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## **The Global South and Comparative Constitutional Law**

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Comparative constitutional law probably never elicited more interest than it does nowadays – as a key to unlock the insights necessary for reforming constitutional systems, for observing migration of ideas and translation of concepts, for managing post-conflict situations, for gauging the normative commitments of emerging powers – or simply as a field of rich reward for intellectual curiosity. Today, it is easy to lose oneself in the burgeoning literature of generalist handbooks and specialized treatises. The discipline is undergoing a deep transformation that globalizes its Euro-American horizon and pluralizes its theories, methods and voices. And yet, there is a yawning gap amidst the landscape of contemporary comparison: There is no one publication that brings together the rich debates on the Global South in comparative constitutional law in a theoretically and methodologically reflected manner.

“The Global South and Comparative Constitutional Law” aims to fill this gap. It aims to synthesize the ongoing debates on constitutional law beyond the OECD-world, providing much needed orientation in a dynamic field. It attempts to make incisive and innovative interventions into these debates based on theories and methods of comparison. The book brings together leading scholars from Asia, Africa and Latin America to take further our thinking on the hotly debated issues of comparative constitutional law’s future. Going beyond a focus on rights and courts in extant literature, the authors unlock the door to the ‘engine room’ of constitutions in the Global South where law and power struggle for supremacy. In short: the book places the Global South squarely into the centre of contemporary comparative constitutional law.

The volume makes a timely intervention in a field the context of which is changing rapidly and significantly. The world is shifting from a unipolar to a multipolar order. The BRICS states (Brazil, Russia, India, China and South Africa) are not only set to overtake Europe and North America in terms of economic output but are already transforming normative debates at the international and, increasingly, the national level. Despite three successive waves of democratization and the worldwide diffusion of liberal constitutionalism, the “end of history” has not occurred. While liberal constitutionalism is under populist pressure in the US and Europe, countries like India, South Africa, and Brazil have moulded a new brand of transformative constitutionalism that seeks to remedy fundamental inequalities and injustices by the means of constitutional law. At the same time, illiberal and authoritarian regimes have evolved increasingly sophisticated “constitutional” means of entrenching their

power. Taken together, these developments pluralize constitutional law and call for new comparative analysis.

We pursue three main goals with this volume: Our first and basic intention is to *pluralize the conversation about constitutional law*. While most scholarship in comparative constitutional law is still revolving around liberal forms of Western constitutionalism, the aim of our book is to provide a global picture of the much broader practice of constitutionalism around the world. This is not linked to any normative preference in favour or against certain forms of constitutionalism. Rather, it is an attempt to take comparative law's promise to cover *all* major legal systems of the world seriously. Such pluralization is also a way to temper European (and by extension US-American) parochialism and to foster mutual global exchange between South and North. There is a rich discourse on South-South comparisons in Africa, Latin America, and Asia, which remains largely unheard in the academic communities of the West. Our volume listens into these conversations, searches for common themes, and explores the mutual benefits of engagement.

Secondly, we aim to *reflect critically the epistemic framework and the distribution of epistemic power in the scholarly community of comparative constitutional law*. One idea and hope for this book is to create more awareness for the persisting asymmetries in knowledge production and to think about ways to overcome those asymmetries. Methodologically, many authors in the book adapt a contextual and self-reflective approach and argue that functionalism alone, cannot provide a suitable toolkit for analysing legal systems of the Global South.

Finally, the book wants to reflect on and to some extent test the notion of the Global South in comparative constitutional law. There are, so far, two ways to approach the relatively new term in legal scholarship. One approach is simply geographical: 'Global South' then comprises the constitutional systems in Africa, Asia and Latin America, i.e. the world beyond the traditional OECD countries. Looking at this enlarged map of constitutionalism is already necessary to grasp further understandings of constitutionalism - beyond the focus on liberal-democratic constitutions and including transformative, authoritarian or theocratic varieties. The other approach to the term Global South is programmatic and critical. Then Global South does not refer to one place but connotes a sensibility to questions of marginalization, exclusion, and inequality. The notion of Global South then raises questions of justice, which can occur in all places – in Bandung as well as Berlin, in New York as well as New Delhi. In this vein, a Global South focus in comparative constitutional law aligns with TWAIL in public international law (or with ideas of Jean and John Comaroff in anthropology). Whichever understanding one prefers, using a Global South lens will question the use of purportedly universal legal standards and 'neutral' criteria in analysing foreign legal orders and advocates an understanding that acknowledges the plural, split, and hybrid character of legal cultures.

