent African Heads of State and Government, *supra* note 497, at arts. 11–12.

countries interested members of national liberation movements for education and vocational training.[504] To help raise funds for decolonization efforts and to bring attention to the mission of the OAU, signatory states established May 25 as African Liberation Day.[505]

These were auspicious beginnings for the OAU and for the project of decolonization on the continent. But the OAU did not survive. As the OAU approached its twentieth anniversary, an observer remarked that the regional group found itself "in an atmosphere of impending doom."[506] The OAU had built a record of success—growing Africa to more than 50 independent states and helping to bring an end to apartheid in South Africa—but in the end its work was frustrated internally by struggles for control and overwhelmed externally by war and poverty on the continent.[507] One observer captured well the two faces of the OAU. On the one hand, the OAU "successfully asserted itself as a voice of African liberation movements that were fighting apartheid, settler colonialism and other forms of European colonialism within the international areas in which African states commanded a considerable number of votes," namely the United Nations and the British Commonwealth.[508] On the other hand, there was a "dramatic deterioration in regime quality" among signatory states: "authoritarian rule became the standard, rather than the exception," as many countries "saw a shift from formal multi-partyism to one-party rule, or military dictatorship,"[509] leading commentators to describe the OAU as a "club of dictators."[510]

The African Union (AU) replaced the OAU in 2002.[511] At its beginnings, the AU directed its institutional energies toward the social and economic challenges

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504 *Id.* at art. 14.

505 *Id.* at art. 13.

506 William Gutteridge, *The Organization of African Unity, 1963-1983*, 3 J. CONTEMP. AFR. STUD. 21, 21 (1983).

507 Joel Adelusi Adeyeye, *A Comparative Analysis of the Charter of the Organization of African Unity (OAU) and the Constitutive Act of the African Union (AU)*, 6 GRONINGEN J. INT'L L. 215, 216, 218–19 (2018).

508 Ulf Engel, *The Organisation of African Unity in the 1960s: From Euphoria to Disenchantment*, 29 COMPARATIV: ZEITSCHRIFT FÜR GLOBALGESCHICHTE UND VERGLEICHENDE GESELLSCHAFTSFORSCHUNG 48, 66 (2019).

509 *Id.* at 65.

510 *See, e.g.*, Karin Bäckstrand & Fredrik Söderbaum, *Explaining Variation in Legitimation and Deligitimation Practices, in* LEGITIMATION AND DELIGITIMATION IN GLOBAL GOVERNANCE 74, 88 (Magdalena Bexell et al. eds., 2022); Thomas Prehi Botchway et al., *From the Organization of African Unity (OAU) to the African Union (AU) – The Dynamics of the Transformation of a Regional Integration*, 2 INT'L ORGS: SERBIA & CONTEMP. WORLD 149, 154 (2022); Istifanus Zabadi & Christian Ichite, *Evolution of Peace Support Operations: An African Union Context, in* A COMPREHENSIVE REVIEW OF AFRICAN CONFLICTS AND REGIONAL INTERVENTIONS 2016 57, 63 (Festus B. Aboagye ed., 2016).

511 Georges Nzongola-Ntalaja, *Pan-Africanism Since Decolonization: From the Organisation of African Unity (OAU) to the African Union (AU)*, 1 AFRICAN J. DEM. & GOVERNANCE 31, 42 (2014).

facing the continent, including poverty, health, and human rights.[512] The Constitutive Act of the AU enumerates objectives that echo those of the OAU but that also reach further afield.[513] Similar to the OAU before it, the AU enumerates its objectives as fostering greater unity among African countries and peoples, protecting sovereignty, territorial integrity and independence, and encouraging international cooperation.[514] New objectives include promoting democratic principles and institutions, enhancing popular participation and good governance,[515] protecting human rights consistent with human rights agreements,[516] and advancing research in science and technology.[517] Today, just over twenty years since its establishment, the AU continues to promote human rights across the continent within an institutional structure that can be traced to the defunct OAU.[518] Both the AU and the OAU reflect the strategy of decolonial regional supraconstitutionalism.

2. Anti-colonialism in the Arab-Asian Bloc

Separate regional groups sometimes join forces to advance common objectives. This was the case for the Arab-Asian Bloc, a rare forum for regional diplomatic cooperation formed early in the life of the United Nations.[519] An informal association of Arab and Asian states,[520] the Bloc ultimately grew into the biggest grouping of member states in the United Nations.[521] It was known as a "third force," a reference to a "group of nations recently freed from colonial status which together with peoples still under foreign control would act in concert on the international level."[522] The Bloc's strength lay "in common nationalist aspirations and opposition to dictation by major powers, and in its common economic interests in such problem as technological development and safeguards

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512 T. Maluwa, *From the Organisation of African Unity to the African Union: Rethinking the Framework for Inter-State Cooperation in Africa in the Era of Globalisation*, 5 U. BOSTWANA L.J. 5, 47 (2007).

513 *See generally* Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3.

514 *Id.* at art. 3(a), 3(b), 3(e).

515 *Id.* at art. 3(g).

516 *Id.* at art. 3(h).

517 *Id.* atart. 3(m).

518 Tendai Shephard Mbanje, *African Union at 20: Taking Stock of the AU's Normative and Institutional Frameworks on Human Rights and Governance*, *in* DEVELOPMENT AND REGIONAL STABILITY IN AFRICA 65, 65–66 (Adeoye O. Akinola & Emmaculate Asige Liaga eds., 1st ed. 2024).

