The Southern Turn in Comparative Constitutional Law: An Introduction

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[forthcoming in: Dann/Riegner/Bönnemann (eds),
The Global South and Comparative Constitutional Law, OUP 2020]

A. Introduction and argument

Comparative constitutional law is not what it used to be. As a field of study, it has globalized geographically, diversified methodologically and pluralized epistemologically. Constitutional orders in Asia, Africa and Latin America have expanded the Euro-American horizon of the discipline. Critical comparatists and social scientists have provided new methodological tools to study constitutional orders across the North-South divide. "Southern voices" are more present in constitutional conversations, and the "Global South" is increasingly invoked in comparative debates.[1]

And yet, the Global South still seems to punch under its weight in constitutional conversations. While it represents "most of the world"[2] in terms of population and constitutions, it remains vastly underrepresented in global constitutional debates, teaching materials, publications, and conferences. Unlike in neighbouring disciplines, the Global South remains undertheorized as a concept, and no equivalent to "Third World Approaches to International Law" has emerged in comparative constitutional law.[3]

* We would like to thank Daniel Bonilla Maldonado, Deval Desai, James Fowkes, Florian Hoffmann and Michaela Hailbronner for valuable comments on an earlier version of this chapter. The text has also greatly benefitted from discussions and conversations with presenters and participants during and after the 50th anniversary conference of the Verfassung und Recht in Übersee / World Comparative Law journal in 2017.

[1] See only William Twining (ed), *Human rights, southern voices*: *Francis Deng*, *Abdullahi An-Na'im*, *Yash Ghai and Upendra Baxi* (Cambridge Univ. Pr. 2009); Daniel Bonilla Maldonado (ed), *Constitutionalism of the global South*: *The activist tribunals of India, South Africa, and Colombia* (Cambridge Univ. Pr. 2013); Michaela Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South', (2017) 65 (3) Am. J. Comp. Law 527.

[2] Partha Chatterjee, *The politics of the governed: Reflections on popular politics in most of the world* (Columbia University Press 2006).

[3] Zoran Oklopcic, 'The South of Western constitutionalism: A map ahead of a journey' (2016) 37 (11) Third World Quarterly 2080. On TWAIL see Obiora Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) 10 (4) International Community Law Review 371; James Gathii, 'TWAIL:

Against this background, this volume posits that it is high time for a "Southern turn" in comparative constitutional scholarship. It aims to take stock of existing scholarship on the Global South and comparative constitutional law and to move the debate forward. It brings together authors who all hail from, or are based in, the Global South and who represent a range of regions, perspectives and methodological approaches. The volume emerged from a conference on the occasion of 50th anniversary of the journal '*Verfassung und Recht in Übersee / World Comparative Law*' (VRUe / WCL), which has been dedicated since 1968 to legal developments outside Euro-America and has become an important platform for and archive of South-North dialogue.[4] Our own scholarly approach is informed by our work as editors of this journal, and by a number of other long-term scholarly projects connecting Southern and Northern constitutionalism.[5]

In this introductory chapter, we will contextualize, describe and frame this Southern turn in comparative constitutional scholarship. Our argument has three elements: First, we observe that "Global South" has already become a term used productively in neighbouring disciplines and legal scholarship, even though in very different and sometimes undertheorized ways. From this follows the question of how we could make sense of the notion in comparative constitutional law.

We argue, secondly, that the "Global South" is a useful concept to capture and understand a distinctive constitutional experience. This experience is shaped by the *distinctive context* that emerges from the history of colonialism and the peripheral position of the South in the geopolitical system, placing Southern constitutionalism in a dialectical relationship with its

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A brief history of its origins, its decentralized network, and a tentative bibliography' (2011) 3 Trade, Law and Development 26; Luis Eslava and Sundhya Pahuja, 'Beyond the (post)colonial: TWAIL and the everyday life of international law' (2012) 45 (2) VRÜ/WCL 195.

[4] For a history of WCL (formerly the "Law and Politics in Asia, African and Latin America"), see Brun-Otto Bryde, '50 years of "VRÜ / Law and Politics in Asia, Africa and Latin America": History and Challenges' (2018) 51 (1) VRÜ/WCL 3. For a discussion of our role and position as Northern scholars in this context, see below 5.

[5] Philipp Dann, 'Federal Democracy in India and the European Union: Towards Transcontinental Comparison of Constitutional Law' (2011) 44 (2) VRÜ/WCL 160; Philipp Dann and Felix Hanschmann, 'Post-colonial Theories and Law' (2012) 45 (2) VRÜ/WCL 123; Michael Riegner, 'Access to information as a human right and constitutional guarantee. A comparative perspective' (2017) 50 (4) VRÜ/WCL 332; Michael Riegner and Smarika Kumar, 'Freedom of expression in diverse democracies: Comparing hate speech law in India and the EU' in Philipp Dann and Arun Thiruvengadam (eds), *Democratic Constitutionalism in Continental Polities: EU and India compared* (Edward Elgar Publishing 2020), forthcoming; Maxim Bönnemann and Laura Jung, 'Critical Legal Studies and Comparative Constitutional Law' in Rainer Grote, Frauke Lachenmann, and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford Univ. Pr. 2017).

Northern counterpart. Three *distinctive themes*, so we continue to argue, characterize Southern constitutionalism: constitutionalism as an experience of socio-economic transformation; constitutionalism as a site of struggle about political organization; and constitutionalism as denial of, and access to, justice. Southern constitutionalism is hence a shared experience, shaped by similar macro-dynamics but also profoundly heterogeneous micro-dynamics. It is distinct from, and at the same time deeply entangled with, constitutionalism in the Global North.

