

# Southern turn, Northern implications: rethinking the meaning of colonial legacies for Comparative Constitutional Studies

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*Comparative constitutional studies has not digested globalization and the emergence of a multipolar world. To do so, I argue here, would require a far more serious engagement with Southern experiences of constitutionalism, including colonial legacies and a past that lingers on in legal doctrine, conceptual vocabulary, methodology and institutional structures. Such a Southern turn is not only about the South but equally about the North and the entanglement of North and South. In fact, colonial legacies are equally relevant but much less understood in the North. The Southern turn is hence a double turn: to the South and then to the North and the world.*

*This article sketches how to rethink methodologies and approaches to comparative constitutional scholarship and discusses the notion of the Global South in that context. In doing so, it demonstrates how a Southern turn would both provide new insights into constitutionalism in the South as much as in the North and open up new avenues to rethink constitutional theory.*

*Such rethinking enters tricky terrain as colonial legacies play out differently in different places and epistemic communities. This article is a call for a common conversation nonetheless. It is an intellectual provocation and invitation to develop an approach to comparative constitutional scholarship and ‘world comparative law’ that does not bow to any one centre and instead engages with the distinctive but entangled constitutional regimes all over the world.*

**Keywords:** *constitutionalism, constitutional theory, colonialism, comparative constitutional law, liberalism, global south*

## INTRODUCTION

Comparative constitutional studies (‘CCS’) has not digested globalization and the emergence of a multipolar world. True, there is an immense interest in such studies and an ongoing expansion and professionalization of the field, as the founding of this journal demonstrates. International (i.e. English-language) scholarship now regularly includes a select number of Southern jurisdictions (especially India, South Africa, and Colombia to some extent). There is also a noticeable regionalization of the field.<sup>2</sup> In a superficial way one could assume that globalization has reshaped CCS.

1. I am grateful for comments on earlier drafts of this article by Antony Anghie, Maxim Bönnemann, Maartje De Visser, James Fowkes, Theunis Roux, Arun Thiruvengadam as well as two anonymous reviewers.

2. Roberto Gargarella and Conrado Hubner (eds), *Oxford Handbook of Constitutional Law in Latin American* (Oxford University Press, 2022); Wen-Chen Chang and Li-Ann Thio, Kevin

Yet, the field has not drawn deeper conclusions. It has not re-thought what the study of Southern jurisdictions might require with regard to methodological, theoretical, and epistemological approaches. In particular, there is precious little attention to the broader historical context and the manifold legacies of empires in constitutionalism(s). In contrast to other disciplines (global history, anthropology, literature) – but also in contrast to public international law, where Third World Approaches to International Law (TWAAIL) has led to a broad engagement with the colonial legacies of the international legal order<sup>3</sup> – comparative constitutional studies has avoided studying the experience and legacy of colonialism in a more reflective and theorized way.

Building on pioneering work,<sup>4</sup> and together with colleagues, I have called what is needed to rethink CCS a ‘Southern Turn’, arguing that the field needs to better understand existing asymmetries and injustices, and engage with Southern experiences more seriously to be able to develop adequate approaches.<sup>5</sup> This is not only about the South but equally about the North, where the legacies of colonialism have been disregarded until very recently, distorting our understanding of the history as well as their implications for constitutional law. Ultimately, the Southern turn is a double turn: to the South and then to the North and the world. It is not about describing a ‘Southern paradigm of constitutionalism’ but to think about what approaches enable us to take seriously colonial legacies and Southern experiences and how this might affect our understanding of constitutionalism(s) in the South and the North. In a way, it is an intellectual provocation and invitation to think about what is needed for a field of studies that does not bow to any one centre but engages with the distinctive but entangled constitutional regimes all over the world.

But it is tricky terrain. The legacies of colonialism and empire play out differently in different places and in different epistemic communities. There is a fundamental and sometimes jarring ‘*Ungleichzeitigkeit*’ (non-simultaneity) at work. In most countries of the Global South, the legacies of empire are present all the time. But even though legal scholarship might have used post-/decolonial theory only in some regions (mostly Latin America), the legacies of (direct or indirect) empire are always present and legal scholarship in all Southern countries deals with the impact of this reality in law constantly. In the Global North (especially in Europe), the legacies of colonialism have been disregarded until very recently, and domestic legal academia (in constitutional but actually all fields of law) has mostly ignored not just de-/postcolonial theory

YL Tan (eds), *Constitutionalism in Asia: Cases and Materials* (Hart Publishing, 2014); Charles Fombad (series editor), *Stellenbosch Handbooks in African Constitutional Law* (Oxford University Press since 2015); Sabino Cassese, Armin von Bogdandy, Peter Huber (eds), *Max Planck Handbooks in European Public Law* (Oxford University Press since 2017).

3. Anthony Anghie, *Imperialism, Sovereignty and the Making of international law* (Cambridge University Press, 2005); James Gathii, (2011) ‘TWAAIL: A Brief History of its Origins, its Decentralized Network and a Tentative Bibliography’ (2011) 3(1) *Trade, Law and Development* 26–48.

4. Upendra Baxi, ‘Constitutionalism as a Site of State Formative Practices’ (2000) 21(4) *Cardozo Law Review* 1183; Daniel Bonilla Maldonado (ed), *Constitutionalism of the Global South* (Oxford University Press, 2014); William Twining, *Globalization and Legal Theory* (Northwestern University Press, 2000); see also the archive of the journal ‘World Comparative Law’, since 1968 a platform for Southern scholarship in constitutionalism.

5. See Philipp Dann, Michael Riegner and Maxim Bönneman, ‘The Southern Turn in Comparative Constitutional Law’ in Dann, Riegner and Bönneman (eds), *The Global South and Comparative Constitutional Law* (Oxford University Press, 2020) 1.

but also the history of colonialism itself.<sup>6</sup> At the same time, a call for ‘decolonization’ can mean different things in different times and places. While it emerged as a call to take seriously the legacies of empire to achieve emancipatory ends, it is seen as a stale trope by some today<sup>7</sup> and has even been abused to advance nativist and authoritarian causes and undermine emancipation.<sup>8</sup>

But, while we have to be mindful about these differences, there is still a need to have a common conversation. To have such a conversation, scholars in the South and North alike should take a Southern turn and help rethink approaches to CCS mindful of the implications that colonial legacies had and have. In fact, this call has a special urgency for those writing from a privileged position in the North, raising the question of the place of sincere and respectful scholars in the North in debates about Southern constitutionalism. A tentative answer to this question should begin by acknowledging the necessity of the question and a reflection about positionality here.<sup>9</sup>

CCS needs to take the next step in its methodological and theoretical evolution. After its emergence and a first call for professionalization along social sciences lines,<sup>10</sup> I join Theunis Roux who argues for more attention to different approaches with their respective strengths and sensibilities in the field of CCS.<sup>11</sup> Just as the field grapples with constitutional identities and varieties of constitutionalism, we grapple with the methodological and theoretical approaches adequate to understand the world of constitutionalism. In this discussion, I argue for a broadened, multi-disciplinary approach that helps us study various dimensions of constitutionalism, including law and humanities.

I will lay out the argument in three steps. In the first section, I will describe the methodological, epistemological, organizational and temporal demands to make the Southern turn, i.e. rethink our approach to doing CCS. I will also discuss whether the notion of the Global South and de-/postcolonial theory are useful tools. In the second section, I will sketch what a Southern turn can unearth with regard to the distinct constitutional experiences of the South. In the third section, I will turn to the North and also spell out implications that taking colonial legacies seriously can have for themes and elements of CCS more generally. By way of conclusion, I argue that CCS should become the study of a truly ‘world comparative law’. This should not be a globalized version of Northern constitutionalism but an engagement with and a reflection of the various experiences of constitutionalism around the world, their entanglements and limitations.

6. Florian Hoffmann, ‘Unerwartete Nachbarschaft, Zeitschrift für Ideengeschichte XV’ (2021) 118; for a succinct analysis of the potentials of de-/postcolonial theories for legal research, see Maximilian Bönnemann and Max Pichl, ‘Postkoloniale Theorien’ in Fischer-Lescano (ed), *Neue Theorien des Rechts* (Lucius & Lucius, 2020) 359.

7. See e.g. Olúfémí Táíwò, *Against Decolonisation* (Hurst, 2022).

8. J. Sai Deepak, *India that is Bharat* (Bloomsbury, 2021).

9. On different roles of Northern scholars, see Dann, Riegner and Bönnemann, ‘Southern turn’ (fn 5) 35.

10. Ran Hirschl, *Comparative Matters* (Oxford University Press, 2014).

11. Theunis Roux, ‘Comparative Public Law’ in Paul Daly and Joe Tomlinson (eds), *Researching Public Law in Common Law Legal Systems* (Edward Elgar, forthcoming 2023), available at: <<https://ssrn.com/abstract=3685535>> (accessed 29 May 2023).

