

The Global South and Comparative Constitutional Law

Edited by

PHILIPP DANN, MICHAEL RIEGNER,
and MAXIM BÖNNEMANN

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

© Oxford University Press 2020

The moral rights of the authors have been asserted

First Edition published in 2020

Impression: 1

All rights reserved. No part of this publication may be reproduced, stored in
a retrieval system, or transmitted, in any form or by any means, without the
prior permission in writing of Oxford University Press, or as expressly permitted
by law, by licence or under terms agreed with the appropriate reprographics
rights organization. Enquiries concerning reproduction outside the scope of the
above should be sent to the Rights Department, Oxford University Press, at the
address above

You must not circulate this work in any other form
and you must impose this same condition on any acquirer

Crown copyright material is reproduced under Class Licence
Number C01P0000148 with the permission of OPSI
and the Queen's Printer for Scotland

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2020937991

ISBN 978-0-19-885040-3

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

Links to third party websites are provided by Oxford in good faith and
for information only. Oxford disclaims any responsibility for the materials
contained in any third party website referenced in this work.

Acknowledgements

CP.P1

CP.P2

This book has a really long history, even for standards of publishing edited volumes in legal academia. It is based on the proceedings of a conference that took place in 2017 at Humboldt University in Berlin. But this is not its entire pedigree. Rather, the conference and with it this book grew out of the fifty-year history of the journal *Verfassung und Recht in Übersee/World Comparative Law (VRÜ/WCL)* that we commemorated and celebrated with the 2017 conference. Founded in the late 1960s in Hamburg, Germany (of all places) out of sheer curiosity about the constitutional developments in the then ‘newly independent countries’, the *VRÜ/WCL* became a platform for a global exchange about public law in the Global South for decades to come. It was founded by Professor Herbert Krüger, who also created an academic association to feed into the journal (the ‘Arbeitskreis für überseeische Verfassungsvergleichung’), and edited many years in particular by Professor Brun-Otto Bryde and Professor Philip Kunig, who also continued to organize the association.

AQ: It's not clear this association name needs to be in quotation marks? Please delete unless there's a specific reason to retain.

CP.P3

We are immensely grateful to the daughter of the founder, Gabriele Krüger, who has continued to generously support the journal and the academic association ever since and the 2017 conference in particular. We also thank in particular Brun-Otto Bryde for his continued support in all these *VRÜ*-related endeavours, and the larger editorial board.

CP.P4

Philipp Dann—Michael Riegner—Maxim Bönnemann

CP.P5

Berlin, March 2020



Contents

<i>List of Contributors</i>	xiii
1. The Southern Turn in Comparative Constitutional Law: An Introduction	1
<i>Philip Dann, Michael Riegner, and Maxim Bönnemann</i>	
A. Introduction and Argument	1
B. Towards a Southern Turn in Comparative Constitutional Law	3
1. The notion of the Global South and its use in neighbouring disciplines	5
2. The Global South in comparative constitutional law: a brief intellectual history	7
(a) <i>Comparative constitutional law for the Global South</i>	11
(b) <i>Comparative constitutional law with the Global South</i>	12
(c) <i>Comparative constitutional law from the Global South</i>	13
C. Southern Constitutionalism as Distinctive Constitutional Experience	14
1. Context: the colonial experience and geopolitical asymmetries	15
2. Themes: socio-economic transformation, political organization, and justice	18
(a) <i>Constitutionalism as socio-economic transformation</i>	18
(b) <i>Constitutionalism as site of struggle about political organization</i>	23
(c) <i>Constitutionalism as denial of and access to justice</i>	27
D. Implications for Comparative Constitutional Scholarship	30
1. Epistemic reflexivity	31
2. Methodological pluralism	33
3. Institutional diversification, collaboration, slow comparison	35
E. Conclusion	36
PART I: THEORIZING THE GLOBAL SOUTH IN COMPARATIVE CONSTITUTIONAL LAW	
2. Facing <i>South</i> : On the Significance of an/other Modernity in Comparative Constitutional Law	41
<i>Florian Hoffmann</i>	
A. Prolegomenon	41
B. On Nomenclature	43
C. Facing (the) <i>South</i> in Legal Modernity	50

AQ: Please just check/confirm that the 3 authors of the Introduction do not need to be included in the List of Contributors (or revise).

viii CONTENTS

D. <i>The South in the West: Ideology Critique and Epistemic Justice</i>	57
E. <i>The South as the West: Towards (a) Meridional Modernity</i>	63
3. (Global) Constitutionalism and the Geopolitics of Knowledge	68
<i>Christine Schwöbel-Patel</i>	
A. Introduction	68
B. The Geopolitics of Knowledge and Constitutionalism	70
C. Global Constitutionalism and Neoliberalism: A Brief Genealogy	74
1. The first generation of global constitutionalists	75
2. The second generation of global constitutionalists	76
3. The third generation of global constitutionalists	80
D. Decolonizing Global Constitutionalism?	83
E. Conclusion	85
4. Comparing as (Re-)Imagining: Southern Perspective and the World of Constitutions	86
<i>Zoran Oklopcic</i>	
A. Introduction	86
1. <i>Constituting</i> : in contemporary constitutional thought (and beyond)	88
2. <i>Comparing</i> : in contemporary constitutional studies	91
3. <i>Comparing</i> : in critical legal studies	94
4. On comparing (from a perspective)	97
B. Beyond Standpoints: Perception, Location, and Polemical Imagination	99
1. Global South and the (non-)urban way of life	103
C. The World of Constitutions beyond Juridical Metaphorology	106
5. Legal Innovation as a Global Public Good: Remaking Comparative Law as Indigenization	110
<i>Jedidiah J Kroncke</i>	
A. Introduction: A New Paradigm for Comparative Law	110
B. Comparative Law and National Competition	114
C. Leaving Behind the Parochial Past, Engaging the Global Present	119
D. Institutional and Pedagogical Duties of the Critical Comparativist	128
E. Conclusion: Comparative Law as Domestic Reform Stimulus	135