From this observation of the South-North entanglement follows the third element of our argument: namely that taking the Global South seriously has implications for comparative constitutional scholarship as a whole. The Southern turn implies an approach to *doing* comparative law that improves our understanding of constitutional law in both North and South. Thinking about and with the "Global South" denotes a specific epistemic, methodological and institutional sensibility that reinforces the ongoing move towards more epistemic reflexivity, methodological pluralism and institutional diversification in comparative constitutional scholarship generally. In that sense, the Southern turn is also a double turn: After the pivot to the South, it turns back to the North and to the world as a whole.

The remainder of this chapter mirrors this argument and proceeds in three steps: First, we describe the use of the notion of 'Global South' in neighbouring disciplines, in comparative constitutional scholarship historically and today (B). We then sketch what we consider to be distinct about the constitutional experience in the South (C). From this we move on to describe the implications for comparative constitutional scholarship generally, mapping the contours of how to do "world comparative law" (D.). We conclude with a short self-reflection of our own positionality and role in the Southern turn (E).

B. Towards a Southern turn in comparative constitutional law

If comparative constitutional law wants to remain relevant in a multipolar world, it urgently requires a broader foundation. A discipline whose very *raison d'être* is to transcend individual legal orders but which continues to exclude most of the world, is bound to lose relevance.[6] Less than ever, the comparatist can afford overgeneralizations based on an unrepresentative

[6] On this understanding of comparative law as general jurisprudence, see William Twining, *General jurisprudence. Understanding law from a global perspective* (Cambridge Univ. Pr. 2009).

sample of Western legal orders.[7] But not only the discipline's quest for relevance urges us to turn to the Global South. Recognizing the constitutional experiences of the Global South is also a genuine question of epistemic justice. From colonial times to contemporary rule of law projects, Euro-American law has been exported, imposed and mimicked elsewhere, while other legal traditions have been either ignored or relegated to the sphere of the "local", "indigenous" or "pre-modern".[8] Taking these legal traditions seriously also highlights the deep entanglements, past and present, that continue to shape constitutional orders in both North and South and that require a transregional dialogue beyond the universalism-particularism dichotomy. A final reason for engaging with the Global South in comparative constitutional law is rather simple: it is intellectually productive. It not only adds innovative legal material for comparison, but also offers fresh theoretical perspectives, alternative ways of thinking and necessary irritations of disciplinary orthodoxies. Many of the themes in current global debates have been under discussion in Southern constitutional law for quite some time: the globalization of constitutional law; democratic constitutionalism beyond homogenous nation states; contestations of liberal constitutionalism and non-liberal varieties of constitutional government; the constitutionalization of social rights and welfare guarantees; the relationship between globalized capitalism, inequality and democratic constitutionalism; judicial review and state power; methodological debates between comparative constitutional law and comparative constitutional studies. The Global South speaks to all these debates, and offers a wealth of insights.[9]

Considering these reasons for a Southern turn, we first want to understand better its context – in three steps: We first analyse the history of the term and its productive use in other disciplines (1.). We then turn to legal scholarship and trace the treatment of Southern

[7] An exemplary error arising from an unrepresentative comparative sample is pointed out by Upendra Baxi's review of David Dyzenhaus "The Unity of Public Law" in Law and Politics Book Review 14 (2004) 799, at 804: "It is "plainly and surprisingly wrong" to state that the Canadian Supreme Court established in 1999 "for the first time in the common law world a general duty for administrative decision-makers to give reasons for their decisions … The Indian Supreme Court has already, and reiteratively, further with multiplier impacts in South public law jurisprudence, performed this feat ever since 1950!".

[8] Teemu Ruskola, *Legal orientalism*: *China*, *the United States*, *and modern law* (Harvard Univ. Pr. 2013); Turan Kayaoğlu, *Legal imperialism*: *Sovereignty and extraterritoriality in Japan*, *the Ottoman Empire*, *and China*, (1. paperback edn, Cambridge Univ. Press 2013).

[9] Boaventura de Sousa Santos, 'A new vision of Europe: Learning from the South' in Gurminder K. Bhambra and John Narayan (eds), *European cosmopolitanism*. *Colonial histories and postcolonial societies* (Routledge 2017) 173.

constitutionalism in comparative (constitutional) law over time (2.). We end with a brief overview of contemporary approaches to constitutional law in the South (3.).

1. The notion of the Global South and its use in neighbouring disciplines

Using the notion of "Global South" is an endeavour which requires explanation. Sceptics criticize that the term is too fuzzy to be analytically useful, that it lumps together very different legal orders with little normative common ground, or that there is nothing distinctive about the constitutional experience of the Global South.[10] Indeed, comparatists may rightfully ask whether this vastly heterogeneous array of constitutional orders has something in common that justifies the label Global South, and at the same time sets it apart from its logical other, the Global North. Are highly aggregated concepts like "Global South" heuristically valuable at all?

A bit of context is useful here. Commonly, the Global South is considered as the heir to the notion of the "Third World", which emerged in the early 1950s as the confident self-description of the newly independent and non-aligned states in the South. "Third World" was a reference to Abbé Sieyès' notion of the 'third estate' during the French revolution, which had formulated the demand of the democratic majority of citizens to end aristocratic rule in the 18th century.[11] In the era of "decolonization", the notion easily conveyed the idea that now the democratic majority of peoples in the world demanded their voice to be heard on the world stage.[12] It quickly caught on in political and academic language, as it expressed a common agenda based on a shared historical experience. This common agenda, however, fell apart under the dichotomous pressures of the Cold War and the increasingly different paths of the group of countries. In the North, the notion was also routinely mis-interpreted as meaning a hierarchy of the first (capitalist), second (communist) and third or last world of

[10] Ran Hirschl, *Comparative matters*: *The renaissance of comparative constitutional law* (Oxford Univ. Pr. 2014), 218. Sceptic as to the distinctiveness is Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South' (n 1).