## 1 METHOD AND APPROACH: CREATING AWARENESS AND PROVIDING TOOLS

It is necessary to re-think the way we do CCS, hence process and methodology (in a broad sense). The Southern turn calls for a more critical, self-reflective engagement with our own working methods (and perhaps habitus), aiming to create awareness of their colonial dimensions and provide tools to understand them. The following section addresses three relevant dimensions of the turn: methodological, linguistic and epistemological aspects (section 1.1); institutional questions in the system of knowledge production (section 1.2); and finally, conceptual questions concerning the use of the notion of the ‘Global South’ and post/de-colonial theories (section 1.3).

### 1.1 Epistemology and language, methodology and time

#### 1.1.1 *Epistemic reflexivity and linguistic diversity*

The first implication of a Southern turn for comparative constitutional studies is the need for epistemic reflexivity. This has three aspects. The first leads from epistemic hierarchy to recognizing epistemic injustice and aiming for epistemic equality. It is important to step back and reflect how constitutional scholarship has so far neglected and subordinated Southern forms of knowledge and vocabularies.<sup>12</sup> A recognition of this injustice and its proactive correction is an important first step to then reach some kind of epistemic equality. This implies that Southern and Northern authors, texts, concepts, histories are equally legitimate reference points in constitutional discourse.<sup>13</sup> It also demands fundamental conceptual openness, requiring us to treat phenomena as ‘constitutional’ that may not qualify as such from the perspective of liberal constitutionalism.<sup>14</sup>

A second aspect is multi-perspectivity and decentring. There is no one privileged standpoint for comparison. This implies a decentring of Euro-American perspectives – not only by addition of new materials, but by provincializing the theoretical approach with respect to the scope of its claims to validity and applicability; by engaging in inter-contextual dialogue; and by decentring thematic focus or agenda setting in order to go beyond constellations of the Euro-Atlantic world.<sup>15</sup>

12. Daniel Bonilla, *Legal Barbarians: Identity, Modern Comparative Law and the Global South* (Cambridge University Press, 2021); Boaventura de Sousa Santos, *The End of the Cognitive Empire: The Coming of Age of Epistemologies of the South* (Duke University Press, 2018).

13. Ina Kerner, ‘Beyond Eurocentrism: Trajectories towards a renewed political and social theory’ (2018) 44(5) *Philosophy & Social Criticism* 550.

14. On these aspects see the contributions by Hoffmann, Oklopčić, Schwoebel-Patel and Kroncke in Dann et al (fn 5). This may include, for instance, various forms of societal or indigenous approaches to constitutionalism or a rethinking of the nation state as a vehicle for collective self-determination in plurinational contexts. See e.g. Roger Merino, ‘Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America’ (2018) 31 *Leiden Journal of International Law* 773; conceptualizing India and the EU as continental polities, see contributions in Philipp Dann and Arun Thiruvengadam (eds), *Democratic Constitutionalism in Continental Polities: Comparing the European Union and India* (Edward Elgar, 2021).

15. Baxi (fn 4) 1185; Florian Hoffmann, ‘Facing South: On the Significance of An/Other Modernity’ in Dann et al (fn 5) 41.

A third aspect is relationality. Even though we study other jurisdictions as ‘foreign’, it would be wrong to think of these as separate entities with fixed identities. Legal culture is inherently hybrid, marked by conflicts, contradictions, and global entanglements.<sup>16</sup> This puts the comparatist in a somewhat precarious position: on the one hand, the hybrid character of culture requires us to avoid essentialist and fixed depictions of legal systems. At the same time, however, it would be equally dangerous to deny differences for the sake of universal problems and experiences. CCS thus might be described as a navigating exercise between those two poles, as an endeavour which uses this tension to understand similarity and difference.<sup>17</sup>

An equally important element of such a rethinking of our epistemology is to reflect the linguistic hegemony in the field and to aim for linguistic pluralism. English is the dominant language of our discipline. But we hardly ponder the implications of this situation.<sup>18</sup> While it provides the potential of a global conversation, it also often undermines it. There is the sometimes suffocating (and somewhat self-parochializing) dominance of English-language scholars, universities and of UK and US publishing houses. This goes along with a narrowing of interest in the concepts, theoretical and doctrinal vocabularies deemed relevant, while the rich constitutional and political experiences around the world – in South and North – get obliterated, because they are recorded in Spanish or Farsi, Chinese or French. We need to make a conscious effort to go beyond this narrow basis – organize translations and create pluralistic glossaries of concepts, to give different languages equal standing.

### 1.1.2 Methodological pluralism

CCS has seen a number of methodological debates in past years, but ultimately, a methodological pluralism seems most appropriate.<sup>19</sup> This includes a rethought contextualized functionalism that looks across the globe for comparable problems and functions of constitutions.<sup>20</sup> At the same time, a meaningful comparative endeavour requires us to embed the law in its societal contexts. Looking at the distinct constitutional experiences mapped above, some neighbouring disciplines offer themselves for context-sensitive comparison from and with the South more than others.<sup>21</sup> Understanding the impact of colonialism and formal decolonization, for instance,

16. Daniel Bonilla Maldonado, ‘The Concept of Culture and the Cultural Study of Law. An Essay’ (2019) 52(3) VRÜ/WCL 297.

17. Judith Schacherreiter, ‘Postcolonial Theory and Comparative Law: On the Methodological and Epistemological Benefits to Comparative Law through Postcolonial Theory’ (2016) 49(3) VRÜ/WCL 291.

18. See Maartje De Visser, ‘Towards a more inclusive constitutional discourse’ (IConnect-Blogpost, May 2022), available at: <<http://www.iconnectblog.com/towards-a-more-inclusive-constitutional-discourse-overcoming-linguistic-barriers/>> (accessed 29 May 2023); Odile Amann, ‘Language Bias in International Legal Scholarship’ (2022) 33(3) EJIL 821.

19. Mathias Siems, *Comparative Law* (Cambridge University Press, 2022); Ran Hirshl, *Comparative Matters* (Oxford University Press, 2014); Maxim Bönnemann and Laura Jung, ‘Critical Legal Studies and Comparative Constitutional Law’ in *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press, 2017).

20. James Fowkes, ‘Ten Boxes’ VRU-WCL 2023 (forthcoming). As examples see Gary Jacobsohn, *The Wheel of Law* (Princeton University Press, 2009); Theunis Roux, *The Politico-legal Dynamics of Judicial Review* (Cambridge University Press, 2018).

21. For the need of inter- and multi-disciplinarity in comparative constitutional scholarship see Thiruvengadam, in this issue.

is not possible without reference to various fields of history, be it political history, economic history, or history from below.<sup>22</sup> Likewise, once we have acknowledged the central role of global and domestic inequality, there is no way around deepening our conversation with political economy.<sup>23</sup> And finally, the need to capture the emic perspective on Southern constitutional *experiences* makes anthropology another important partner for contextual comparison. No matter whether we try to understand how injustice is perceived on the ground and battled with legal instruments, whose knowledge and social reality counts in constitution-making, or how ‘radically different conceptions of law’ evolve – all those elements of world constitutionalism cannot be studied with doctrinal legal methods but rather by engaging in ‘thick descriptions’ of local legal contexts.<sup>24</sup>

And yet, while multi-disciplinarity is important, we should not dismiss the value of constitutional experiences in the South *as law* by limiting comparison to legal realist or social scientific approaches.<sup>25</sup> Law has a relative autonomy and internal rationality that should be taken seriously across the North-South divide; there is the equal relevance of formalist and doctrinal comparison with and from the South. Comparative *law* ultimately is *also* a hermeneutic exercise of understanding legal meaning. What is required is a layered narrative that takes into account constitutional text, interpretation, underlying the theoretical and ideological assumptions, as well as the multi-faceted contexts beyond the law.<sup>26</sup>

### 1.1.3 Time: the case for slow comparison

Taken together, these demands of sophisticated comparative constitutional scholarship require one particularly valuable thing that is in short supply: time. This is especially true, once we move into a much larger pool of experiences and formations, where complexity and strangeness risks to lead to superficiality. What is thus needed is an approach that has been termed ‘slow comparison’.<sup>27</sup> Like slow food, the notion of ‘slow comparison’ emphasizes that the process through which comparative

22. William Partlett and Herbert Küpper, *The Post-Soviet as Post-Colonial: A New Paradigm for Understanding Constitutional Dynamics in the Former Soviet Empire* (Edward Elgar, 2022).

23. Poul Kjaer (ed), *The Law of Political Economy: Transformations in the Function of Law* (Cambridge University Press, 2020); Isabel Feichtner and Geoff Gordon, ‘Constitutions of Value: An Introduction’ in Isabel Feichtner and Geoff Gordon (eds), *Constitutions of Value, Law, Governance, Political Economy and Ecology* (Routledge, 2023); David Kennedy, ‘Law and the Political Economy of the World’ (2013) 26(1) *Leiden JIL* 7; Katharina Pistor, *Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, 2019).

24. Marie-Claire Foblets et al (eds), *Oxford Handbook Anthropology* (Oxford University Press, 2022); Shane Chalmers and Sundya Pahuja (eds), *Routledge Handbook on International Law and the Humanities* (Routledge, 2021). In a similar vein, cultural studies and law and literature may be a promising way to understand processes of othering and collective identity formation that are crucial for legal consciousness, see e.g. Sherally Munshi, ‘Comparative Law and Decolonizing Critique’ (2017) 65 (suppl\_1) *AmJCompL* 207.