519 Michael Brecher, *Elite Images and Foreign Policy Choices*, 40 PAC. AFF. 60, 75 (1967).

520 Norman J. Padelford et al., *Recent Developments in Regional Organizations*, 49 PROCEEDINGS AM. SOC. INT'L L. 23, 24 (1955).

521 Rami Ginat, *Egypt's Efforts to Unite the Nile Valley: Diplomacy and Propaganda, 1945-47*, 43 MIDDLE E. STUD. 193, 204 (2007).

522 Robert A. Scalapino, *"Neutralism" in Asia*, 48 AM. POL. SCI. REV. 49, 55 (1954).

against foreign exploitation."[523] Bolstered by its regional foundations, the Bloc could exert significant pressure to achieve its goals of justice and recognition for its member states.[524]

The Bloc emerged from efforts to avert the Korean War.[525] Its first signatories in 1948 were Afghanistan, Burma, Egypt, India, Iran, Iraq, Lebanon, Pakistan, the Philippines, Saudi Arabia, Syria, and Yemen.[526] By 1956, the Bloc had grown to 26 states.[527] The Bloc's members forged shared interests despite their differences in race, religion, and language.[528] They united behind their "deep and abiding interest in all problems of trusteeship and non-self-governing territories, with the emphasis on the urge toward self-government or independence."[529] The Bloc was especially agitated by "any situation that can be construed as European oppression of a non-European people,"[530] perhaps unsurprisingly given "the still rankling memory of their own domination by the European Powers."[531] Yet while the Bloc was unambiguous about its objective of statehood for all subordinated peoples, its member states diverged on the most effective strategy to realize it; some called for immediate statehood while others preferred an incremental path.[532] Still, the Bloc was recognized as a coherent entity that held meetings, developed policies, and coordinated votes.[533]

The Bloc had some success. The Bloc exerted a discernible impact on terminating the French imperial exploitation of Morocco and Tunisia,[534] bringing the matter to the floor of the General Assembly,[535] even in the face of objections from France that "these were matters of internal concern."[536] The Bloc also spoke

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523 *Id.*

524 *Id.*

525 Esmat Elhalaby, *Nonalignment and its Forms of Knowledge*, 43 COMP. STUD. S. ASIA., AFR. & MIDDLE E. 386, 388 (2023).

526 Cindy Ewing, *The "Fate of Minorities" in the Early Afro-Asian Struggle for Decolonization*, 41 COMP. STUD. S. ASIA, AFR. & MIDDLE E. 340, 340 (2021).

527 S.W.R.D. Bandaranaike, *Asia and the New World*, 9 PAKISTAN HORIZON 182, 188 (1956).

528 J.D.B. Miller, *British Attitudes Towards Asia*, 8 AUSTRALIAN J. INT'L AFF. 4, 5 (1954).

529 Harry N. Howard, *The Arab-Asian States in the United Nations*, 7 MIDDLE E. J. 279, 282 (1953).

530 Carol Bell, *The United Nations and the West*, 29 INT'L AFF. 464, 466 (1953).

531 *Id.* at 467.

532 Cindy Ewing, *The Third World Before Afro-Asia*, *in* INVENTING THE THIRD WORLD: IN SEARCH OF FREEDOM FOR THE POSTWAR GLOBAL SOUTH 29, 38 (Gyan Prakash & Jeremy Adelman eds., 1st ed. 2023).

533 Mary Knatchbull Keynes, Memorial, *The Arab-Asian Bloc*, 1 DAVID DAVIES MEMORIAL INST. OF INT'L STUD. 238, 241 (1957).

534 Cindy Ewing, *"With a Minimum of Bitterness:": decolonization, the right to self-determination, and the Arab-Asian group*, 17 J. GLOBAL HIST. 254, 269–70 (2022).

535 Hélène Cazes-Bénatar, *French Morocco*, 55 AM. JEWISH YEARBOOK 319, 319 (1954).

536 Sidney B. Fay, *The United States and North Africa*, 26 CURRENT HIST. 240, 246 (1954).

out against racial discrimination in South Africa, subordination of non-self-governing territories, and involvement in East-West issues, often voting by supermajority on these matters of common interest.[537] The Bloc eventually lost momentum due to internal conflicts around communism and which liberation movements to prioritize, but not before shining a light on its decolonial mission for self-determination.[538]

3. A court for the Caribbean

In February 2001, ten Caribbean States created a new regional court when they ratified the Agreement Establishing the Caribbean Court of Justice (CCJ).[539] The new Court exercises both original and appellate jurisdiction,[540] it is supported by a full staff,[541] and its judges are appointed to serve until the age of 72.[542] The Agreement to create the Court makes clear its principal objectives to deepen regional integration and to develop a local Caribbean jurisprudence without threatening the sovereignty of the signatory Caribbean States.[543] Yet there is a deeper and more profound political purpose to the CCJ, as Michelle Scobie explains: "the CCJ was born of a desire for an indigenous judicial system, a Caribbean legal philosophy and 'Caribbean Common Law' that would separate the region from the colonial legal heritage."[544] The CCJ had an even more immediate practical purpose: to replace the Judicial Committee of the Privy Council,[545] a London-based body in the House of Lords of the Westminster Parliament.[546]

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537 *Paper Prepared by the United Nations Planning Staff, Bureau of United Nations Affairs*, 3 FOREIGN RELATIONS OF THE UNITED STATES, 1952-1954, UNITED NATIONS AFFAIRS, Doc. 29.