[11] Alfred Sauvy, 'Trois mondes, une planète' *L'Observateur* (Paris, 14 August 1952); on the history of the notion: Vijay Prashad, *The darker nations*: *A people's history of the third world* (The New Press 2007) 6-11.

[12] Luis Eslava, Michael Fakhri, and Vasuki Nesiah, 'The Spirit of Bandung' in Luis Eslava, Michael Fakhri, and Vasuki Nesiah (eds), *Bandung, global history, and international law. Critical pasts and pending futures* (Cambridge Univ. Pr. 2017) 3; Jochen von Bernstorff and Philipp Dann, 'The Battle for International Law in the Decolonization Era: An Introduction' in: Bernstorff and Dann (eds), *The Battle for International Law in the Decolonization Era* (OUP 2019) 1.

"developing countries" and hence took on a rather derogative meaning. In the early 1990s, with the end of the Cold War, the notion lost its appeal and resonance.

And yet, there seemed to have been a demand to capture the non-OECD group of states and peoples in one notion. In the 1990s, the notion of the 'Global South' emerged and started a productive intellectual career less in the formalized political arena but in the grass-roots political sphere and especially in the social sciences and humanities. In these disciplines, "Global South" is a widely established term, while its specific meaning and contours remain subject to debate.

In international political economy and international relations, the "Global South" is not only associated with the rise of emerging economies, especially by the BRICS, but also with the unequal distribution of wealth and benefits in a unified globalized economy.[13] This distribution, however, does not necessarily follow the methodological nationalism of GDP figures but also entails massive internal inequalities. In this vein, in area studies, re-energized and to some extent displaced by "Global Studies", the concept does not primarily emphasize a North/South divide but rather highlights entanglements and uneven developments.[14] Areas of the Global South can be found in racialized urban ghettos of North America, as much as the Global North in gated communities of the rich in Rio, Lagos or Mumbai.

Postcolonial theorists, by contrast, use the term to emphasize that much of our knowledge, categories and methods, which claim to be universal, turn out to be deeply provincial when we take a closer look.[15] In a similar vein, certain strands of anthropology and sociology have developed a rich body of "Southern theory" which tries to escape the trap of methodological nationalism (and parochialism) and puts subaltern knowledge and experiences centre stage.[16]

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[13] B. S. Chimni and Siddharth Mallavarapu (eds), *International relations*: *Perspectives for the global south* (Pearson, 2012); Amitav Acharya and Barry Buzan, *The making of global international relations*: *Origins and evolution of IR at its centenary* (Cambridge Univ. Pr. 2019); Grovogui, S. "A Revolution Nevertheless: Global South in International Relations" (2011) 5 (1) The Global South 175; Thomas Eriksen, 'What's wrong with the global north and the global south?' in Andrea Hollington, Tijo Salverda, Tobias Schwarz et al. (eds), *Concepts of the Global South – Voices from around the world* (Global South Studies Center Cologne 2015) <https://kups.ub.uni-koeln.de/6399/1/voices012015_concepts_of_the_global_south.pdf> accessed 8 March 2020.

[14] C.f. Katja Mielke and Anna-Katharina Hornridge (eds), *Area Studies at the Crossroads* (Palgrave 2017).

[15] Dipesh Chakrabarty, *Provincializing Europe*: *Postcolonial Thought and Historical Difference* (2nd edn, Princeton University Press 2009); Walter D. Mignolo and Catherine E. Walsh, *On Decoloniality*: *Concepts, Analytics, Praxis* (Duke University Press 2018).

[16] Jean Comaroff and John L. Comaroff, *Theory from the south, or, how Euro-America is evolving toward Africa*, (Paradigm Publ. 2012); Julian Go, 'Globalizing Sociology, Turnig South. Perspectival Realism and the Southern

Thus, the Global South can also be understood as a political concept that gains its critical potential from its geographical imprecision: It allows to negotiate an array of geographic scales from planet to neighbourhood "to understand how forces that seek to impose exploitative and hegemonic economic and political forms have been and can be resisted."[17]

In this light, the Global South is not only, or even primarily, a place, but rather a sensibility and perspective, a way of looking at the world as a whole. This relative flexibility and imaginative resonance may explain its relative popularity over possible contenders, such as the more technical developed/developing distinction, the politically explicit "most of the world" or centre-periphery opposition, or the geographically more precise "Asia, Africa and Latin America".

2. The Global South in comparative constitutional law: A brief intellectual history

Law has not been entirely absent from these debates. Anthropologists, sociologists and postcolonial theorists alike have discussed the distinctive features of law and its role in the Global South.[18] Lawyers in the South, of course, have reflected on their respective legal systems. Yet, as a distinctively theoretical perspective, the South has been developed mostly in public international law. Since the 1990s, "Third World Approaches to International Law" (TWAIL) have brought together scholars from the South and fellow travellers in a shared intellectual project that has gained some internal coherence, theoretical sophistication, and critical traction in global legal discourse.[19]

By contrast, in comparative law, up to date no equivalent to TWAIL has emerged, be it in private, criminal or constitutional law.[20] The reasons for this gap are surely manifold.[21] But of

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Standpoint' [2016] (2), Sociologica 1; Shalini Randeria and Sebastian Conrad (eds), *Jenseits des Eurozentrismus* (Campus Verlag 2014).