25. Jorge Esquirol, ‘The geopolitics of constitutionalism in Latin America’ in Colin Crawford and Daniel Bonilla Maldonado (eds), *Constitutionalism in the Americas* (Edward Elgar, 2018) 79.

26. Günter Frankenberg, ‘Comparing constitutions: Ideas, ideals, and ideology – toward a layered narrative’ (2006) 4(3) *ICON* 439; Baxi (fn 4) 1188–89.

27. Philipp Dann and Arun Thiruvengadam, ‘Framing a Comparative Law of Democracy: An Introduction’ in Dann and Thiruvengadam (fn 14) 4–7.

knowledge emerges is necessarily longer, often difficult and cumbersome, that the ingredients need careful selection, flavours emerge slowly and taste is only acquired over time. This might be an anomaly in today's academic system. It requires a profound contextual understanding of one's own constitutional order, a certain level of 'bi-legalism', an ability to deal with 'comparative confusion' and, well, patience. But it (hopefully) generates better and longer lasting results.

## 1.2 Institutions and legal education

Another implication of a Southern turn concerns the institutional and organizational dimension of doing comparative constitutional law research and knowledge production. To date, the overall number of prestigious law schools and widely cited journals remain in the North. Southern voices, by contrast, are facing numerous hurdles both in terms of access and recognition. Targeting those asymmetries thus requires us to think about modes of collaboration and questions of organization. This begins with seemingly technical questions such as setting a conference location or a reimbursement policy, continues with issues of copyright and open access to research publications, and extends to the very question of how we organize comparative research. If the age of the solitary comparatist is over, we must turn to new modes of organization such as dialogical and collaborative forms of research in which there is time to reflect and understand each other without the pressure to produce easy comparative 'take-aways'.<sup>28</sup> Making such collaborative settings work is not only a question of resources, but also of diversity. This includes geographical diversity, but also – and equally important – diversity in terms of gender, race, language or socio-economic backgrounds.

To address the role of universities and journals in former colonial centres head on is yet another element of a Southern turn. This concerns the study and better understanding of their historical role in providing expertise and experts for colonialism. But it also concerns current structures, such as the hiring strategies and staff of Northern universities today.<sup>29</sup> As has been rightly pointed out by Adam Habib (director of SOAS), universities in the North play an important and very problematic role in the brain drain of scholars from the South.<sup>30</sup> Another central element is the review of curricula and teaching materials that should include discussions of colonial past and its legacies (as much as the legacies of other era).<sup>31</sup> This doesn't have to happen in a cleansing fervour and with inter-general (and other) accusations. But it is surely the calling of our generation to complete our historical, epistemological and conceptual accounts.

28. For example Dann and Thiruvengadam (fn 14) 1; Annelise Riles, 'From comparison to collaboration: Experiments with a new scholarly and political form' (2015) 78(1) *Law and Contemporary Problems* 147.

29. Priyamvada Gopal, 'On Decolonization and the University' (2021) 35(6) *Textual Practice* 873.

30. Interview with *The Guardian*, 8 January 2022, available at: <<https://www.theguardian.com/education/2022/jan/08/adam-habib-of-soas-uk-universities-must-stop-taking-other-countries-best-people>> (accessed 29 May 2023).

31. Foluke Adebisi, 'Decolonizing law school' (2020) 54 *The Law Teacher* 471 and the other contributions in this special issue on decolonizing curricula. Also, Joel Modiri, 'The time and space of critical legal pedagogy' (2016) 27 *Stellenbosch Law Review* 507.

### 1.3 Concepts: the notion of the Global South and de-/post-colonial theory

The Southern turn builds on epistemic, methodological and institutional awareness, and calls for visualizing colonial legacies as well as persisting asymmetries, and developing a fuller understanding of constitutionalisms around the world. An important heuristic device is the notion of the ‘Global South’. Interestingly, in reaction to our first formulation of the Southern turn, the use of this notion has become the most contentious element of this approach. It triggered a number of criticisms, three of which stand out. First, it is argued that colonialism historically had so many different facets and instantiations that speaking of ‘colonialism’ is a crude simplification and unhelpful. It is secondly argued that assuming one bloc of countries as ‘the South’ and juxtaposed to ‘the North’ is a dramatic oversimplification that ignores regional and local histories and trajectories and as such grouping them together is unhelpful, if not wrong. Finally, different people have argued that using the notion of the South ultimately only reifies and stabilizes the categories of South and North, instead of overcoming them.<sup>32</sup>

These are indeed important considerations but I think ultimately not convincing. I want to respond with three points.

First, and with respect to the criticism that the notion of the Global South groups too many countries and constellations together, one has to point out that the Global South is a polythetic category, i.e. not all countries captured necessarily share all its distinctive features. Using the notion does not mean that one is looking for a ‘common core’ and does not imply a strong judgement about the relative importance of the colonial history and peripheral position today. In that sense, speaking of ‘distinctiveness’ as done here (rather than ‘difference’) accentuates features that are particularly salient for the (self)description of the South but that may be present in the North, too. Asking the same question about (post)colonial legacies with regard to many countries, constitutions or constellations surely does not mean that one expects the same answer.

Second, using the notion of ‘Global South’ does not imply a strict dichotomy or reification. The adjective ‘global’ highlights that ‘South’ here is not a strictly geographical notion, but also has a political meaning. Yes, the South does highlight the relevance of history of colonialism, its legacy and ongoing structures of centre and periphery. But it also connotes a certain sensibility towards marginalization and the ongoing effects of centre-periphery structures, not least its effects on knowledge production (lack of voices) and hence the ability to trigger and frame debates. As such, the notion of the Global South is a political notion and dynamic, open for shifts, while pointing to the general observation of structures of centre and periphery. To ignore those structures and think of CCS as a colour-blind endeavour in a ‘flat world’ would be misconceived. It is not.

This leads to the third and broader point on the role of history and its different eras in CCS (which responds to the first critique mentioned above). It strikes me as strange to suggest that colonial history is so diverse and different in each location that we cannot use ‘colonialism’ as category or take it into account properly. By contrast, it is uncontested that the nineteenth century is a central time in the evolution of European constitutionalism even though this historical context is diverse and complex. Why should diversity and complexity prevent such an approach to non-European nations?

32. Thoughtful critique in Dinesha Samararatne, ‘Review of Philipp Dann, Michael Riegner and Maxim Bönnemann (eds) *The Global South and Comparative Constitutional Law*’ (2022) 1 *ICON* 534; De Visser (fn 18).

And why should we take into account the struggle between liberals and monarchists but not the transnational and politico-economic context, in which these struggles took place, i.e. colonialism? The suggestion here is not to over-emphasize one aspect but simply to properly acknowledge it and factor it in. This requires more general macro-reflections on colonial legacies beyond the micro-dynamics in each country.

Next to the question of whether it is justified to use the notion of Global South, there is also a larger and thoughtful debate about the merits of a call for ‘decolonization’. The US-Nigerian philosopher, Olufemi Táíwò, for example, argues that the call for decolonization has become a trope to force any ex-colony ‘to forswear, on pain of being forever under the yoke of colonizations, any and every cultural, political, intellectual, social and linguistic artefact, idea, process, institution and practice that retains even the slightest whiff of the colonial past’.<sup>33</sup> Voices critiquing mechanical and simplistic calls for decolonization and defending certain achievements of modernity have grown louder in past years.

It is also important to point out that the vocabulary of post- or decolonial theory can be and has been misused in recent times to support nativist and chauvinist ideas of a (supposedly) purer age – before colonization.<sup>34</sup> Scholars using de-/postcolonial theory should therefore be beware of false friends, especially those voices that adopt formulations of postcolonial theory to not only attack liberalism but erase the memory and achievements of longer struggles for emancipation and social mobility in modernity more generally. But the misuse by some does not devalue an approach in general. The critical observation and analysis of colonial patterns and structures continues to be important.

One final remark: it is important to realize the immense *Ungleichzeitigkeit* (temporal disparity) in how different epistemic communities and disciplines acknowledge and engage with such questions. While it is true that the idea of taking colonial dimensions seriously might be trite and worn-out in the fields of history, anthropology, cultural studies or in fact most of humanities, it is not the case in (domestic and in particular Northern) legal academia. Very much in contrast to those disciplines and to international law, (post)colonial dimensions are simply not studied systematically or in a satisfactory way in Northern and Northern dominated comparative law academia. In fact, most legal scholarship asking about the South and legacies of colonialism is not thought-police but completing the understanding of law in modernity. So far, we have studied only half of it.

In sum, it would be a mistake to drop the notion of the ‘Global South’ and only work with regional or functional clustering. The legacies of colonialism form too important a part of our political, cultural and constitutional experience. Heightened attention and better understanding of colonial legacies trigger relevant cross-regional questions. In any event, the path forward is not so much defining the concept (‘Global South’) but about a more reflective approach to and practice of doing scholarship in a way that complements, not replaces regional perspectives. Maybe, in an ideal world the ‘South’ would only be a temporarily relevant crutch, soon to be thrown away; but we have too much work to do before that – and I don’t expect the world to become flat any time soon.