538 LORENZ M. LÜTHI, COLD WARS 273–86 (2nd ed. 2020).

539 Agreement Establishing the Caribbean Court of Justice, July 23, 2022, 2255 U.N.T.S. 319.

540 *Id.* at art. III.

541 *Id.* at art. XXVII.

542 *Id.* at art. IX.

543 *Id.* pmbl. When the Court exercises its appellate jurisdiction, it applies the constitution, laws, and common law of the country concerned. Sheldon A. McDonald, *The Caribbean Court of Justice: Enhancing the Law of International Organizations*, 27 FORDHAM INT'L L.J. 930, 931 (2003). The Court has the last word on both civil and criminal matters, as well as on those matters concerning the interpretation of national constitutions. Agreement Establishing the Caribbean Court of Justice, *supra* note 539, at art. XXV.

544 Michelle Scobie, *The Caribbean Court of Justice and Regionalism in the Commonwealth Caribbean*, 4 CARIB. J. INT'L REL. & DIPLO. 93, 96 (2016).

545 Leonard Birdsong, *The Formation of the Caribbean Court of Justice: The Sunset of British Colonial Rule in the English Speaking Caribbean*, 36 U. MIAMI INTER-AM. L. REV. 197, 199–200 (2005).

546 Paul F. Scott, *The Privy Council and the constitutional legacies of empire*, 71 NORTHERN IRELAND LEGAL Q. 261, 266–67 (2020). For more on the Judicial Committee of the Privy Council, *see* Lord Neuberger of Abbotsbury, *The Judicial Committee of the Privy Council in the 21st Century*, 3 CAMBRIDGE J. INT'L & COMP. L. 30 (2014).

Speaking in 1922, a leading member of the Judicial Committee of the Privy Council, Viscount Haldane, described its function: "it regulates the course of justice all over the Empire outside the United Kingdom," he declared, matter-of-factly.[547] The Judicial Committee of the Privy Council, formally established in 1833 but whose history can be traced far before then,[548] was the final court of appeal for British colonies and dominions, and later for independent states as well. This body served as judicial policymaker until those jurisdictions elected to break free from the foreign court's jurisdiction.[549] Even newly independent Caribbean states retained the Judicial Committee of the Privy Council as their final court of appeal after winning independence and adopting their own constitution.[550]

The choice to rely on a foreign court to resolve domestic disputes is unconventional. And yet there may well be reasons for a country to keep the foreign Judicial Committee of the Privy Council as its court of last resort, as a judge of the Caribbean Court of Justice himself has suggested: the Law Lords are judges of the highest caliber, the body has earned the confidence of the public abroad on the strength of its competence and experience, and the local administration of justice in many countries may fail to reach the historically high standard set by the Judicial Committee.[551]

However, critics of the Judicial Committee of the Privy Council have countered with a plain but powerful argument in favor of the Caribbean Court of Justice: it is a decolonial institution with a decolonial mission, intended to "repatriate to the Caribbean the development and control over the common law."[552] A year before the 2001 Agreement opened for signature, Hugh Salmon observed that "the establishment of a Caribbean Court of Justice represents one

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547 Viscount Haldane of Cloan, *The Work for the Empire of the Judicial Committee of the Privy Council*, 1 CAMBRIDGE L.J. 143, 145 (1922).

548 William Renwick Riddell, *The Judicial Committee of the Privy Council*, 44 AM. L. REV. 161, 165 (1910).

549 Daniel Clarry, *Institutional Judicial Independence and the Privy Council*, 3 CAMBRIDGE J. INT'L & COMP. L. 46, 48–53 (2014).

550 *See* David Simmons, *The Caribbean Court of Justice: A Unique Institution of Caribbean Creativity*, 29 NOVA L. REV. 171, 172–76 (2005).

551 The Hon. Mr. Justice Adrian Saunders, *2nd Annual Eugene Dupuch Distinguished Lecture: The Fear of Cutting the Umbilical Cord . . . the Relevance of the Privy Council in Post Independent West Indian Nations*, CARIBBEAN COURT OF JUSTICE (Jan. 28, 2010), at 5, https://perma.cc/8REB-WXE9. Other arguments in favor of retaining the Judicial Committee of the Privy Council include its greater capacity to take an objective view of local disagreements, *see* Ezekiel Rediker, *Courts of Appeal and Colonialism in the British Caribbean: A Case for the Caribbean Court of Justice*, 35 MICH. J. INT'L L. 213, 247–50 (2013), and that local political actors might more easily interfere with the deliberations of the Caribbean Court of Justice. *See* Cynthia Barrow-Giles, *Regional Trends in Constitutional Developments in the Commonwealth Caribbean*, Conflict Prevention and Peace Forum, 17 (2010) (unpublished manuscript), https://perma.cc/2MZ7-DYQB.