[17] Leigh Anne Duck, 'The Global South via the US South', in Andrea Hollington, Tijo Salverda, Tobias Schwarz et al. (eds), *Concepts of the Global South* (Global South Studies Center Cologne 2015) <https://kups.ub.uni-koeln.de/6399/1/voices012015_concepts_of_the_global_south.pdf> accessed 8 March 2020.

[18] Jean Comaroff (ed), *Law and disorder in the postcolony* (Univ. of Chicago Press 2006); Chatterjee, *The politics of the governed: Reflections on popular politics in most of the world* (n 2).

[19] Luis Eslava and Sundhya Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) 45 (2) VRÜ/WCL 195.

[20] But see Pablo Ciocchini and George Radics (eds), *Criminal Legalities in the Global South* (Routledge 2019).

[21] On possible reasons, see Z Oklopcic, 'The South of Western constitutionalism: A map ahead of a journey' (n 3) (arguing that competing critical projects (such as transnational law or political economy approaches) as well as the much more complex political agenda of critical comparison in domestic law (in contrast to critical international law) have hindered the emergence).

course, this does not mean that there has been no comparative study of constitutional law of the South. In fact, there is a particular history of comparative law engagement with Southern constitutional orders that comparatists should be aware of. Occasions for comparative engagement often arose at founding moments.[22] When Latin American constitution-makers first drafted independence constitutions in the 19th century, they looked to other constitutional orders for inspiration – mostly the US and Europe, not necessarily because of their perceived superiority but for a perceived lack of alternative examples of constitutional government.[23] Similarly, constitution-making during the 20th century decolonization era in Asia and Africa was accompanied by comparative studies.[24] Ultimately, however, these processes generated much less scholarly engagement as one would have thought and wished for – and much is still to be discovered.

One reason is that in the second half of the 20th century, comparative legal studies very much remained in the shadow of the Cold War.[25] The "law and development" movement of the 1960s and 70s, which was a primary place of scholarly legal engagement between South and North, was gripped by modernization theory and the concept of development, thus being more preoccupied with legally remaking developing economies in the image of industrialized nations than with comparing constitutional foundations of political government.[26] At the same

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[22] Daniel Bonilla Maldonado and Michael Riegner, 'Decolonization', *Max Planck Encyclopedia of Comparative Constitutional Law* (2020): forthcoming online; Mara Malagodi, Luke McDonagh, and Thomas Poole, 'New Dominion constitutionalism at the twilight of the British Empire: An introduction' (2019) 17 (4) ICON 1166.

[23] Roberto Gargarella, *Latin American constitutionalism, 1810-2010: The engine room of the constitution* (Oxford University Press 2013) 2.

[24] James S. Read, 'Bills of Rights in "The Third World": Some Commonwealth Experiences' (1973) 6 (1) VRÜ/WCL 21; Gordon Woodman, 'British Legislation as a Source of Ghanaian Law: From Colonialism to Technical Aid' (1974) 7 (1) VRÜ/WCL 19; A. S. Fadlalla, 'Fundamental Rights and the Nigerian Draft Constitution' (1977) 10 (4) VRÜ/WCL 543; Ebitimi E. Chikwendu, 'Considerations of the Freedom Value in a Military Regime. A Decade of Military Rule in Nigeria' (1977) 10 (4) VRÜ/WCL 531; Zdenek Červenka, 'Rhodesia Five Years after the Unilateral Declaration of Independence' (1971) 4 (4) VRÜ/WCL 9. In retrospect see Harshan Kumarasingham (ed), *Constitution making in Asia*: *Decolonisation and state-building in the aftermath of the British Empire* (Routledge 2016); Charles Parkinson, *Bills of rights and decolonization: The emergence of domestic human rights instruments in Britain's overseas territories* (Oxford Univ. Pr. 2007); Kwasi Prempeh, 'Africa's "constitutionalism revival": False start or new dawn?' (2007) 5 (3) ICON 469; see also Kevin Tan, *Constitutional Foundings in Southeast Asia* (Hart Publishing 2020).

[25] Ugo Mattei, 'The Cold War and Comparative Law: A Reflection on the Politics of Intellectual Discipline' (2017) 65 (3) AmJCompL 567;

[26] David Trubek and Marc Galanter, 'Scholars in self-estrangement: some reflections on the crisis in law and development studies in the United States' [1974] *Wisconsin Law Review* 1062; David Trubek, 'Toward a social theory of law: An essay on the study of law and development' (1972) 82 (1) YaleLJ 1; for a recent day reflection, David Trubek, 'Law and development: Forty years after 'Scholars in Self-Estrangement'' (2016) 66 (3) University

time, there was hardly any engagement with the emerging new constitutions of the South. Even though the new objects of study were plentiful, studies are rare in legal scholarship – and if existent were often shaped by Cold War logics.[27] This dearth of comparative constitutional studies looking at the South was no outlier, however, when looking at the state of comparative constitutional law more generally. While comparative studies in the area of private law blossomed and professionalized, the comparative studies of constitutions even with regard to Northern constitutions was rather dormant during the cold war era.