33. Táíwò (fn 7).

34. See e.g. Deepak (fn 8) (who uses references to writers such as Walter Mignolo – but at the same time ignores the Indian school of subaltern studies).

## 2 CONSTITUTIONAL EXPERIENCES IN THE SOUTH

The Southern turn denotes an epistemic, methodological and institutional *approach* to doing comparative law in order to capture distinct constitutional *experiences*. Applying the methodological and other thoughts of the previous section to study constitutional experiences in the South as much as in the North aims to bring out, crystallize or contextualize a number of features.

In turning South now, one should acknowledge first that constitutionalism in the South is a shared experience, shaped by homogenous macro-dynamics and profoundly heterogeneous micro-dynamics. Using the notion of ‘constitutional experience’ is a careful choice as it indicates a multi-layered notion of constitutionalism, which includes the realities and localities of constitutionalism (as opposed to unitary notions of constitutional law or constitutional tradition). This constitutional experience is distinct from, and at the same time deeply entangled with, constitutionalism in the Global North. The distinctiveness of the Southern constitutional experience results from a combination of contextual and normative, historical and contemporary, global and local factors. It resides as much in the object of analysis as in the perspective of the observer. One can describe and analyse this constitutional experience on two levels: (1) as a *distinctive context*, and (2) with regard to *distinctive themes*.

### 2.1 Context: colonial history and geopolitical asymmetries

One starting point to grasp the distinct nature of constitutionalism in the South lies in the history of colonialism and the geopolitical asymmetries it entrenched. Most societies in the South share the experience of having been colonized – at least in a wider sense of having been in the periphery of a global order that was centred around the North Atlantic. Conversely, the Northern/Western constitutional experience is shaped by its position at the centre of this global order.

The colonial experience is a heterogeneous one, and the impact of colonization on constitutionalism is modulated by a range of factors: the identity of the colonizer, the nature of the colonialism, the type of imperial rule, the duration and intensity of the colonial encounter and the time of decolonization, and the type of transition to independence. The constitutional legacy of colonialism in Latin America thus differs in important respects from that in Africa and Asia.<sup>35</sup>

Yet, the colonial experience typically had some recurring features. These include: a substantial period of foreign domination that interrupted autonomous evolution and replaced or profoundly affected indigenous ideas, institutions and elites; a colonial state structured by an imperial modality of resource extraction and social administration predicated on European superiority; a legal system imported from or heavily influenced by the metropolis which entrenched structures of political oppression, economic exploitation, racism and physical violence; and the forced integration of

35. Upendra Baxi, ‘Postcolonial Legality: A Postscript from India’ (2012) 45(2) VRÜ/WCL 178; Bonilla Maldonado and Michael Riegner, ‘Decolonization’ in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press, 2017); Caroline Elkins, *Legacy of Violence* (The Bodley Head, 2022); Kevin Bruyneel, ‘Review Essay: On Settler Colonialism’ (2020) 82(1) Rev Pol 145.

colonized societies into a hierarchically structured global order, in which power and wealth were increasingly centred in Europe and North America.<sup>36</sup>

With respect to these experiences, formal ‘decolonization’ was both a moment of rupture and continuity. Colonial institutions both perished and persisted after independence. On the one hand, many (though not all) independence constitutions symbolized a break with the past and provided a foundation for a new political community with emancipatory possibilities unavailable under imperial rule.<sup>37</sup> On the other hand, colonial institutions and laws persisted in practice, local elites replaced foreign ones, and new states appropriated colonial instruments of domination and exploitation. Equally importantly, the constitutional imagination and possibilities of postcolonial societies were heavily conditioned by the grammar of modern constitutionalism and the unequal global order in which they remained embedded. Postcolonial constitution-making thus has been an uneven process of constitutional mimicry, poesis, and hybridization.<sup>38</sup>

Taking into account colonial legacies and geopolitical asymmetries is an analytical imperative of the Southern turn in CCS. One cannot understand Southern constitutionalism without this context. Yet, neither colonialism nor geopolitics furnish monocausal and linear explanations of constitutional development, and more often than not ruptures and continuities create distinctly hybrid constitutional assemblages. Moreover, the global context itself is changing in response to the geopolitical rise of some emerging economies, and there is considerable variation in how Southern constitutional orders respond to, reject or vernacularize global influences.

## 2.2 Themes: Socio-economic transformation, political organization, and access to justice

Constitutional experiences of countries in the Global South play out in a distinctive set of themes, three of which recur in the wider literature.<sup>39</sup>

### 2.2.1 Constitutionalism as socio-economic transformation

Southern constitutionalism often encapsulates a distinctive response to experiences of poverty, exclusion, inequality and historical injustice inherited from colonialism and perpetuated by the postcolonial state system. Poverty has been a deeply formative

36. Arudra Barra, ‘What is “Colonial” About Colonial Laws?’ (2016) 31(1) *American University International Law Review* 137; Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Duke University Press, 2018); Upendra Baxi, ‘The colonialist heritage’ in Pierre Legrand and Roderick J.C. Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, 2003) 46; Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press, 2018).

37. On the checkered history of constitution-making at independence see e.g. Harshan Kumarasingham (ed), *Constitution-Making in Asia* (Routledge, 2016).

38. Maldonado and Riegner (fn 35); Baxi (fn 35); for an excellent study of how Indian and South-African struggles gave rise to an autochthonous hybridized tradition of constitutionalism, see Theunis Roux, ‘Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa’, draft paper (on file with author).

39. These three themes are not meant as an exclusive and comprehensive list capturing all aspects of Southern constitutionalism, and other themes remain possible.

experience for the South, frequently associated with practices of exclusion based on gender, ethnicity, race, caste, geography or socioeconomic status.

This socio-economic context has deeply shaped the nature of statehood and constitutionalism across the Global South. Beginning with decolonization in Latin America, postcolonial states emerged with a modernizing impetus and sought to ‘catch up’ economically, politically and socially with European metropolises. During the high point of decolonization in the twentieth century, statehood became the universal vehicle for ‘modernization’, industrialization and development across the Global South. For many Southern states the concept of development played a formative role.<sup>40</sup> Yet unlike nineteenth century Europe and North America, developmental states of the twentieth century were defined and constrained by Eurocentric notions of development, external influence and internal legacies of colonial administration and social stratification.<sup>41</sup>

In this context, constitutions and constitutional law in the Global South are often conceived as symbols and instruments of fundamental social transformation, aimed at dismantling socio-economic hierarchies and inequalities.<sup>42</sup> In contemporary comparative debates, this dynamic dimension is captured in particular by the concept of transformative constitutionalism,<sup>43</sup> but it has a much older and broader lineage (for example, in Haiti,<sup>44</sup> Mexico,<sup>45</sup> Brazil<sup>46</sup> and India<sup>47</sup>).

### 2.2.2 *Constitutionalism as site of struggle about political organization*

Constitutionalism in the Global South also reflects the immense challenges of state-building and political organization in postcolonial, heterogenous and

40. Meredith Woo-Cummings (ed), *The Developmental State* (Cornell University Press, 1999); Benjamin Zacharia, *Developing India* (Oxford University Press, 2005); Pinar Bilgin and Adam David Morton, ‘Historicising Representation of “Failed States”’ (2002) 23(1) *Third World Quarterly* 55; Zdenek Červenka, ‘Africa and the New International Economic Order’ (1976) 9(2) *VRÜ/WCL* 187.

41. Luis Eslava, ‘The Developmental State: Independence, Dependency, and History of the South’ in Philipp Dann and Jochen v. Bernstorff (eds), *The Battle for International Law in the Decolonization Era* (Oxford University Press, 2019) 71; Merino (fn 14); Sebastián Mazzuca, *Latecomer State Formation* (Yale University Press, 2022); Shalini Randeria, ‘Cunning States and Unaccountable International Institutions’ (2003) 44(1) *European Journal of Sociology* 27.

42. ‘Symbolic’ in this context refers to the cultural importance of constitutions in processes of collective identity formation and should not be misunderstood as necessarily implying their ineffectiveness.

43. Vilhena Vieira, Upendra Baxi and Frans Viljoen (eds), *Transformative Constitutionalism. Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press, 2013).

44. Adom Getachew, ‘Universalism After the Post-colonial Turn: Interpreting the Haitian Revolution’ (2016) 44(6) *Political Theory* 821.

45. Roberto Gargarella, *Latin American Constitutionalism, 1810-2010* (Oxford University Press, 2013) 101; Javier Garcíadiego, ‘The Revolution’ in Pablo Escalante (ed), *A New Compact History of Mexico* (El Colegio de México, 2013) 229, 255.

46. Gilberto Bercovici, ‘A problemática da constituição dirigente: algumas considerações sobre o caso brasileiro’ (1999) 36(142) *Revista de Informação Legislativa* 35; Luis Virgílio Afonso da Silva, *The Constitution of Brazil: A Contextual Analysis* (Hart Publishing, 2019).