552 Salvatore Caserta & Mikael Rask Madsen, *Between Community Law and Common Law: The Rise of the Caribbean Court of Justice at the Intersection of Regional Integration and Post-Colonial Legacies*, 79 L. & CONTEMP. PROBS. 89, 90 (2016).

of those defining moments which will determine our ability as a nation and as a region to take our destiny into our own hands."[553] For Salmon, the time had come to "recognize that the continued existence of a final Court of Appeal located outside the region is an inhibiting factor to the development of an indigenous jurisprudence which is more responsive to the values within our society and our aims and aspirations as independent Caribbean nations."[554] This regional Court must be seen, according to a then-judge on the Court, "in the light of a decolonization movement that has still not been completed, as most countries still retain the British Privy Council as their final court of appeal."[555]

Despite the decolonial aspirations for the Caribbean Court of Justice, only five countries have so far acceded to its appellate jurisdiction: Barbados, Belize, Dominica, Guyana, and Saint Lucia.[556] Today, over 20 years since its creation, the Caribbean Court of Justice has a lot of room still to grow into the institution many hoped it would become. It has been said that "decolonization begins with recognition of our interdependence and deep yearning to belong."[557] The peoples of the Caribbean Community could perhaps achieve the goals of building and strengthening regional solidarity by acceding to the Court's appellate jurisdiction. Yet the path ahead remains uncertain given the regional resistance that persists against the Court and the regional affinity that endures for the Judicial Committee.[558] Nonetheless, for those who believe in the decolonial possibilities of regionalism, the Caribbean Court of Justice could be vehicle for strengthening regional integration, forging stronger pan-Caribbean ties, and prioritizing Caribbean over colonial institutions.[559]

C. Decolonization Below the State

Just as decolonial constitutionalism can occur above the state—at the supranational level on an international or regional scale—it can also occur below

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553 Hugh M. Salmon, *The Caribbean Court of Justice: A March with Destiny*, 2 FLA. COASTAL L.J. 231, 231 (2000).

554 *Id.*

555 Jacob Wit, *Remarks on the Caribbean Court of Justice*, 102 PROC. ANN. MEETING AM. SOC'Y INT'L. L. 285, 285 (2008).

556 Press Release, Caribbean Court of Justice, CCJ President Welcomes Saint Lucia to its Appellate Jurisdiction (May 9, 2023), https://perma.cc/TP4X-YB9P.

557 Gabrielle Elliott-Williams, *Who Belongs?: The Caribbean Court of Justice Reveals Caribbean Identity's Inclusive Potentiality*, 69 SOC. & ECON. STUD. 73, 73 (2020).

558 Armand de Mestral, *The Constitutional Functions of the Caribbean Court of Justice*, 1 MCGILL J. DISP. RES. 43, 64–66 (2015); Joris Kocken & Gerda van Roozendaal, *Constructing the Caribbean Court of Justice: How Ideas Inform Institutional Choices*, 93 EUR. REV. LATIN AM. & CARIBBEAN STUD. 95, 107 (2012).

559 In light of my current appointment on the Constitutional Reform Committee of Jamaica, I take no public position on whether any country should accede to the appellate jurisdiction of the Caribbean Court of Justice.

the state. For instance, provinces and municipalities have leveraged their powers under law to advance decolonization within their jurisdictional boundaries. Whether as a response to political debilitation at the state level or as a complement to the positive engagements by state-level actors, these sub-state governments have taken steps forward on reconciling with legally or politically subordinated peoples. Decolonial constitutionalism has benefited from this multi-level approach, as is evident in sub-state progress in the City of Vancouver, the State of Queensland, and the Territory of the U.S. Virgin Islands.

1. The first city of reconciliation in the world

Municipalities around the world are engaged in the decolonial project.[560] One notable example is the City of Vancouver, home to the third largest urban Indigenous population in Canada.[561] Vancouver was the first city to announce plans for a year of reconciliation between Indigenous Peoples and the state and to declare its intention to become the world's first "city of reconciliation."[562] The Vancouver City Council followed through in 2014 when it unanimously approved a "Framework for City of Reconciliation" along with plans to report annually on the City's progress on reaching its benchmarks.[563]

The framework reflects the objectives set by the Mayor and City Council "to improve relations between the City and local First Nations and Aboriginal communities, and to act as a leader in furthering the long-term work of promoting reconciliation."[564] Reconciliation, for the City of Vancouver, is "more than a priority."[565] The purpose of Vancouver's reconciliatory ambitions is "to help all cultures within our community foster new relationships, heal from the past, and move forward with shared understanding and respect."[566] The City's goals are inclusion and mutual understanding,[567] yet it acknowledges also that reconciliation will not occur overnight. Success demands "a long term commitment" to reaching

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560 NATIONAL LEAGUE OF CITIES, ROADMAP TO REPAIR 42–50 (2022), https://perma.cc/V833-WJCU; DEIRDRE HOWARD-WAGNER, INDIGENOUS INVISIBILITY IN THE CITY: SUCCESSFUL RESURGENCE AND COMMUNITY DEVELOPMENT HIDDEN IN PLAIN SIGHT 1–2 (1st ed. 2021).

561 Memorandum from City Manager to Vancouver City Council, Administrative Report 2 (Sept. 18, 2014) (on file with city).

562 Kay Johnson, *Exhibiting Decolonising Discourse: Critical Settler Education and "the City Before the City"*, 48 STUD. EDUC. ADULTS 177, 180 (2016).

563 City of Vancouver, Regular Council Meeting Minutes 3–4 (Oct. 28, 2014), https://perma.cc/NKJ5-X44G.

564 Memorandum from City Manager to Vancouver City Council, *supra* note 561, at 6.

565 *Id.* at 7.