Notable counterexamples only highlight this point. Most prominent is maybe India, whose Constitution has not only been studied intensely from early on[28] but also attracted wider comparative attention soon.[29] But then again, India's constitution is also the unusual example of a postcolonial constitution that had been debated intensely even before independence, was soon defended by a confident Supreme Court and not hollowed out by constant constitutional change or poisonous constitutional politics.[30] Another fascinating exception to the overall rule of Northern ignorance towards Southern constitutionalism is the history of our journal, *Verfassung und Recht in Übersee / World Comparative Law* (VRUe / WCL), formerly with the English subtitle "Law and Politics in Asia, Africa and Latin America". The journal was founded in 1968 in the spirit of decolonization and a cooperative new beginning and its trajectory is a good indicator of the developments in scholarship. Initially it covered constitutional developments in Asia, Africa and Latin America with a range of authors from all world regions.[31] Up to the late 1970s, it was a global and plural platform for public law

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of Toronto Law Journal 301. For exceptions, see e.g. Kenneth Karst and Keith Rosenn, *Law and development in Latin America*: *A case book*, vol 28 (Univ. of California Pr. 1975).

[27] For a fascinating exchange on new Southern constitutions and the role of German scholars from East and West, see (the East German communist) G. Brehme and K. Hutschenreuter, 'Zur Rolle der westdeutschen Staats- und Rechtswissenschaft im System des Neolkolonialismus' (1970) 19 (8) Staat und Recht 1254; and the replique by (the West German, liberal) B.-O. Bryde, 'Überseerecht und Neokolonialismus' (1971) 4 (1) VRÜ/WCL 51.

[28] H. M. Seerwai, *Constitutional Law of India* (first edn, Tripathi 1967).

[29] Granville Austin, *The Indian Constitution*: *Cornerstone of a Nation* (Clarendon Press 1966); Marc Galanter, '"Protective Discrimination" for Backward Classes in India' (1961) 3 (1) Journal of the Indian Law Institute 39; Dieter Conrad, 'Limitation of Amendment Procedures and the Constituent Power' (1970) 15-16 Indian Year Book of International Affairs 1966–1967 375.

[30] On the Indian constitutional history only Arun K. Thiruvengadam, *The constitution of India*: *A contextual analysis* (Hart Publishing 2017).

[31] See for the opening statement of the journal Herbert Krüger, 'Verfassung und Recht in Übersee' (1968) 1 (1) VRÜ/WCL 3–29; for an example of the early contributions on constitutional developments around the world see only S. C. Sen, 'Constitutional Storm in India' (1974) 7 (1) VRÜ/WCL 33; K. M. de Silva, 'Sri Lanka (Ceylon). The New Republican Constitution' (1972) 5 (3) VRÜ/WCL 239; Hector Fix-Zamudio, 'México: El Organismo

reflections. However, with authoritarian regimes increasingly displacing constitutional governments, the journal more and more turned to international law as a better, less ominous site of legal engagement by and with the Third World.[32]

The overall situation changed in the 1990s. Interest in comparative constitutional law resurged after the end of the Cold War, when waves of democratization brought about new constitutions in the former Third World and post-Soviet states. Northern scholars took an interest in the "rise of world constitutionalism" and the "inevitable globalization of constitutional law".[33] At the same time, Southern scholars like Upendra Baxi began to challenge the eurocentrism of purportedly universal categories of comparative constitutional law and argued for a reconceptualization of constitutionalism from a subaltern perspective.[34] In a similar vein, critical legal comparatists turned to the Global South and especially began to use insights from postcolonial theory for the theory and practice of comparative law.[35] The situation and reception of VRÜ/WCL changed, too; a new generation of authors and editors began to realize the opportunities of an already well established journal for reflection of South-North comparative constitutionalism.

Yet, while in public international law TWAILers were busy forging a scholarly movement, constitutionalists did not follow suit for some time. Neither questions of poverty, colonial past and asymmetries, nor the challenge of inequality, marginalization and distributive justice acquired prominence in a discipline, whose epistemic horizon was limited by the idea and experience of liberal democracy. It took until 2013 for a volume to see the light of day in which

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Judicial (1950-1975)' (1977) 10 (3) VRÜ/WCL 391; Kwame Opoku, 'African Law: Existence and Unity' (1976) 9 (1) VRÜ/WCL 65.

[32] See for a reflection on the role and use of international law in the history of the journal Philip Kunig, 'Völkerrecht und Übersee' (1997) 30 (4) VRÜ/WCL 465.

[33] Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 (4) Virgina Law Review 771; Mark Tushnet, 'The Inevitable Globalization of Constitutional Law' (2009) 50 (1) VaJIntlL 985.

[34] Upendra Baxi, 'Constitutionalism as a Site of State Formative Practices' (1999-2000) 21 Cardozo Law Review 1183; Twining (ed), *Human rights, southern voices* (n 1).

[35] Nathaniel Berman, 'Aftershocks: Exoticization, Normalization, and the Hermeneutic Compulsion' [1997] (2) Utah Law Review 281; Lama Abu-Odeh, 'Comparatively Speaking: The "Honor" of the "East" and the "Passion" of the 'West"'[1997] (2) Utah Law Review 287; Teemu Ruskola, 'Legal Orientalism' (2002) 101 (1) Michigan Law Review 179; Bönnemann and Jung, 'Critical Legal Studies and Comparative Constitutional Law' (n 5); Sherally Munshi, 'Comparative Law and Decolonizing Critique' (2017) 65 (suppl_1) AmJCompL 207; 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.

the Global South explicitly became title and scholarly program in "The Constitutionalism of the Global South".[36]

3. Approaches in contemporary constitutional scholarship

Today, Southern constitutions are part of the global comparative conversation, some more (like the Indian, Brazilian, Colombian or South African constitution), some less; academic journals have evolved and provide platforms for global exchange; new voices have emerged.[37] But the approaches to these constitutions vary considerably – and with significant implications. At the risk of oversimplifying, we propose to distinguish three ideal-typical approaches: Comparative constitutional law *for*, *with* and *from* the Global South. Each approach is characterized by a combination of scholarly concerns and has distinct epistemic and political implications. They ultimately differ by the importance they give to the constitutional experience in the South.