47. Rohit De, *A People’s Constitution: The Everyday Life of Law in the Indian Republic* (Princeton University Press, 2018); Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (Harper Collins India, 2019).

hierarchical societies. Constitutionalism is often experienced not as a stable order tending towards linear progress, but as a site of contested state formative practices and a struggle for political organization between democratic and authoritarian forces.<sup>48</sup>

In most places, these challenges hark back to the moment of decolonization and the political form it took: the nation state. Under the dominant, European vision of international law, nation statehood was the only viable form of political organization to achieve self-determination. Mimicking the European (nation) state offered colonized peoples a path to decolonization with a well-defined endpoint, but also implied limitations for internal political organization and self-determination, especially concerning the acceptance of colonial borders that imperial powers had imposed and the rejection of alternative forms of political organization.<sup>49</sup>

In addition, independent nation states inherited the authoritarian legacy of colonialism: repressive institutions, legalized practices of violence, executive discretion unconstrained by law, permanent states of exception, unaccountable government, as well as practices of racist subordination and economic exploitation.<sup>50</sup> It inhibited the emergence of the democratic culture and institutions, such as a public sphere, political parties and civil society.<sup>51</sup>

Under these difficult circumstances, constitutions in the Global South had the task of creating the very conditions considered to be prerequisites of their own existence. Southern constitutionalism has been a site of state formative practices and – often violent – nation-building projects.<sup>52</sup> These practices and projects have evolved over time in democratic or authoritarian directions, with fits and starts, and recurring phases of constitutional crisis and stability. From this unsteady process emerges, on the one hand, a rich practice of innovation and adaptation of democratic institutions.<sup>53</sup> On the other hand, many Southern constitutions pursued the process of state- and nation-building not by limiting public power and protecting individual rights, but by concentrating power in imperial presidencies or unconstrained executives.<sup>54</sup>

48. Baxi (fn 4) 1183.

49. Adom Getachew, *Worldmaking After Empire: The Rise and Fall of Self-determination* (Princeton University Press, 2019); Margaret Kohn and Keally D. McBride, *Political Theories of Decolonization: Postcolonialism and the Problem of Foundations* (Oxford University Press, 2011) 18ff. On the equally important impact of the Cold War, see Odd Arne Westad, *The Global Cold War: Third World Interventions and the Making of Our Times* (Cambridge University Press, 2005); Vijay Prashad, *The Darker Nations: A People's History of the Third World* (The New Press, 2007).

50. Weitseng Chen, 'Same bed, different dreams' in Dann et al (fn 5) 250; Mara Malagodi, 'Dominion status and the origins of authoritarian constitutionalism in Pakistan' (2019) 17(4) *ICON* 1235. For the impact of pre-colonial and post-colonial state structures, see Pierre Englebert, *State Legitimacy and Development in Africa* (Lynne Rienner, 2000).

51. Boaventura de Sousa Santos, 'Public Sphere and Epistemologies of the South' (2012) 37 (1) *African Development* 43.

52. Baxi (fn 4).

53. Mostafa Rejai and Cynthia H. Enloe, 'Nation-States and State-Nations' (1969) 13(2) *Int Stud Q* 140; Boaventura de Sousa Santos, *Refundación del Estado en América Latina: Perspectivas desde una epistemología del Sur* (3rd edn, Siglo XXI, 2010) 81ff.; Alfred Stepan, Juan Linz and Yogendra Yadav, *Crafting State-Nations* (Johns Hopkins University Press, 2011); Dann and Thiruvengadam (fn 14).

54. Gargarella (fn 45); Jose Cheibub, Zachary Elkins, and Tom Ginsburg, 'Still the Land of Presidentialism? Executives and the Latin American Constitution' in Detlef Nolte and Almut

### 2.2.3 *Constitutionalism as denial of and access to justice*

The first two themes converge in a third, distinctive theme: namely, the profoundly ambivalent, sometimes even contradictory, nature of the state and its law in the Global South. Like the metaphorical Janus, state and law often have two faces: one looks forward, one backward; one is strong, one weak; one emancipatory, one oppressive. Constitutionalism is experienced as both a denial of justice, and as means of access to justice.

States in the Global South are often two-faced in that they are, on the one hand, expected to be strong states: as ‘developmental states’ they organize economic activity, keep together extremely heterogeneous societies. On the other hand, many Southern states were ‘instant states’, created overnight, without functional institutions and local elites, sufficient public resources, and social legitimacy. Many remain dependent on external support and vulnerable to global economic shocks, while waves of liberalization and structural adjustment have weakened state capacity.

Likewise, there is an ambivalence in the perception of its law. Law is an instrument of emancipation and liberation – for the society at large (the right to self-determination) and for the individual and disadvantaged groups (rights, affirmative action, etc.)<sup>55</sup> – but it is also often perceived as instrument of oppression, subordination and exploitation. Constitutionalism is then perceived as entrenching these structures of subordination and exploitation, insulating them from democratic change. This ambivalence is not exclusive to the South. It is in fact a core of the Marxist critique of the state and its law in general. However, it is interesting to realize that in response to these ambivalences and contradictions, the legal and constitutional orders of the South display more pronounced, flexible, and multifaceted reactions to the law of the state.<sup>56</sup> They also created alternative and partly collectivized avenues and instruments to use the law but also to resist the law and the state.<sup>57</sup>

Schilling-Vacaflor (eds), *New constitutionalism in Latin America. Promises and Practices* (Ashgate, 2012) 73; Kwasi Prempeh, ‘Africa’s “constitutionalism revival”: False start or new dawn?’ (2007) 5(3) *ICON* 469.

55. On this ambivalence see Baxi (fn 35); on the historical roots of attitudes towards the law, see Yves Dezalay and Bryan Garth, *Asian Legal Revivals* (University of Chicago Press, 2010).

56. Siddharth de Souza, ‘Non-State Justice Systems’ in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (2019, online); Tanja Herklotz, ‘Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women’s Movement and the Indian Supreme Court’ (2016) 49(2) *VRÜ/WCL* 148; Gavin Anderson, ‘Societal Constitutionalism, Social Movements, and Constitutionalism from Below’ (2013) 20(2) *IndJGlobalLegalStud* 881; Boaventura de Sousa Santos and Cesar Rodriguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, 2005).

57. Mauro Cappelletti and Bryant Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective* (A. W. Sijthoff, 1978); David Mason, ‘Access to Justice in South Africa’ (1999) 17 *Windsor Yearbook of Access to Justice* 230; Julia Eckert (ed), *Law Against the State: Ethnographic Forays into Law’s Transformations* (Cambridge University Press, 2014); Partha Chatterjee, *Lineages of the Political Society* (Columbia University Press, 2011); Anuj Bhuiwalia, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge University Press, 2017); Allan Brewer-Carías, ‘The Amparo as an Instrument of a *Ius Constitutionale Commune*’ in Armin von Bogdandy, Eduardo Ferrer Mac-Gregor and Mariela Morales Antoniazzi et al. (eds), *Transformative Constitutionalism in Latin America. The Emergence of a New *Ius Commune** (Oxford University Press, 2017) 171; Juan Jose Reyven, ‘Der Grundrechtsschutz

### 3 NORTHERN IMPLICATIONS: NEW THEMES, BROADER UNDERSTANDINGS

The world of constitutionalism and comparative constitutional studies looks profoundly different once the colonial challenge is taken seriously. It changes not only our understanding of Southern constitutionalism and our approach, but triggers a number of other questions. In fact, the Southern turn is an intellectual provocation that has a number of Northern and global implications. I want to point to three implications and research areas that will profit from taking the Southern turn, as an approach to doing CCS.

#### 3.1 Geographic implications: constitutionalism of the former colonizers

One surprising aspect when thinking about colonial legacies is the almost complete absence of their reflection in the constitutional law of the former colonizers. But surely, empires had a profound impact on the constitutional regimes and thinking not only in the colonies but also in the colonizing metropolises that have legacies and repercussions there today. The Southern turn opens up a variety of new research areas concerning the distinctive constitutional experiences of colonialism and its legacies in the North and the role of law and lawyers in that regard. Three areas come readily to mind.

A first area is studying the role of Northern law and lawyers in enabling and structuring colonialism, which would involve a renewed look into the legal and academic history of constitutional and public law from the eighteenth to the middle of the twentieth century in European countries. These were foundational centuries for European constitutionalism but hardly studied in their colonial dimensions in France, England, Spain and most other European nations. With regard to Germany, which was only created as a nation-state in 1871 and became a colonial power following the Berlin conference in 1885, initial research in this direction is fascinating.<sup>58</sup> It recalibrates the understanding of the separation of powers by showing how parliament and the crown struggled over primacy in controlling colonial and domestic budgets. It also provides insights into the darker side of the rule of law and parliamentary rule, which are regularly celebrated in their domestic dimension but were built on arbitrariness and an unchecked executive power in the colonies – reflecting the façade-providing but ultimately arbitrary and racist use of administrative law.<sup>59</sup> These colonial dimensions in German public law

(Habeas Corpus, Recurso de Amparo) im argentinischen Recht' (1970) 3(2) VRÜ/WCL 179; Detlef Kantowsky, 'Indische Laiengerichte. Die Nyaya Panchayats in Uttar Pradesh' (1968) 1(2) VRÜ/WCL 140.