566 *Id.*

567 *Id.*

a "better understanding of matters of cultural significance and priorities of First Nation and urban Aboriginal communities."[568]

The City of Vancouver lists three components in its framework. First, cultural competency: partnerships between the City and Indigenous Peoples in Vancouver must support learning about each other.[569] Second, strengthening relations: in order to forge strong relationships, municipal actors must appreciate Indigenous heritage, presence, and achievements, and learn about Indigenous Peoples' history of harm, discrimination, and dispossession.[570] Third, effective decision-making: flexibility, thoughtfulness, transparency, and a principled approach must characterize the collaborative work done jointly by the City and Indigenous Peoples.[571]

The framework envisions concrete actions that could help the City of Vancouver advance its objectives in the years ahead. For instance, the City of Vancouver might share experiences and initiatives with other municipalities, facilitate opportunities for communities in the City to come together in dialogue, create linkages to other City initiatives, and it might also create a mentorship program.[572] In the years since the unanimous approval of the framework, the City of Vancouver has released updates on its progress. Its reports outline the reconciliation activities undertaken as well as assessments of how well Vancouver is honoring its commitment to become the City of Reconciliation.[573] These public reports are consistent with Vancouver's well-founded belief that transparency is necessary for reconciliation. They furthermore advance the decolonial project consistent with the rule of law.[574]

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568 *Id.* at 4.

569 *Id.* at 5.

570 Memorandum from City Manager to Vancouver City Council, *supra* note 561, at 5.

571 *Id.*

572 *Id.* at 6.

573 *See* Memorandum from City Manager to Vancouver City Council, City of Reconciliation 2014 – 2016 (Jan. 14, 2016), https://perma.cc/6ALZ-UJEC; Memorandum from City Manager to Standing Committee on City Finance and Services on City of Reconciliation Update (Dec. 4, 2017), https://perma.cc/AR9M-X3DS; Memorandum from City Manager to Standing Committee on City Finance and Services, City of Reconciliation Update (June 11, 2019), https://perma.cc/2FA5-MWNY; Memorandum from City Manager to Mayor and Council, Reconciliation Update Work and Efforts (July 2, 2020), https://perma.cc/X8NU-557T; Memorandum from City Manager to Mayor and Council, Reconciliation Update Work and Efforts June 2020 – June 2021 (Sept. 28, 2021), https://perma.cc/ZZN7-YKRC.

574 Publicizing the reports is consistent with the value of publicity in the rule of law. *See* LON L. FULLER, THE MORALITY OF LAW 39 (Rev. ed. 1969).

2. Truth-telling in the State of Queensland

After the failed Voice to Parliament referendum in Australia,[575] attention shifted to the states as sites for advancing the decolonial mission in the country.[576] The premier of the State of Queensland indicated that the next step on the road to reconciliation with Indigenous Peoples would be a process of truth-telling.[577] Truth-telling was central to the Uluru Statement that called for reconciliation with Aboriginal and Torres Straits Islander Peoples in Australia: the statement expressed "aspirations for a fair and truthful relationship with the people of Australia" and recommended a commission to oversee "truth-telling about our history."[578] Truth-telling is "broadly understood as activities or processes that seek to recognise or engage with a fuller account of Australia's history and its ongoing legacy for Aboriginal and Torres Strait Islander peoples."[579] Truth-telling serves as the imperative for justice, the need for healing and reconciliation, and the recovery and preservation of history.[580] Gabrielle Appleby and Megan Davis have explained that "perhaps the most well-recognised objective of a truth-telling exercise is to establish a public and state-sanctioned platform for those affected by socially ignored and denied violence."[581]

The State of Queensland has enacted a law that creates a process for truth-telling, which is now underway. The law establishes a Truth-Telling and Healing Inquiry to probe the impacts of colonization on Aboriginal and Torres Strait Islander Peoples through truth-telling sessions and hearings, research into colonization, and promotion of awareness and understanding of colonization.[582] The members of the Inquiry are to "act independently and in the public interest, having particular regard to the interests of Aboriginal peoples and Torres Strait Islander peoples."[583] The Inquiry itself must be conducted "in a culturally appropriate manner" with attention to Indigenous law and tradition "in a way that recognizes the stress and psychological trauma that may be experienced by a

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575 *See supra* Subsection II.B.1.

576 Benita Kolovos et al., *Australian States to Push Ahead With Voice and Treaty Processes in Absence of Federal Body*, THE GUARDIAN (Oct. 16, 2023), https://perma.cc/R95M-6T39.

577 Andrew Messenger & Eden Gillespie, *Indigenous Queenslanders in "Double Mourning" as State's Pathway to Treaty Loses Bipartisan Support*, THE GUARDIAN (Oct. 19, 2023), https://perma.cc/RTS2-9FMX.

578 The Uluru Statement from the Heart, *supra* note 87.

579 ANNE MAREE PAYNE & HEIDI NORMAN, COMING TO TERMS WITH THE PAST? 8 (Indigenous Land and Justice Research Group School of Humanities & Languages ed., 1st ed. 2024), https://perma.cc/96UY-KZ3N.

580 *Id.* at 11–18.

581 Gabrielle Appleby & Megan Davis, *The Uluru Statement and the Promises of Truth*, 49 AUSTRALIAN HIST. STUD. 501, 505 (2018).

582 *Path to Treaty Act 2023* (Queensl.) s 66 (Austl.).