a) Comparative Constitutional Law for the Global South

A first approach might be called "Comparative Constitutional Law for the Global South". It is concerned with the production of knowledge about constitutional law in the North for consumption in the South, be it in the form of colonial export, law and development initiatives, rule of law projects, constitutional octroi or contemporary projects of constitutional advice and reform that draw on templates of Western liberal constitutionalism.[38] Here, constitutional law and experience of the South does not feature as particularly relevant but more as an object to be reformed and shaped. Such scholarship has been largely driven by European and American actors, international organizations or bilateral aid agencies with little input from the Global South. Its main concern is the transplantation, or diffusion, of Western liberal constitutionalism to new contexts in the Global South.[39] Epistemically and politically, these

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[36] Bonilla Maldonado (ed), *Constitutionalism of the global South* (n 1).

[37] Today, three international English-language journals aim to reflect comparative constitutional law in general (with no regional or particular thematic focus): VRUe / WCL, International Journal of Constitutional Law (I-CON) and 'Global Constitutionalism'.

[38] For analysis and critique of these dynamics, see Philipp Dann and Zaid Al Ali, 'Internationalized Pouvoir constituant' (2006) 10 (1) Max Planck Yearbook of United Nations Law 423; Constance Grewe and Michael Riegner, 'Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared' (2011) 15 (1) Max Planck Yearbook of United Nations Law 1; Jedidiah Kroncke, *The futility of law and development*: *China and the dangers of exporting American law* (Oxford Univ. Pr. 2016).

[39] Journals such as 'Global Constitutionalism' or 'The Hague Journal of the Rule of Law'.

approaches are highly ambivalent: While studying these processes descriptively may be heuristically valuable, advocating them normatively has been increasingly complex, politically dubious, and practically impossible where transplantation is accompanied by violent imposition or economic coercion.

b) Comparative Constitutional Law with the Global South

The second approach – *with* the Global South – is to include Southern constitutional law and practice and treat it as an equally important object of study. Two varieties of this approach can be distinguished, depending on the further intentions and epistemic awareness connected to them.

In a rather neutral version, authors of this approach simply want to broaden the sample for comparison, or to globalize the "gene pool" of comparative constitutional law.[40] Reasons for this can be intellectual curiosity but also a methodological concern with representativeness of their case selection.[41] The notion of the Global South (if used at all) describes this geographical and thematic expansion but is not used as an identity marker or theoretical concept.[42] Proponents of social-scientific and quantitative comparative studies have argued that quantitative methods have an egalitarian impetus because they treat all observations alike, whether they concern the constitution of the US or Gambia.[43] Overall, however, the epistemic and political implication is that this approach extends the existing framework to new materials: it allows for addition, but not for more.

In a more deliberate variety, Southern constitutionalism is more than an equal object of study and appears as an original producer of legal knowledge, ideas and innovation. Scholars in this camp emphasize the production of comparative constitutional law scholarship by and in the Global South.[44] Methodologically, this variety tends to use qualitative approaches that

[40] Cheryl Saunders, 'Towards a Global Constitutional Gene Pool' (2009) 4 (1) National Taiwan University Law Review 1.
[41] Hirschl, *Comparative matters* (n 10); Tom Ginsburg, *Judicial review in new democracies*: *Constitutional courts in Asian cases* (Cambridge Univ. Pr. 2003); David Law and Tom Ginsburg, 'Constitutional Drafting in Latin America: A Quantitative Perspective' in Colin Crawford and Daniel Bonilla Maldonado (eds), *Constitutionalism in the Americas* (Edward Elgar Publishing 2018) 217.
[42] See Hirschl, *Comparative matters* (n 10) 207–223.
[43] Ibid, 223.
[44] Heinz Klug, *Constituting democracy*: *Law, globalism, and South Africa's political reconstruction* (Cambridge Univ. Pr. 2000); Th. Roux, *The Politico-Legal Dynamics of Judicial Review* (Cambridge Univ. Pr. 2018); Gary Jeffrey Jacobsohn, *The wheel of law*: *India's secularism in comparative constitutional context* (Princeton Univ.

emphasize the specific contexts of constitutional law in the Global South (as much as in the Global North).[45] Most authors seem comfortable with a global pluralism that allows for a peaceful co-existence of North and South as equals, each with their own distinctive constitutional outlook. The epistemic framework is thus pluralized but remains intact for the North itself.

c) Comparative Constitutional Law from the GS

Finally, in a third and more fundamental approach, some scholars demand to rethink comparative constitutional law *from* the perspective of the Global South and use the South as a tool to critique of constitutional orthodoxy. Here, the notion of the Global South functions as a lens to rethink comparative constitutional law in its entirety. This approach brings together authors from both North and South critical of orthodoxies in comparative constitutional discourse. The primary concern of this approach is to revise the epistemic framework of the discipline and to dismantle the hierarchy of legal ideas and scholarship dominated by Northern scholars and institutions.[46] Many scholars here insist on the originality of Southern constitutionalism and distinctive constitutional themes and experiences.[47] Often, this includes recovering constitutional experiences and themes in the South that would not count as "constitutional" within a Northern framework. Approaches belonging to this modus are often intertwined with critical legal theory and question the Western script of liberal constitutionalism with a distinctively emancipatory agenda in mind.[48] To this end, the notion

Press 2003); James Fowkes, 'Texts in a time of imposition: lessons from two imposed constitutions in Africa' in Richard Albert et al. (eds.), The Law and Legitimacy of Imposed Constitutions (Routledge 2018), 243; Michaela Hailbronner, 'Constitutional Legitimacy and the Separation of Powers in Africa: Looking forward' in Charles Fombad (ed), Stellenbosch Handbooks in African Constitutional Law, Volume 1: The Separation of Powers (Oxford Univ. Press 2016), 385.