58. See Philipp Dann, Isabel Feichtner and Jochen von Bernstorff (eds), *(Post)koloniale Rechtswissenschaft* (Mohr Siebeck, 2022). For an English language reflection of this research, see (forthcoming) Philipp Dann, 'Reversing the gaze: (post)colonial dimensions in German law and legal academia' (2023) 56 VRU-WCL. On the history of German colonialism, see S. Conrad, *German Colonialism* (Oxford University Press, 2011); on the Berlin conference, Matthew Craven, 'Between Law and History' (2015) 3 London Review of International Law 31.

59. See the contributions by Andreas Gutmann and Felix Hanschmann ('Staatsorganisationsrecht: deutsche Kolonialgebiete im Verfassungsrecht des Deutschen Reiches', p. 45), by Christian Waldhoff ('Kolonial-Finanzverfassung: Die Finanzierung der deutschen Kolonien und deren Rückwirkungen auf die Verfassung des Kaiserreichs', p. 67) and by Pascale Cancik ('Strukturen des Kolonialverwaltungsrechts im Deutschen Kaiserreich', p. 123) in Dann et al (fn 58).

show a deep involvement of lawyers in colonialism, but also a significant impact on the constitutional law and constitutionalism in Germany. Surely, similar observations can and will be made for other European states.<sup>60</sup>

Research in a second field would shine light on the moment of formal decolonization and the legacies of colonialism in Northern constitutionalism thereafter.<sup>61</sup> For France, the UK, Portugal and the Netherlands, the end of colonial rule in the mid-twentieth century triggered profound disruptions and coincided with a national reinvention. While not difficult to imagine, this remains mostly unstudied, and it is yet to be spelled out how the concepts of citizenship, border, democracy or sovereignty reflect these legacies.<sup>62</sup> In addition, economic reorganization of these countries after losing direct imperial control deserves attention. The legal dimensions of this are (again) yet to be studied. The economic questions also point to another fruitful field of inquiry: the European integration.

There has been hardly any recognition of the fact that European integration emerged precisely at the moment (1950s and 1960s) when the empires collapsed, and there are no studies of the role of colonial legacies in the process of European integration and its law more generally.<sup>63</sup> The connections are not difficult to trace, however. It is fascinating to observe, for example, that the very rhetoric of the civilizing nature of law that provided the tune for colonialism in nineteenth century international law, reappears in hailing the role of law in furthering European integration as a process to overcome barbaric nationalism in the spirit of European civilization.<sup>64</sup> Studying EU law and its history through this (post)imperial lens also raises, for example, a question about whether there are European functional equivalents to colonial

60. See for France: Albane Geslin, Carlos Miguel Herrera, Marie-Claire Ponthoreau (eds), 'Postcolonialisme et droit' (2020); the Netherlands: Karin van Leeuwen 'Rights for Others', available at: <<https://verfassungsblog.de/rights-for-others-firing-back/>> (accessed 29 May 2023); for Great Britain: Thomas Poole, *Reason of State: Law, Prerogative and Empire* (Cambridge University Press, 2015); Dylan Lino, 'Albert Venn Dicey and the Constitutional Theory of Empire' (2016) 36(4) *Oxford Journal of Legal Studies* 751–80; Jordan Rudinsky, 'James Bryce's Home Rule Constitutionalism and Victorian Hagiography' in Edward Cavanagh (ed), 'Empire and Legal Thought' (2020) 492; John Finnis, 'Common Law Constraints: Whose Common Good Counts?', Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper 10/2008.

61. Maldonado and Riegner (fn 35). Again, historical research (in contrast to legal historical research) is earlier but incomplete, see Martin Thomas and Andrew S. Thompson (eds), *The Oxford Handbook on the Ends of Empire* (Oxford University Press, 2019) (a handbook of 37 contributions, which widely ignore the role of law and lawyers).

62. Again for Germany, see e.g. Fischer-Lescano, 'Deutschengrundrechte: Ein kolonialistischer Antagonismus' in Dann et al (fn 58) 339; for an early attempt regarding France, see Amélie Imbert, 'Une histoire du droit des libertés française post-coloniale est-elle possible?' in Albane Geslin, Carlos Miguel Herrera and Marie-Claire Ponthoreau (eds), *Postcolonialisme et droit* (Éditions Kimé, 2020) 93.

63. For first recent inquiries in historical research, see Peo Hansen and Stefan Jonsson, 'Another Colonialism: Africa in the History of European Integration' (2014) 27 *Journal of Historical Sociology*, 442; Peo Hansen and Stefan Jonsson, 'Eurafrica Incognita: The Colonial Origins of the European Union' (2017) 7 *History of the Present* 1; Megan Brown, *The Seventh Member State* (Harvard University Press, 2021); Signe Larsen, 'European Public Law after Empires' (2022) 1 *European Law Open* 5; and our common research project, available at: <<https://www.rewi.hu-berlin.de/en/lf/l/dnn/res>> (accessed 29 May 2023).

64. Joseph H.H. Weiler, *The Constitution of Europe* (Ch. 10: To be a European Citizen) (Cambridge University Press, 1999) 324 (347).

structures or new divisions of labour between domestic and regional law. Thinking in reverse, we could also inquire into how colonial legacies were and are impediments to European integration (which seems obvious when thinking about the UK, but surely has other applications too).<sup>65</sup>

Research in these fields will involve difficult inquiries into continuities and ruptures, amnesia and chosen amnesia, and might reconfigure European understandings of constitutionalism generally and profoundly. It is evident that the simple story of the European nation-state and national constitutional traditions is connected to and clashes with the colonial and transnational dimensions of these very states at the time of their emerging constitutionalism before the end of empire as much as afterwards. At the same time, these stories will (again<sup>66</sup>) be very different from country to country, society to society.<sup>67</sup> They are connected to very different national cultures of memory, of national self-perceptions and preoccupations. To relate this by way of example again to my German background, there are various reasons for the almost complete absence of reflections on colonial legacies.<sup>68</sup> These include: the history of formal colonialism ended relatively early (in 1919 after World War I); colonialism is in German memory overshadowed by the experience of Nazi fascism, which in turn is not understood as an imperial endeavour; the perceived urgency and dominance of the Cold War in public and legal perception; and the doctrinal training of the German legal academy that hinders engagement with the political economy and history of that law. Nevertheless, these factors don't explain why we shouldn't finally aim for a more complete picture and study these questions today – including their consequences, such as demands for compensation.<sup>69</sup>

One more point is fundamental. Countries in Europe were colonizers but also colonized. The constitutional history and memories of countries in Eastern Europe, pent-up between Germany and Russia, reflect that, but so do those of Ireland and perhaps even of Scotland.<sup>70</sup> It is important to remember that Europe itself has a centre and peripheries. All of these questions connect to an emerging field of scholarship on the variety of constitutionalism in Europe and imaginaries of Europe.<sup>71</sup> On a more

65. On larger implications of such research, Gurminder K. Bhambra, 'A Decolonial Project for Europe' (2022) 60 *Journal of Common Market Studies* 229.

66. See the distinction between macro-commonalities and micro-divergences in Dann et al (fn 5).

67. Uladzislau Belavusau and Aleksandra Gliszczynska-Grabias (eds), *Memory and Law* (Cambridge University Press, 2017); Uladzislau Belavusau and Aleksandra Gliszczynska-Grabias, 'The Remarkable Rise of "Law and Historical Memory" in Europe: Theorizing Trends and Prospects in the Recent Literature' (2020) 47 *Journal of Law and Society* 325.

68. Philipp Dann, *Reversing the Gaze* VRU-WCL 2023 (fn 58).

69. Matthias Goldmann, 'The Ovaherero and Nama Peoples v. Germany: Declaration of Matthias Goldmann before the SDNY Court' (25 April 2018), available at: <<https://ssrn.com/abstract=3169852>> (accessed 29 May 2023).

70. John Reynolds, 'Peripheral Parallels? Europe's edges and the World of Bandung' in Luis Eslava, Michael Fakhri, and Vasuki Nesiiah (eds), *Bandung, Global History and International Law* (Cambridge University Press, 2019) 247; James Fowkes and Michaela Hailbronner, 'Decolonizing Eastern Europe: A global perspective on 1989 and the world it made' (2019) 17(2) *ICON* 497; William Partlett and Herbert Küpper, *The Post-Soviet as Post-Colonial: A New Paradigm for Understanding Constitutional Dynamics in the Former Soviet Empire* (Edward Elgar, 2022).

71. Signe Larsen, 'Varieties of Constitutionalism in the European Union' (2021) 84 *Modern Law Review* 477; Jan Komarek, 'European Constitutional Imaginaries: Utopias, Ideologies and the Other' University of Copenhagen Faculty of Law Research Paper 2020.

general level, it is important to keep in mind that colonialism was not only a maritime endeavour but there were also various forms of land-based colonialism, imperialism or empire. We are only slowly realizing the broader contours and implications of these structures in law and public perceptions.