583 *Id.* s 71.

person in giving oral testimony or making a submission to the session or hearing."[584] With some exceptions, sessions and hearings are to be memorialized and held in public.[585] The Inquiry must submit a report on its findings before the end of its term.[586]

There are three major objectives for truth-telling under Queensland law. First, to "help inform the Queensland community generally and help heal the trauma suffered by Aboriginal Peoples and Torres Strait Islander Peoples as a result of colonisation."[587] Second, to "inform treaty negotiations between Aboriginal peoples, Torres Strait Islander peoples, and the State, highlight the resilience, enduring culture, law and knowledge of Aboriginal peoples and Torres Strait Islander peoples, and demonstrate how these strengths are priceless assets for Queensland."[588] And third, to "provide measurable economic, social, cultural and environmental benefits for Aboriginal peoples, Torres Strait Islander peoples, the Queensland community generally and the State."[589]

The Queensland Government announced the five members of the Inquiry in April 2024.[590] The Inquiry started its work on July 1, 2024.[591] The Inquiry is operating according to detailed Terms of Reference issued in May 2024.[592] The Terms of Reference require the Inquiry to consult, document, research, and advise on how the conduct of colonial and State governments has impacted Aboriginal Peoples and Torres Strait Islander Peoples about dispossession and settlement, assimilation and protection of language and culture, the separation of family members, treatment in policing and the criminal justice system, and, among others, opportunities to participate on an equal footing within Queensland.[593] The members of the Inquiry plan to travel the State to hold sessions and hearings,[594] first with hearings on the experience of Elders.[595]

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584 *Id.* s 72.

585 *Id.* ss 74–75.

586 *Id.* s 88.

587 *Path to Treaty Act* 2023, *supra* note 582, at prmbl., s 8.

588 *Id.*

589 *Id.* at prmbl. s 10.

590 Press Release, Queensland Government, Appointment of Leaders Brings Truth-Telling and Healing Closer (Apr. 26, 2024), https://perma.cc/3ARZ-KEVL.

591 Press Release, Queensland Government, Terms of Reference (July 1, 2024), https://perma.cc/Y93U-DPGR.

592 *See* QUEENSLAND GOVERNMENT, TRUTH-TELLING AND HEALING INQUIRY, TERMS OF REFERENCE (2024), https://perma.cc/6H25-VU88.

593 *Id.* § 5.

594 Baz Ruddick & Lily Nothling, *Queensland's Path to Treaty Truth-Telling Will Begin Next Month*, ABC NEWS (July 4, 2024), https://perma.cc/35Z8-YPE9.

595 Dechlan Brennan, *Terms of Reference for Truth-Telling and Healing Inquiry to Shine Light on Queensland's Past and Present*, NAT'L INDIGENOUS TIMES (June 4, 2024), https://perma.cc/6SHW-46DP.

3. Constitution-making in the territory of the U.S. Virgin Islands

In 1974, an analyst suggested that the U.S. Virgin Islands would eventually achieve self-government.[596] Half a century later, the U.S. Virgin Islands—an unincorporated territory acquired from Denmark in 1917[597]—remains politically and legally subordinate to the United States, without its own constitution despite several efforts to adopt one.[598] The most recent attempt at enacting a constitution for the U.S. Virgin Islands ended in failure—the fifth such effort.[599] A sixth constitution-making process is now underway.[600] Whether or not this one succeeds, the remarkable fact is not the repeated failures of constitution-making, but rather the persistence in waging the battle for self-government using legal means that are consistent with the values and expectations of the rule of law.

The U.S. Virgin Islands is authorized by Congress to adopt its own constitution.[601] But the process is not easy, as it requires procedures both internal and external to the territory. The rules appear in a law enacted in 1976: "recognizing the basic democratic principle of government by the consent of the governed," Congress consents to "the peoples of the Virgin Islands" creating a constitution for themselves.[602] The first step requires the legislature of the Virgin Islands to call a constitutional convention to draft, "within the existing territorial-Federal relationship," a constitution for local self-government.[603] Delegates to the constitutional convention are to be chosen according to laws enacted by the Virgin Islands, but eligibility to be a delegate is limited to citizens of the United States qualified to vote in the Virgin Islands.[604]

The Virgin Islands cannot propose just any constitution. Its proposed constitution must respect subject-matter restrictions that limit its content. For example, the proposed constitution must "recognize, and be consistent with, the sovereignty of the United States over the Virgin Islands."[605] The proposed

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596 Jake C. Miller, *The Virgin Islands and the United States: Definition of a Relationship*, 139 WORLD AFF. 297, 304 (1974).

597 Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1260 (2019).

598 UNITED STATES VIRGIN ISLANDS ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, THE STATUS OF CIVIL RIGHTS IN THE U.S. VIRGIN ISLANDS 51 (2023).

599 Maria Ferreras, *After Nearly 10 Years, Constitutional Convention Still Owes the V.I. Public a Report of All its Spending*, VIRGIN ISLANDS DAILY NEWS (Aug. 12, 2017), https://perma.cc/B6F5-Q8SP.

600 Matt Probasco, *Sixth Constitutional Convention Elections Dates Set*, ST. THOMAS SOURCE (Dec. 12, 2023), https://perma.cc/HUD9-7QPZ.

601 *See* An Act to provide for the establishment of constitutions for the Virgin Islands and Guam, H.R. 9460, 94th Cong. (1976) (codified as amended by Pub. L. No. 96-597, § 501, 94 Stat. 3477, 3479 (1980).

602 *Id.* at prmbl.

603 *Id.*

604 *Id.* § 3.