[45] Klug, *Constituting democracy* (n 44).

[46] Daniel Bonilla Maldonado, 'The political economy of legal knowledge' in Colin Crawford and Daniel Bonilla Maldonado (eds), *Constitutionalism in the Americas* (Edward Elgar Publishing 2018), 29; Jorge L. Esquirol, *Ruling the law*: *Legitimacy and failure in Latin American legal systems* (Cambridge Univ. Pr. 2020); Baxi, 'Constitutionalism as a Site of State Formative Practices' (n 34) 1210. Boaventura de Sousa Santos, *The end of the cognitive empire*: *The coming of age of epistemologies of the South* (Duke University Press 2018).

[47] Philipp Dann and Arun Thiruvengadam (eds), *Democratic Constitutionalism in Continental Polities: EU and India compared* (Edward Elgar Publishing 2020); S. Gloppen, B. Wilson, R. Gagarella et al (eds), *Courts and power in Latin America and Africa* (Palgrave 2010); Armin von Bogdandy et al. (eds), *Transformative constitutionalism in Latin America*: *The emergence of a new Ius Commune* (Oxford Univ. Pr. 2017).

[48] Boaventura de Sousa Santos, 'Plurinationaler Konstitutionalismus und experimenteller Staat in Bolivien und Ecuador: Perspektiven aus einer Epistemologie des Südens' (2012) 45 (2) Kritische Justiz 163; Heiner Fechner, *Emanzipatorischer Rechtsstaat*: *Praxistheoretische Untersuchung soziokultureller Inklusion durch Recht am Beispiel Venezuelas* (Nomos 2016); Upendra Baxi, 'Constitutionalism as a Site of State Formative Practices'

of the Global South is used as a central theoretical concept, characterized by its ex-centric perspective outside Euro-America. At their most radical, its proponents perceive the Global South as an alternative lens to understand the world.[49] Methodologically, scholars belonging to this approach reject positivism and formalism as tools of legal scholarship and turn to other sources of knowledge such as anthropology, sociology of knowledge, political economy or post-structuralism.[50] The main epistemic and political implication is a challenge to existing structures of global knowledge production in comparative constitutional law.

C. Southern Constitutionalism as distinctive constitutional experience

The authors of this volume contribute to the Southern turn in comparative constitutional law in a variety of ways and do not follow a unified theory or approach. They can be located in the latter two approaches outlined above (*with* and *from* the Global South) and thus reflect the internal plurality of Southern constitutionalism. From this plurality, however, emerge some recurring patterns and shared experiences that we want to highlight and develop further in this introductory chapter. We do not attempt to summarize each author's contribution here but rather highlight key thoughts at relevant points throughout the text.

Our own argument in this section is that the Global South is a useful concept to capture and understand a distinctive constitutional *experience*. Southern constitutionalism is, first and foremost, a shared experience, shaped by homogenous macro-dynamics and profoundly heterogeneous micro-dynamics. This constitutional experience is distinct from, and at the same time deeply entangled with, constitutionalism in the Global North. This 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.

(2000) 21 (4) Cardozo Law Review 1183; Upendra Baxi, 'Postcolonial Legality: A Postscript from India' (2012) 45 (2) VRÜ/WCL 178; Roger Merino, 'Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America' (2018) 31 (4) Leiden JIL 773.

[49] Zoran Oklopcic, 'The South of Western constitutionalism: a map ahead of a journey' (2016) 37 (11) Third World Quarterly 2080; Kroncke # and Hoffmann in this volume #.

[50] See, for instance, the early observation by Baxi, 'Constitutionalism as a Site of State Formative Practices' (n 47), p. 1209: "As a non-hegemonic epistemic enterprise, comparative constitutionalism needs to transform itself into constitutional ethnography, or the anthropology of power-fields, so memorably developed by Max Gluckman."; Ruskola, *Legal orientalism* (n 8); Kroncke, *The futility of law and development* (n 39)

We describe and analyse this distinctiveness on two levels: First, we argue that the history of colonialism and the position of the South in the geopolitical system are a *distinctive context* that shapes the experience of Southern constitutionalism in a dialectical relationship with its Northern counterpart (1.). Secondly, we identify three *distinctive themes* that characterize Southern constitutionalism: constitutionalism as an experience of socio-economic transformation; constitutionalism as a site of struggle about political organization; and constitutionalism as denial of, and access to, justice (2.).[51]

We hope that using the concept of the Global South helps not only to capture distinctive features and entanglements, but also to guard against some pitfalls of a global comparison, namely against essentializing, othering and subordinating constitutional experiences from outside Euro-America. The Global South is a polythetic category, i.e. not all its members necessarily share all its distinctive features. Besides, the North-South divide is not a strict dichotomy. The adjective "Global" highlights that the South is not a strictly geographical notion, and "distinctiveness" (rather than "difference") accentuates features that are particularly salient for the (self)description of the South but may be present in the North, too.

1. Context: The colonial experience and geopolitical asymmetries

As several authors in this volume emphasize, 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.[52] 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. Or to put it more bluntly: Historically, the North has been the colonizer, the South the colonized – and both have been bound together in an imperially structured global order.