### 3.2 Theoretical implications: Liberal and other varieties of constitutionalism

Reflecting and understanding the legacies of colonialism will also enrich the recent debates about the varieties of constitutionalism and hence constitutional theory at large. When the new wave of CCS emerged (1990s and 2000s), the field was dominated (if not monopolized) by a certain brand of Western liberal constitutionalism.<sup>72</sup> In the past years, however, discussions about the varieties of constitutionalism have taken off.<sup>73</sup> Whether it is transformative constitutionalism, authoritarian legalism, gendered constitutionalism or in fact liberal constitutionalism, this is a serious attempt to better differentiate between paths and elements of constitutionalism. A Southern perspective adds to this debate, asking how colonial legacies and peripheral situatedness have shaped constitutional experiences and produced constitutional models.

To demonstrate the productive nature of the Southern turn for these debates on constitutionalism, I want to show how factoring in and reflecting on Southern experiences of constitutionalism enriches our understanding and discussion of *liberal* constitutionalism.<sup>74</sup> Such reflection has three directions: it helps to sharpen critiques of liberal constitutionalism, it helps to decipher varieties of constitutionalism, and it points to a perceived visionary void in liberal constitutionalism. I will explain these directions and reflections in turn.

In terms of the critique liberal constitutionalism, two main points stand out from a Southern perspective. One is the epistemological critique of ‘othering’ (in which non-Western concepts are juxtaposed to Western concepts and deemed merely particular, whereas Western concepts are considered universal and superior) and of the skewed structures of knowledge production that remain dominated by Western actors, Western fora, and Western themes.<sup>75</sup> The second critique is an economic or material one, or one of political economy more broadly, and addresses two problematic promises of liberal constitutionalism. The first is that individual rights (especially the individual right to private property) organized in a free-market economy will lead to economic growth and that this will trickle down to the benefit of society as a whole. The other promise is that the individual right to vote and other political rights in a democratic system will address the needs of all. The reality, as we all know, often looks very different. Private property can privilege some, and the right to vote has a limited impact

72. If this is not obvious, then it is indicative to look at the early discussions on and critique of the transfer of constitutional ideas, see Noah Feldmann, ‘Imposed Constitutionalism’ (2004–5) 37 *Connecticut Law Review* 857; Philipp Dann and Zaid Al-Ali, ‘Internationalized Pouvoir Constituant’ in *Max Planck Yearbook* 10 (2006) 423; Gunter Frankenberg (ed), *Order from Transfer* (Edward Elgar, 2013); Sujit Choudhry (ed), *Migration of Constitutional Ideas* (Oxford University Press, 2009).

73. Mark Tushnet, ‘Varieties of Constitutionalism’ (2016) 14 *ICON* 1; See Michael Wilkinson and Michael Dowdle, *Constitutionalism Beyond Liberalism* (Cambridge University Press, 2017); Martin Loughlin, *Against Constitutionalism* (Harvard University Press, 2022).

74. Some more thoughts in this regard, Philipp Dann, ‘Liberal Constitutionalism and postcolonialism in the Global South and Beyond’ (2022) 20 *ICON* 1.

75. Bonilla (fn 4); B. De Sousa Santos, *Epistemologies of the South* (Routledge, 2014).

on power structures. This has a domestic dimension in the South (as much as in the North), but also a global, entangled, multilevel dimension. The economic as well as the political structure of center and periphery that emerged under colonialism in many forms still persists. Liberalism is here linked to capitalism, which becomes exploitative, not least when looked at from a Southern perspective.<sup>76</sup>

Reflecting on liberal constitutionalism from a Southern perspective also helps to develop a broader understanding of the varieties of liberal constitutionalism itself. More concretely, the question here is whether constitutions in the South have developed a new variety of liberalism or something entirely new.<sup>77</sup> This question about the liberal nature of Southern constitutionalism is closely connected to the debate about another type of constitutionalism: transformative constitutionalism. The notion of transformative constitutionalism was introduced, as is well known, with an eye on the South African post-apartheid constitution.<sup>78</sup> It soon travelled to other constitutional contexts (in particular to India and Latin America by way of it being used in literature and courts there).<sup>79</sup> Especially in the early phase of this discussion, it was often understood as post-liberal and a Southern counter-model to (supposedly Northern) liberalism.<sup>80</sup> The care for the common good and general welfare, the protection not just of individual, negative rights but also positive, potentially group (minority) rights and the role of constitutions in overcoming or dealing with past wrongs were seen as distinguishing elements. Soon again, however, it was pointed out that these elements marked not really a contrast to Northern types of constitutionalism but rather a contrast to a very particular, US-American instantiation of liberal constitutionalism.<sup>81</sup> It became clear that many Southern constitutions were indeed not liberal in the US-sense but still liberal in the sense of a social-liberal or social-democratic model that was important in much of twentieth century constitution-making (and hence perhaps not post-liberal but rather post-American).

This discussion points to another important insight, namely the long tradition of liberal ideas in the South, where liberal arguments were in fact used to counter

76. Upendra Baxi, *Human Rights in a Posthuman World* (Oxford University Press, 2009); M. Somaraja, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015); Gargarella (fn 45).

77. On this Theunis Roux, 'Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa' (on file with the author). See also Berihun Adugna Gebeye, 'Stability of Constitutional Structures and Identity Amidst "Political Settlement": Lessons from Kenya and Israel' (2023) 1(1) *Comparative Constitutional Studies* (advance).

78. Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) *SAJHR* 146; but see also Pius Langa, 'Transformative constitutionalism' (2006) 17(3) *Stellenbosch Law Review* 351; James Fowkes, 'Transformative Constitutionalism and the Global South: The View from South Africa' in Armin von Bogdandy, Eduardo Ferrer Mac-Gregor and Mariela Morales Antoniazzi et al. (eds), *Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune* (Oxford University Press, 2017) 97.

79. Vilhena, Baxi and Viljoen (fn 43); Bhatia (fn 47); Armin von Bogdandy and René Urueña, 'International Transformative Constitutionalism in Latin America' (2020) 114 *American Journal of Comparative Law* 402.

80. Upendra Baxi, 'Preliminary Notes on Transformative Constitutionalism', p. 19; but see also Modiri and Madlingozi (who conceive TC as part of the legitimating ideology for neo-apartheid).

81. Theunis Roux, 'Remarks on Professor Baxi' in Vilhena, Baxi and Viljoen (fn 43) 48; Michaela Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South' (2017) 65(3) *Am. J. Comp. Law* 527.

colonialism,<sup>82</sup> and where rights arguments are used against neoliberal global governance. It is clear that there is no Western ownership of liberalism. In the same way that Marxism is not a Western concept, liberalism is not a Western concept either. It is an open source that has been used all over the world.

Finally, a third direction in which thinking about constitutionalism through the lens of Southern experiences might be helpful lies in pointing to a perceived void in liberal constitutionalism: namely, a visionary void. When we look at the longer history of liberal thought and constitutionalism, we see that liberal thought was actually visionary and progressive in the beginning, i.e. in the French revolution and in the nineteenth century, when it led to the abolition of feudalism and the constitutional declaration of formal equality of citizens. But to many, it has lost this visionary dynamic – especially since the end of the Cold War. When Fukuyama observed the (conceptual) end of history in a liberal world, he stated the merely presentist nature of the liberal order today.<sup>83</sup> In contrast, many argued that other political theories are providing more ideas for the future than liberalism – and that might be part of the allure of other constitutional models, such as transformative constitutionalism understood as a Southern alternative that encapsulates the idea of a more just, transformed society.<sup>84</sup> I think that such an understanding is ultimately based on a misconceived narrowing of liberal constitutionalism to neoliberal, market-focused version of liberalism. But it nonetheless signals the dimension of neoliberal dominance and social-liberal frustrations.

If the Southern turn helps to understand liberal constitutionalism in these ways, it also helps thinking beyond liberal constitutionalism. Taking a Southern turn and studying Southern experiences is useful to broaden the constitutional conceptual vocabulary and sharpen our lens. In fact, Southern scholars have helped to generate new trends and elements of constitutionalism, such as military constitutionalism, fourth branch institutions or pluri-national and climate constitutionalism to name but a few examples.<sup>85</sup> In a way, the South is a treasure trove of constitutional innovations and theorizing and the Southern turn should be an intellectual provocation and even more an invitation to understand them.

### 3.3 Thematic implications: the example of the laws of democracy

While the Southern turn provides a geographical impulse (turning its attention to South and North) and a theoretical impulse (reinvigorating thinking about varieties of constitutionalism), it also provides a thematic impulse. It triggers us to rethink long-established concepts and notions. By way of example, I want to describe one area in which I work and where I find a Southern turn very productive: namely, thinking about representative democracy. It is an example of how to utilize the Southern turn approach for a general inquiry that could be conducted anywhere.

82. Uday Singh Mehta, *Liberalism and Empire* (University of Chicago Press, 1999).

83. Francois Hartog, *Regimes of Historicity* (Columbia University, 2015).

84. On temporality as (another) fascinating angle to study constitutionalism, see Philipp Dann, 'Liberal constitutionalism and temporality' in Tanja Börzel, Johannes Gerschewski and Michael Zürn (eds), *Contestations of the Liberal Script* (forthcoming Oxford University Press, 2023).