605 *Id.* § 2(b)(1).

constitution must equally recognize "the supremacy of the provision of the Constitution, treaties, and laws of the United States.[606] The proposed constitution must moreover establish a bill of rights,[607] a system of local courts,[608] an infrastructure for local government,[609] as well as the three conventional branches of government within a "republican form of government."[610]

The constitutional convention is required to submit its proposed constitution, assuming it agrees on one—and assuming the proposed text is compliant with the substantive requirements imposed by Congress—to the Governor of the Virgin Islands, who in turn is to submit the proposed constitution to the President of the United States.[611] The President is then required to transmit the proposed constitution, along with any comments, to the Congress.[612] Congress may approve the proposed constitution, or modify it in whole or in part, by joint resolution.[613] In the final step, the people of the Virgin Islands must vote in a referendum on the approved or modified proposed constitution.[614] The constitution then becomes official if it is approved by a majority of voters.[615]

The Fifth Constitutional Convention of the Virgin Islands reached an agreement on a proposed constitution, and sent it to the Governor,[616] but the Governor refused to submit it to the President.[617] The Superior Court of the Virgin Islands later compelled the Governor to send the proposed constitution to the President.[618] By congressional law, the President received the proposed constitution and transmitted it to the Congress, along with a memorandum from the Department of Justice outlining some concerns about the compliance of the proposed constitution with the substantive requirements of the congressional

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606 *Id.*

607 An Act to provide for the establishment of constitutions for the Virgin Islands and Guam, *supra* note 601, at § 2(b)(3).

608 *Id.* § 2(b)(7).

609 *Id.* § 2(b)(4).

610 *Id.* § 2(b)(2).

611 *Id.* § 4.

612 *Id.* § 5.

613 An Act to provide for the establishment of constitutions for the Virgin Islands and Guam, *supra* note 601, at § 5.

614 *Id.*

615 *Id.*

616 Memorandum from Gerard Luz James II, President of the Fifth Constitutional Convention to Governor John P. de Jongh Jr., Transmittal of the Adopted Proposed Constitution of the United States Virgin Islands (May 31, 2009), https://perma.cc/474D-6JG7.

617 *Governor Says No to Draft Constitution*, ST. CROIX SOURCE (June 12, 2009), https://perma.cc/GEQ3-L7RZ.

618 James v. De Jongh, Jr., 52 V.I. 202 (VI. Super. Ct. 2009).

law.[619] Congress, in turn, refused to approve the proposed constitution, relying on the Department of Justice analysis of the text highlighting several concerns with the draft constitution, including its missing recognition of U.S. sovereignty and the supremacy of federal law.[620] Congress invited the Constitutional Convention to reconvene to consider its concerns; the Convention did reconvene, but it was unable to agree on revisions.[621]

Ten years later, the Virgin Islands had begun its sixth effort at a constitutional convention to draft the first U.S. Virgin Islands Constitution.[622] There was a period for nominating persons to serve as delegates at the Constitutional Convention.[623] The election for delegates to the Constitutional Convention is to be held in November 2024.[624] The Sixth Constitutional Convention is scheduled to begin in January 2025, to produce a draft constitution by the end of October 2025, with a referendum to follow in 2026, all culminating with the anticipated enactment in 2027 of the first and only constitution for the Virgin Islands.[625] The decolonial project for self-government in the U.S. Virgin Islands continues with this sixth attempt at constitution-making.

V. CONCLUSION—THE PARADOX OF THE AMERICAN MODEL OF DECOLONIAL CONSTITUTIONALISM

We can trace the modern beginnings of the global decolonial movement to the American War of Independence from Great Britain. Violent, revolutionary, and ultimately successful, the battle for sovereignty in the United States inspired peoples worldwide to dismantle the colonial infrastructure built to subordinate them. In a world of empires, the United States awakened "a world of states," to

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619 156 CONG. REC H975 (daily ed. Mar. 2, 2010)(Presidential Message on the Constitution for the United States Virgin Islands); United States Department of Justice, Department of Justice Views on the Proposed Constitution Drafted by the Fifth Constitutional Convention of the U.S. Virgin Islands, 34 Op. O.L.C. 73 (2010), https://perma.cc/DR6L-PM9X (analyzing the features of the proposed constitution of the U.S. Virgin Islands).

620 156 CONG. REC (daily ed. June 17, 2010) (Senate Vote Providing for Reconsideration and Revision of Proposed Constitution of the United States Virgin Islands).

621 Special Committee on the Situation about the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples: United States Virgin Islands, 5 (United Nations General Assembly (Secretariat), Working Paper No. A/AC.109/2014/11, 2014).

622 *See* Bethaney Lee, *Committee Advances Bill Assembling the Sixth Constitutional Convention*, ST. THOMAS SOURCE (Jan. 19, 2022), https://perma.cc/DWM3-9SQR.

623 Government of the Virgin Islands, *Notice: Sixth Constitutional Convention Nomination Papers*, https://perma.cc/2Q8Y-TSA2.

624 Janette Millin Young, *In Search of a Constitution – The V.I. Needs Delegates*, ST. THOMAS SOURCE (Mar. 15, 2024), https://perma.cc/7LFF-FNMQ.

625 Bernetia Akin, *Constitutional Convention Glides Under Radar Toward 2024 Election*, ST. THOMAS SOURCE (Aug. 13, 2023), https://perma.cc/8DFE-CWP8.

borrow from David Armitage.[626] The American model should be credited for catalyzing and multiplying declarations of independence, republican constitutions, and free states.