The book pursues these aims in three main parts: Theory, themes, and the global picture.

## 1. Theorizing the Global South

The first part intends to lay the theoretical foundations for thinking about the “Global South” in comparative constitutional law. To this end, the part introduces into different theoretical frameworks to reflect on the Global South as a category in comparative constitutional law.<sup>1</sup> While other scholarly disciplines such as anthropology or political theory already underwent similar theoretical debates<sup>2</sup>, the role of this part is to ask how a “turn to the Global South” in comparative constitutional law should look like. The authors of this section ponder on this question from the angles of epistemic theory, methodology, and intellectual history.

## 2. Themes: Transformation, authoritarianism, inequality

In contrast to the purely theoretical design of the first part, the task of the second part is to introduce into specific themes, which reflect prominent features of constitutionalism in the Global South.

### a) Transformative Constitutionalism

A first section will introduce into and compare different regional variations of “transformative constitutionalism”. The term “transformative constitutionalism” is used increasingly to describe and identify a range of “transformative” features, such as a constitutional teleology of social change, a focus on socio-economic rights/equality, an active role for the state, activist judiciaries, innovative legal procedures/remedies, civil society activism, and horizontal effect of rights among private parties.<sup>3</sup> In examining the relationship between transformative constitutionalism and the Global South in comparative constitutional law, leading authors of this field answer the question how and why the concept of „transformative

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<sup>1</sup> This debate has only recently developed. See only: *Sherally Munshi*, *Comparative Law and Decolonizing Critique*, (2017) 65 *The American Journal of Comparative Law* 207–35; Zoran Oklopčic, *The South of Western constitutionalism: A map ahead of a journey* (2016) 37 *Third World Quarterly* 2080-97; Zoran Oklopčic, *Provincialising Constitutional Pluralism* (2014) 5 *Transnational Legal Theory* 331-63; Florian Hoffmann, ‘Revolution or Regression? Retracing the Turn to Rights in ‘Law and Development’ (2016) 23 *Finish Yearbook of International Law* 45-72; Jedidiah Kroncke, ‘Law and Development as Anti-Comparative Law’ (2012) 45 *Vanderbilt Journal of Transnational Law* 477-555; Jedidiah Kroncke, *The futility of law and development: China and the dangers of exporting American law* (Oxford University Press, 2016);

<sup>2</sup> *J. Comaroff/J. Comaroff*, *Theory from the South: Or, How Euro-America is Evolving Toward Africa* (Routledge, 2012); Raewyn Connell, *Southern Theory: Social Science And The Global Dynamics Of Knowledge* (Polity Press, 2007);

<sup>3</sup> Diego Arguelles and I. Harmann, ‘Law in Books and Books in the Court: Are social rights literature and judicial practice on the same page in Brazil?’ (2014) 7 *Annuaire International des Droits de L’Homme* 15–38; Daniel Bonilla Maldonado (ed.), *Constitutionalism of the global South: The activist tribunals of India, South Africa, and Colombia* (Cambridge University Press, 2013); Oscar Vilhena Vieira; Upendra Baxi; Frans Viljoen, *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (Pretoria University Law Press, 2013); Arun Thiruvengadam and Arvind Narrain, ‘Social Justice lawyering and the meaning of Indian constitutionalism: A case study of the Alternative Law Forum, Bangalore’ (2013) 31 *Wisconsin International Law Journal* 525–65; Karl Klare, ‘Legal culture and transformative constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146; Pius Langa, ‘Transformative constitutionalism’ (2006) 17 *Stellenbosch Law Review* 351; Varun Gauri and Daniel Brinks (eds.), *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (Cambridge University Press, 2008).

constitutionalism“ emerged in selected jurisdictions, and how it did evolve until today. Likewise, the part critically reflects on the function of the concept and asks which societal groups (judges, constitutional lawyers, comparatists, politicians, CSOs etc.) are using it for what interests. Finally, the aim of this part is to bring the different authors into conversation and to ask if there is a “common core” of transformative constitutionalism identifiable through comparison.