85. Evandro Sussekind, available at: <<https://verfassungsblog.de/the-armed-forces-and-the-constitution-in-brazil/>> (accessed 29 May 2023); T. Khaitan, 'Guarantor Institutions' (2021) 16 *Asian Journal of Comparative Law* 40.

Even though the political dimension of constitutionalism (and hence constitutionalism beyond courts) has been a stepchild of CCS for a long time, it is an important domestic field and an emerging comparative field. A central theme of political constitutionalism in this sense is the laws of democracy. Studies in this area examine the institutions and procedures of democratic process (elections, free speech therein, campaign finance), of democracy's formal institutions and their rules (parliaments, election commissions, etc.) and a number of informal actors (political parties, social movements, the people, etc.).<sup>86</sup>

An inquiry from the perspective of the Southern turn would ask: what do these laws and practices look like through a Southern lens? It would consider how these rules and practices are shaped by a colonial past, and how its legacies and dominant notions are based on particular European, but then universalized, experiences.<sup>87</sup> It would apply the theoretical and methodological approach sketched out above: practise epistemic flexibility, and multi-perspectival, relational and methodological pluralism — especially by paying attention to the political economy in the emergence, use and understanding of the legal/constitutional concepts and anthropology of political process as it unfolds within a given constitutional frame.<sup>88</sup>

Such an approach could focus on various aspects, and I want to give two examples. The first could be the foundational concept of the public sphere. In (Western) political theory, the emergence of a general public sphere and an active civil society in the nineteenth century was a central precondition for the emergence of mass/representative democracy and is a central building block of its functioning.<sup>89</sup> In many societies in the South, the history and constellations were different. While there is surely an equivalent to civil society in most countries in the South, there is also an observation of a different dynamic of public deliberation, the existence of a broad political society and more often multilingual settings.<sup>90</sup> It would be fascinating to inquire how these distinct realities in different places shaped and interacted with the law, building on the emerging field of comparative political and democratic theory.<sup>91</sup>

A second example could be the concrete law of the parliamentary process and procedure. Multi-linguism, the instability of party-affiliation and traditions of agitational democracy create different dynamics of representative democracy in parliaments.<sup>92</sup>

86. For the US, Samuel Issacharoff, Pamela Karlan, Richard Pildes and Nathan Persily, *The Law of Democracy* (Foundation Press, 2016); comparing the respective regimes in India and the EU see Philipp Dann and Arun Thiruvengadam (eds), *Democratic Constitutionalism in India and the European Union* (Edward Elgar, 2021).

87. It is an approach similar to that of TWAIL authors, who examine international law. It can engage with the whole vocabulary of constitutionalism (rights, constituent power, etc.).

88. Julia Eckert, 'The Power of Action' (2001) 51(1/2) *Sociologus* 89; Julia Eckert, 'Anthropology and political participation' in Marco Giugni and Maria Grasso (eds), *The Oxford Handbook of Political Participation. Oxford Handbooks* (Oxford University Press, 2022) 101; Tania Li, 'Politics, Interrupted' (2019) 19 *Anthropological Theory* 29–53.

89. Jürgen Habermas, *Structural Transformation of the Public Sphere* (MIT Press, 1962) (English translation 1989).

90. Partha Chatterjee, *Lineages of the Political Society* (Columbia University, 2007).

91. Andrew March, 'What is Comparative Political Theory?' (2009) 17 *The Review of Politics* 531.

92. William Selinger, *Parliamentarianism* (Cambridge University Press, 2019); on Arab parliamentarism see: <<https://jura.ku.dk/cccs/arab-parliamentarism>> (accessed 29 May 2023); Ronojoy Sen, *House of the People: Parliament and the Making of Indian Democracy* (Cambridge University Press, 2022).

From the perspective of (Western) political theory, such dynamics are seen as deficient, not simply distinct. An inquiry based on a Southern turn would contextualize Western standards with a view to (post)colonial legacies and Southern/local realities.

#### 4 CONCLUSION: TOWARDS WORLD COMPARATIVE LAW

In the scholarship on public *international law*, the Southern turn was taken 20 years ago. TWAIL, as it is known there, has reshaped our thinking about international law profoundly – our understanding of a past that lingers on in legal doctrine and conceptual structures. If international law is any guide, a Southern turn has the potential to touch foundations and complicate convenient story lines of domestic public law in similar ways.<sup>93</sup>

But then again, not every field and concept in public law has a relevant colonial history and there is no idea of totality here. The Southern turn should rather be seen as an intellectual provocation, invitation and trigger for rethinking ideas and understandings. This can be very productive. One could contend, for example, that the curious oscillation in CCS between expansion and contestation<sup>94</sup> is connected and to some extent explained by this curious gap in the middle of constitutional studies: the reluctance to deal with the legacy of colonialism and empire in the constitutional regimes around the world.

The Southern turn, however, has a complex matrix and expansive reach in that it addresses South and North as much as substance, process and structures of research. In geographic terms, it is not only about the South but equally about the North and about the entanglement of North and South. It is generally about the history and legacy of colonialism in public law, the persistent structures of centre and periphery. If we take seriously the metaphor of the turn, it is a (geographic) double turn: after the pivot to the South, it turns back to the North and to the world as a whole. It promises new insights for constitutional law in general. The entangled nature of North and South means that one cannot be understood without the other. The complementary notion of the Global North may, *mutatis mutandis*, be useful in rethinking the distinctive constitutional experience of Euro-America in a global framework.

At the same time, the Southern turn is also not only about geographies and substance but equally about how we conduct research and the institutional structures in which we do so. It is about institutional power. It urges us to interrogate the very grammar and foundational notions and assumptions of the discipline through the lens of their colonial past as much as the institutional and educational structures

93. But this is also not sure. One might wonder whether the impact of considering colonial legacies will be as broad in comparative constitutional law as in public international law scholarship. In international law you cannot get away from colonialism once you start inquiring; the instrumentality of international law is just too obvious here (think of the definition of sovereignty to exclude non-European societies or the very concept of terra nullius). The instrumentality might be more hidden in domestic law.

94. I mean the oscillation between the considerable expansion of constitutional regimes and the surge in comparative constitutional studies over the past 30 years on one hand – and the manifold contestations of constitutionalism by the rise of autocratic legalism, which only mimics or mocks it, but also by the dramatic rise of inequalities and destruction of natural living space, which we cannot disentangle from the liberal constitutional structures of the world today, on the other hand.

in which we do it. Global legal academia has to be more self-reflective about the conditions in which it produces knowledge.

Ultimately, what a Southern turn in substantive but even more in an epistemological and methodological way should bring about is not a separate field of Southern studies but a renewed and reflective approach that will bring about a comparative legal and constitutional studies that is mindful of legacies and potentials.

The vision (if there is one and if this is the right term) is one of a world comparative law. This is different than ‘global constitutionalism’, which has been interpreted and understood too much in my understanding as the globalization of a rather distinct North-Western liberal model. World comparative law, in contrast, rather highlights the engagement with the plurality of constitutional experiences and cultures and an understanding of their shared colonial pasts. ‘World comparative law’ then, more like in ‘world music’, should not be viewed as an advertising gimmick but as an invitation to a serious engagement with and comparison of manifold traditions and structures.<sup>95</sup> It is a call to provincialize Europe surely, but in the context of CCS perhaps even more to provincialize the US, the constitutional thinking of which has been so dominant in this field. It is also a call to relativize the importance of English as the dominant language. The vision then is of CCS that does not bow to any one centre but engages with the distinctive but entangled constitutional regimes all over the world.

The Southern turn is, to start with, a descriptive approach. But it turns normative, when you add your own position. Writing from a place and time where and when the liberal tenets of our constitutional order (individual and collective self-determination) are under serious threat, there is no doubt that liberal constitutionalism should be defended as the main guardian against chauvinist authoritarianism. But it is central to take into account that liberalism has many varieties and various flaws (including the for the longest time hypocritical ignorance of colonial violence and material outcomes). Critical approaches, including post- and decolonial studies are central to reflect and improve it. Such approaches have to be defended against nativist misuse and camouflage. The Southern turn and its Northern implications are then also an intellectual path to protect and advance liberal emancipatory promises and social mobility.

95. On this approach in musicology, see e.g. the *Cambridge History of World Music* (edited by Philip V. Bohlmann) and in particular Bruno Nettl, ‘On World Music as a concept in the history of music scholarship’ in Philip V. Bohlmann (ed), *World Music* (Oxford University Press, 2013) 23, referencing among others S.M. Tagore, *Universal History of Music* (Varanasi, 1896). For a similar discussion in art theory, see Juliane Rebentisch, *Theorien der Gegenwartskunst* (Junius Verlag, 2014) 185; Terry Smith, ‘Contemporary Art’ in Hans Belting, Buddensieg and Peter Weibel (eds), *The Global Contemporary and the Rise of New Art Worlds* (MIT Press, 2013) 186.