The decolonial movement in the United States proved successful well before the enactment of the United States Constitution. The American War of Independence severed colonial ties to the British Monarch and ultimately replaced foreign rules of higher law with a novel technology of domestic governance that expressed the consent of the governed: a single written constitutional document.[627] Each of the thirteen states had adopted its own charter or constitution by 1789, the year the country replaced the Articles of Confederation with the new national Constitution.[628] That revolutionary break from the old world launched a global trend of constitution-making that, until recently, established the U.S. Constitution as the world's model for written constitutionalism.[629]

The American Revolution inspired peoples around the world to assert their sovereignty.[630] Within two years of the enactment of the U.S. Constitution, enslaved Haitians launched a revolution of their own, and by 1804 they had declared independence from imperial France.[631] The Haitian Revolution, in turn, reverberated beyond Haiti's island shores to Africa, Europe, and across the Americas, redirecting economic currents and giving hope to others to resist and to rise.[632] One after another, subordinated peoples mounted successful revolutions, winning independence for themselves and expanding the world community of sovereign states, though at great cost of death and destruction to both colonizer and colonized.[633] In the present day, however, the road to

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626 DAVID ARMITAGE, THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY 104 (2007).

627 Louis Henkin, *Revolutions and Constitutions*, 49 LA. L. REV. 1023, 1029 (1989).

628 Mark A. Graber, *State Constitutions as National Constitutions*, 69 ARK. L. REV. 371, 397 (2016). The states of Delaware, Maryland, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, and Virginia enacted their first constitutions, separately in their own constitutional conventions held in 1776, while Georgia and New York did the same in 1777; Massachusetts adopted its constitution by popular vote in 1780. *See* E.D.L. Lewis, *The Adoption of State Constitutions in the United States*, 8 VIR. L. REGISTER 9, 9–0 (1902). Connecticut and Rhode Island revised their existing colonial charters by removing references to the British crown. *See* Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 913 (1993).

629 *See* David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 764–66 (2012).

630 *See* R.R. PALMER, THE AGE OF DEMOCRATIC REVOLUTION: A POLITICAL HISTORY OF EUROPE AND AMERICA, 1760-1800, 239–84 (1st ed. 1959); David Armitage, *The Contagion of Sovereignty: Declarations of Independence since 1776*, 52 S. AFR. HIST. J. 1, 3 (2005).

631 Robin Blackburn, *Haiti, Slavery, and the Age of the Democratic Revolution*, 63 WILLIAM & MARY Q. 643, 647, 651 (2006).

632 Valentina Peguero, *Teaching the Haitian Revolution: Its Place in Western and Modern World History*, 32 HIST. TEACHER 33, 37–38 (1998).

633 *See* Leonid Grinin et al., *20th Century Revolutions: Characteristics, Types, and Waves*, 9 HUM. & SOC. SCI. COMMS. 1, 3–4 (2022).

decolonial constitutionalism is not lined with casualties of war. It is rooted in the rule of law.

Yet there is a paradox at the base of this celebrated American model of decolonization. Just as Americans were freeing themselves from the grip of their colonial rulers abroad, the state was enforcing its own policy of subordination at home.[634] We should therefore read with strong skepticism the Constitution's powerfully egalitarian opening words "We the People."[635] Despite this rousing preambular message of unity and belonging, the reality in America was the opposite: women, persons of color, unpropertied white men, and Indigenous Peoples—all were left out of the collective "we."[636] These were not mere oversights. "These omissions were intentional,"[637] remarked Thurgood Marshall on the bicentennial of the U.S. Constitution, declining the invitation to celebrate the founding text.[638]

Today's global model of decolonization is less American in the two ways that matter most: it is peaceful and inclusive. War is no longer the conventional strategy for decolonization. The preferred weapon in the fight for decolonization is the arsenal of law. Constitutional reform, constitutional interpretation, supraconstitutionalism, and subconstitutionalism are the modalities of decolonial constitutionalism used in our present day to achieve what was once won on the battlefield. Decolonial constitutionalism today is an act to expand protections for rights and recognition beyond the dominant powers, persons, and institutions. Most associated with Indigenous persons, decolonial constitutionalism now entails a suite of legal strategies justly and appropriately deployed by all peoples subordinated in law or politics. And in the struggle for decolonial justice, a victory for one strengthens the claims of all others.

In this Article, I have identified and contextualized the bundle of strategies available to disempowered populations to seize the reins of self-determination. From constitution-making to judicial enforcement and to supraconstitutionalism and subconstitutionalism, the global practice of decolonial constitutionalism offers a menu of options to advance rights and recognition for subordinated peoples. These tactics are legal and legitimate levers of power available in all jurisdictions to liberate people subordinated in law or politics. Whether these strategies ultimately succeed in a given jurisdiction depends on local factors that

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634 For a detailed discussion of this paradox in relation to race, *see* EDMUND MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM (1975), and in relation to Indigenous Peoples, *see* CLAUDIO SAUNT, UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY (1st ed. 2020).

635 U.S. CONST. prmbl.

636 Paula Rhodes, *We the People and the Struggle for a New World*, 30 HOWARD L.J. 997, 999 (1987).

637 Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VANDERBILT L. REV. 1337, 1338 (1987).

638 *Id.* at 1338–42.

defy generalization. But all are worth pursuing on a parallel track to achieve the just objective of self-determination for all peoples.