#### b) Authoritarian Constitutionalism

A second section will deal with the fact that constitutions in the Global South are often associated with non-democratic and non-liberal regimes. Some were enacted by regimes considered authoritarian, or at least in response to experiences with such regimes. As early as 1957, Karl Loewenstein distinguished between normative, nominal and semantic constitutions, the latter essentially being a formalization of political power.<sup>4</sup> More recent comparative constitutional law literature has taken a renewed interest in “authoritarian constitutionalism”.<sup>5</sup> In this context, this section delves into the different elements characterizing authoritarian constitutionalism (in terms of constitutional text, the role of actors and functionalities of varying institutions: e.g. lawyers, legal scholars, prosecutors, judges, courts, political leaders, foreign investors). The contributions to this part look at the term from three regional perspectives and answer the question why authoritarian constitutionalism “works” (in terms of modernization, nation building etc.) in some regions, and not others. Likewise, the aim of this part is to ask how authoritarian constitutionalism relates to illiberal uses of constitutional law in the Global North (for instance in the present Polish and Hungarian constitutional rollback).

#### c) Inequality and Access to Justice

The final theme of the second part concerns the question of access to justice, a key focus of many inquiries into legal systems of the Global South both in comparative constitutional law and in law and development.<sup>6</sup> More than in any other area, the question of legal

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<sup>4</sup> Karl Loewenstein, *Political power and the governmental process*, (Univ. of Chicago Press [u.a.], 1957).

<sup>5</sup> Weitseng Chen and Hualing Fu (eds.), *Authoritarian Legality in Asia* (forthcoming 2017); Tom Ginsburg and Alberto Simpser (eds.), *Constitutions in authoritarian regimes* (Cambridge University Press, 2014); Tom Ginsburg (ed.), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2008); Li-Ann Thio, ‘Constitutionalism in illiberal polities’, in András Sajó and Michel Rosenfeld (eds.), *The Oxford handbook of comparative constitutional law*, (Oxford University Press, 2013), pp. 133–52.

<sup>6</sup> David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press, 2007); Roberto Gargarella, *The Constitution of Inequality: Constitutionalism in the Americas, 1776-1860*, (2005) 3 *International Journal of Constitutional Law* 1-23; Roberto Gargarella, *The legal foundations of inequality. Constitutionalism in the Americas 1776-1860* (Cambridge Univ. Press, 2010); Roberto Gargarella/Theunis Roux/Pilar Domingo (Eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Routledge, 2006); Anuj Bhunia, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge University Press, 2016); Arun Thiruvengadam, ‘Revisiting the Role of the Judiciary in Plural Societies (1987): A Quarter-Century Retrospective on Public Interest Litigation in India and the Global South’, in Sunil Khilnani, Vikram Raghavan and Arun Thiruvengadam (eds.), *Comparative Constitutionalism in South Asia*, (Oxford University Press, 2013), pp. 341–69; Arun Thiruvengadam and Arvind

empowerment and access to legal institutions marks a legal area where several legal systems of the Global South have developed innovative mechanisms. Examples range from community law centres and legal aid boards in South Africa to class or popular action in Latin America and the famous Public Interest Litigation (PIL) in India. Yet, the meaning of the idea to “bring justice within the reach of the poor masses” (Supreme Court of India) can be manifold: Whose justice are we talking about? What is the normative idea behind access to justice? And is it correct at all to locate this idea in a Southern approach to constitutionalism? This part of our volume tackles these questions by bringing together comparative perspectives from India, South Africa, and Latin America. The three contributions discuss the relationship of poverty, inequality, and constitutionalism in the respective regional contexts and enter into a dialogue with each other.