PART II: THEMES OF CONSTITUTIONALISM IN
THE GLOBAL SOUTH

6. Transformative Constitutionalism as a Model for Africa?	141
<i>Heinz Klug</i>	
A. Introduction	141
B. How to Understand Transformative Constitutionalism?	143
1. Constitutions as bridges or agents of change	145

CONTENTS ix

C. Constitutionalism in Postcolonial Africa	149
D. Transformative Constitutionalism and Constitutional Models	154
1. ‘Lawfare’ and transformative constitutionalism	157
2. The resurgence of African constitutionalism	160
E. Conclusion	161
7. Transformative Constitutionalism: A View from Brazil	165
<i>Diego Werneck Arguelhes</i>	
A. Introduction	165
B. Locating Transformative Constitutionalism	168
C. Divergent Paths to Transformative Constitutionalism: The Case of Brazil	172
D. Separation of Powers, Political Dynamics, and Optical Illusions	178
1. Democratic politics and judicial change	179
2. The ‘mission accomplished syndrome’	181
3. Not all judicial wins are victories for transformative constitutionalism	184
E. Concluding Remarks: Back to Politics?	187
8. Postcolonial Proportionality: <i>Johar</i> , Transformative Constitutionalism, and Same-Sex Rights in India	190
<i>Sujit Choudhry</i>	
A. Two Conceptions of Transformative Constitutionalism: Anti-Colonial and Cosmopolitan	190
B. Proportionality, Transformative Constitutionalism, and Constitutional Transitions	192
C. <i>Johar</i> : Cosmopolitanism and Anti-Colonialism	197
1. Cosmopolitanism	199
2. Anti-colonialism	203
D. Conclusion	208
9. Socio-Economic Rights and Expanding Access to Justice in South Africa: What Can Be Done?	210
<i>David Bilchitz</i>	
A. Access to Justice, Fundamental Rights, and the Global South	210
B. Access to Justice as a Capability	212
C. Barriers to Gaining Access to Remedies in Socio-Economic Rights Cases: The South African Experience	214
1. The individual dimension	215
2. The institutional dimension	217
(a) <i>The Public Protector</i>	218
(b) <i>The South African Human Rights Commission</i>	219
(c) <i>The courts</i>	221

X CONTENTS

D. Widening Access to Justice in Fundamental Rights	
Matters: Exploring the Possibilities	224
1. Expanding internal individual capabilities	224
2. Institutional solutions	227
(a) <i>Expanding the capacities of Chapter Nine institutions</i>	227
(b) <i>Expanding the capacity of courts and developing their structure</i>	228
(i) <i>Create specialist courts</i>	229
(ii) <i>Grant human rights jurisdiction expressly to lower courts</i>	230
(iii) <i>High court and Appellate jurisdiction focused on structural cases</i>	230
3. Scarcity and access to justice	232
E. Conclusion	234
10. Inequality and the Constitution: From Equality to Social Rights	235
<i>Roberto Gargarella</i>	
A. Three Different Approaches	235
B. The Republican Approach	236
1. Egalitarian reforms, rather than social rights	237
2. Legal, political, and economic changes	238
3. An anti-presidentialist drive	239
C. The Liberal-Conservative Approach	240
D. The Social-Conservative Approach	243
E. Conclusions: Lessons Learnt (or Not): How (Not) to Defend an Egalitarian Constitutional Approach	246
11. Same Bed, Different Dreams: Constitutionalism and Legality in Asian Hybrid Regimes	250
<i>Weitseng Chen</i>	
A. Introduction	250
B. Constitutionalism and Legality in Asian Authoritarian States	251
C. Conditions for Stable and Functional Constitutions and Legality in Hybrid Regimes	255
1. Fragmentation	255
2. Reconfiguration	257
3. Performance accountability	260
4. Discussion	262
D. From Authoritarian Legality towards Liberalism and Democracy	264
1. Linear theory	264
2. Pitfalls of the linear theory	265
3. The neutrality of legality	267
E. Conclusion	268
12. The Challenge of Transforming Mexican Authoritarian Constitutionalism	270
<i>Roberto Niembro Ortega</i>	

CONTENTS xi

A. Introduction	270
B. Common Features of Authoritarian Constitutionalism	273
C. Authoritarian Constitutionalism Reconsidered	276
1. Constitutions with an authoritarian or a liberal content?	276
2. Practical and ideological functions of liberal democratic constitutions in authoritarian constitutionalism	277
3. Constitutionalist discourse in authoritarian constitutionalism	280
(a) <i>Creating constitutional aspirations</i>	281
(b) <i>Making any real change implausible</i>	283
D. Some Examples of Mexican Authoritarian Constitutionalism	284
E. Conclusions	285
 <i>Index</i>	 289