### *3. The South in Global Constitutionalism*

The last part of the volume zooms out of the national and regional picture and looks at the Global South in comparative constitutional law from a global perspective. The starting point of this wider picture is the assumption that constitutions in the Global South are embedded in particular international environments and discourses ranging from colonialism and decolonization, international law and international intervention, globalization and postcolonialism, to global constitutionalism.<sup>7</sup> Our aim is to address these environments and to discuss the role of the South in the discourse and practice of “global” constitutionalism. The contributions tackle the manifold role of international influences on constitutions but also ask the other way around: How have constitutions from the South shaped certain international constitutional ideas? Is there, for instance, a distinctive Southern toolkit of constitutional provisions, mechanisms, and ideas which is used and travels among southern constitutions? Is the idea of global constitutionalism feasible at all from the perspective of the Global South?

The book provides the first overarching synthesis of scholarship on comparative constitutional law and the Global South and takes the debate forward in theoretical and methodological terms. As such, the book addresses a multidisciplinary audience interested in constitutional law, comparative law, comparative politics, regional studies and the Global South, as well as constitutional, political and critical theory and history of ideas.

The book contributes to the larger field in four ways:

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Narrain, ‘Social Justice lawyering and the meaning of Indian constitutionalism: A case study of the Alternative Law Forum, Bangalore’ (2013) 31 *Wisconsin International Law Journal* 525–65.

<sup>7</sup> C. Schwobel-Patel, *Global Constitutionalism and East Asian Perspectives in the Context of Political Economy*, in: A. Peters, T. Suami, & M. Kumm (Eds.), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press, 2018).

First, the book will relate to recent strands of comparative scholarship on constitutional models that differ from liberal Western constitutionalism. This includes edited volumes and monographs on authoritarian or “illiberal” constitutions<sup>8</sup> or works on transformative aspects of constitutionalism, which tend to focus on a single jurisdiction or compare a limited number of jurisdictions.<sup>9</sup> Likewise, the volume relates to works on specific forms of regional constitutionalism, chiefly in Latin America<sup>10</sup>, South Asia<sup>11</sup>, and Africa.<sup>12</sup> While our volume draws on and synthesises these strands of the literature, it is unique in offering a comparative overview that is overarching both thematically and regionally.

Secondly, the volume contributes to and extends the field of comparative politics and regional studies. Recent work in this field analyses how institutions, democracy, and governance in the Global South differ from their Northern counterparts.<sup>13</sup> The book shares the assumption that contexts of poverty, different ethnic identities, or post-conflict situations fundamentally shape the institutional set-up of political systems in the Global South.<sup>14</sup> Yet, the sketched approaches in comparative politics rarely focus on the role of law and courts. By contrast, our volume considers the political particularities in the Global South, but goes a step further by asking how those particularities play out at the level of constitutional law.

Thirdly, the volume relates to theoretical works on the question of how ideas of modernity are imagined in different societies and travel across the world. This rather broad theoretical field has been tackled from various scholarly disciplines such as anthropology<sup>15</sup>, political

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<sup>8</sup> *W. Chen/Hualing Fu (eds.), Authoritarian Legality in Asia*, forthcoming 2017; *T. Ginsburg/A. Simpson (eds.), Constitutions in authoritarian regimes* (Cambridge University Press, 2014). On China, see especially *J. Kroncke, The futility of law and development* (Oxford University Press, 2016); *J. Rajah, Authoritarian Rule of Law: Legislation, Discourse and Legitimacy in Singapore* (Cambridge University Press, 2012); *T. Ginsburg/T. Moustafa (eds.), Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2008).

<sup>9</sup> *A. Bhuwana, Courting the People* (Cambridge University Press, 2017); *Oscar Vilhena Vieira/Upendra Baxi/Frans Viljoen, Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (Pretoria University Law Press, 2012); *S. Liebenberg, Socio-Economic Rights - Adjudication Under a Transformative Constitution* (Juta, 2010).

<sup>10</sup> *A. Bogdandy et al. (eds.), Transformative constitutionalism in Latin America* (Oxford University Press, 2017); *R. Gargarella, Latin American Constitutionalism, 1810-2010* (Oxford University Press, 2013); *R. Gargarella, The legal foundations of inequality* (Cambridge University Press, 2010); *T. Ginsburg/R. Dixon, Comparative Constitutional Law in Latin America* (Edward Elgar, 2017).

<sup>11</sup> *S. Khilnani/V. Raghavan/A. Thiruvengadam (eds.), Comparative Constitutionalism in South Asia* (Oxford University Press, 2013); *R. Dixon/T. Ginsburg, Comparative Constitutional Law in Asia* (Edward Elgar, 2014).

<sup>12</sup> *C. Fombad (Ed.), Constitutional Adjudication in Africa* (Oxford University Press, 2017); *C. Fombad (Ed.), Separation of Powers in African Constitutionalism* (Oxford University Press, 2016).

<sup>13</sup> *P. Smith/C. Sells (eds.), Democracy in Latin America* (Oxford University Press, 2016); *S. Mainwaring/A. Pérez-Liñán (eds.), Democracies and Dictatorships in Latin America* (Cambridge University Press, 2014); *S. Sangmpam, Comparing apples and mangoes* (State University of New York Press, 2008); *A. Croissant/P. Lorenz, Comparative Politics of Southeast Asia: An Introduction to Governments and Political Regimes* (Springer, 2018); *E. Rodrigues Sanches, Party Systems in Young Democracies: Varieties of Institutionalization in Sub-saharan Africa* (Routledge, 2018).

<sup>14</sup> *M. Taylor-Robinson, Do the Poor Count?: Democratic Institutions and Accountability in a Context of Poverty*, (Penn State University Press, 2010); *MP Singh/V. Kukreja, Federalism in South Asia* (Routledge, 2016).

<sup>15</sup> *J. Comaroff/J. Comaroff, Theory from the South* (Routledge, 2012).

theory<sup>16</sup>, intellectual history<sup>17</sup>, or postcolonial theory<sup>18</sup>. Legal scholarship has much to contribute to this debate, but has only rarely begun to think about law's role in the global circulation of intellectual ideas.<sup>19</sup> We contribute to this field by highlighting how certain ideas of democracy, justice, and equality travel across the legal systems in the Global South – and how those ideas relate to the liberal democracies of the Global North.

Ultimately, the book builds on an increasingly rich conversation on the pluralization of comparative constitutional law's methods. Contextual and critical approaches urge that the discipline's dominant methods alone cannot provide a tool for deep and meaningful analysis of legal orders and cultures.<sup>20</sup> Postcolonial and anthropological approaches make a similar claim with an emphasis on the Global South.<sup>21</sup> Our book builds on and reflects those approaches, but does not stop here. While most contributions on new methods in comparative law remain on the level of theory, our book uses and applies contextual and reflective methods in each of its chapters.

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<sup>16</sup> *Amy Allen*, *End of Progress: Decolonizing the Normative Foundations of Critical Theory* (Columbia University Press, 2016).

<sup>17</sup> Samuel Moyn/ Andrew Sartori (Eds.), *Global Intellectual History* (Columbia University Press, 2013).

<sup>18</sup> *Dipesh Chakrabarty*, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press, 2007).

<sup>19</sup> The rare exceptions are *M. Goodale*, *Dilemmas of Modernity: Bolivian Encounters with Law and Liberalism* (Stanford University Press, 2008); *T. Ruskola*, *Legal Orientalism* (Harvard University Press, 2016); Eve Darian-Smith, *Laws and Societies in Global Contexts* (Cambridge University Press, 2013); Thomas Duve (ed.), *Entanglements in Legal History: Conceptual Approaches* (Max Planck Institute for European Legal History, 2014).

<sup>20</sup> *G. Frankenberg*, *Comparative law as critique* (Edward Elgar, 2016); *M. Bönnemann/L. Jung*, *Critical Legal Studies and Comparative Constitutional Law*, in: *Max Planck Encyclopedia of Comparative Constitutional Law*, 2017.

<sup>21</sup> *T. Ruskola*, *Legal Orientalism* (Harvard University Press, 2016); *J. Comaroff/J. Comaroff*, *Theory from the South* (Routledge, 2012); Raewyn Connell, *Southern Theory: Social Science And The Global Dynamics Of Knowledge* (Polity Press, 2007); Boaventura de Sousa Santos, *Epistemologies of the South* (Routledge, 2014); Gurinder K Bhabra, *Connected Sociologies* (Bloomsbury Academic, 2014).

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