Surely, the colonial experience is a heterogeneous one, and its impact on constitutionalism is modulated by a range of factors: the identity of the colonizer (Spanish, Portuguese, British, French, German empires etc.), the nature of colonialism (e.g. settler vs. exploitation

[51] These three themes are not meant as an exclusive and comprehensive list capturing all aspects of Southern constitutionalism, and other themes remain possible. Cultural diversity, for example, could be another important trait of Southern constitutionalism, which we however treat as a cross-cutting dimension that is relevant across all of our three themes.

[52] Schwöbel-Patel, in this volume, #; Klug, in this volume, #; Choudhry #.

colonialism), the type of imperial rule (direct vs indirect), the duration and intensity of the colonial encounter and the time of decolonization (Latin America vs Asia and Africa), and the type of transition to independence (negotiated vs liberation war). The constitutional legacy of colonialism in Latin America thus differs in important respects from that in Africa and Asia, and former settler colonies like the USA and Australia are another category unto themselves.[53]

Yet, the colonial experience typically had some recurring features: a substantial period of foreign domination that interrupted autonomous evolution and replaced indigenous ideas, institutions and elites with foreign ones; 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 colonized societies into a hierarchically structured global order, in which power and wealth was increasingly centred in Europe and North America.[54]

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, independence constitutions symbolized a break with the past and provided a foundation for a new political community with emancipatory possibilities unavailable under imperial rule. 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. As 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 (or "transplantation" and "migration"), poesis, and hybridization.[55]

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[53] Upendra Baxi, 'Postcolonial legality: A postscript from India' (2012) 45 (2) VRÜ/WCL 178; Bonilla Maldonado and Riegner, 'Decolonization' (n 22); Kevin Bruyneel, 'Review Essay: On Settler Colonialism' (2020) 82 (1) Rev Pol 145.

[54] 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 Univ. Pr. 2003) 46; Mahmood Mamdani, *Citizen and subject*: *Contemporary Africa and the legacy of late colonialism* (Princeton University Press 2018).

[55] Maldonado and Riegner, 'Decolonization' (n 22); Baxi, 'Postcolonial legality: A postscript from India' (n 52).

One might object that constitutionalism in the North is equally marked by ruptures and continuities, especially in the French tradition of revolutionary constitutionalism.[56] Nevertheless, there are differences: Revolutionary constitutionalism in the North and its experience of rupture and continuity were predominantly an internal, domestic struggle. In the South, in contrast, external imperial forces (ideas, elites, powers, etc.) played a significant, if not dominant role, degrading and supressing endogenous developments. This co-governance from the outside is distinct and persists often long after formal decolonization.[57]

A second difference relates to the historical evolution of European modernity and its alternatives. Statehood, constitutionalism, secularism, capitalism, industrialization and other features of European modernity developed over centuries and in a particular historical sequence. In contrast, imperialism suppressed similar or alternative processes in the colonies, and decolonization often compressed these processes into much shorter timespans. Many former colonies acquired formal attributes of statehood – territory, people, government, sovereignty, constitutions, a national economy etc. – practically overnight and had to achieve many things at the same time: functioning state institutions, economies, mass democracy, constitutional systems etc. To the extent that decolonization was a rupture, it was thus also a moment of overload. The experience of rupture and continuity in constitutional development was hence profoundly different in many Southern cases.[58]

For the geopolitical system, decolonization was also a moment of rupture and continuity. While formal empires dissolved and colonies acquired independence, most Southern nations continue to occupy a peripheral position in the global order. Economically, many of them

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[56] Constitutional theory has juxtaposed two types of constitutionalism, namely revolutionary and evolutionary constitutionalism, based on their understanding of the connection between law and politics, see in particular C. Möllers, 'Pouvoir Constituant – Constitution – Constitutionalism' in: Bogdandy and Bast (eds), *Principles of European Constitutional Law* (Hart Publishing & C.H. Beck 2009) 170; H. Arendt, *On Revolution* (Penguin Books 1963). For a global view of revolutionary constitutionalism, see Bruce A. Ackerman, *Revolutionary constitutions*: *Charismatic leadership and the rule of law* (Harvard University Press 2019). The distinction between Northern and Southern revolutionary constitutionalism remains an important subject of further comparative research, especially with regard to the interplay of decolonial and revolutionary dynamics in the South.

[57] Surely, foreign European powers also sought to intervene in European revolutions (Prussian monarchists in France, for example) and constitutional ideas and practices were deeply entangled within Europe. But these external influences were of a different quality than imperial rule, although some of the struggles with foreign overbearance especially in areas of former European land empires might display some structural parallels with decolonization, see below 4.a). and James Fowkes and Michaela Hailbronner, 'Decolonizing Eastern Europe: A global perspective on 1989 and the world it made' (2019) 17 (2) ICON 497.

[58] On the relevance of historical sequence in political, economic and constitutional development, see Sudipta Kaviraj, 'An Outline of a Revisionist Theory of Modernity' (2005) 46 (3) Eur J Soc 497.

remain dependent on commodity exports, capital imports, and asymmetric trade and debt relations. Decolonization-era attempts to reform the international legal system, which pre-existed most postcolonial states, did not fundamentally change its structure.[59] Cold war tensions and US-American or Soviet hegemony limited the space for autonomous Southern politics. Global knowledge production continues to reflect epistemic hierarchies, which subordinate the South as space and subject of knowledge production. This geopolitics of knowledge, as Christine Schwöbel-Patel calls it, affects not least the production of legal knowledge and the discipline of comparative constitutional law.[60]

In sum, taking into account colonial legacies and geopolitical asymmetries is an analytical imperative of the Southern turn in comparative constitutional law. One cannot understand Southern constitutionalism without this context. At the same time, 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. The respective local contexts thus remain a crucial factor in understanding the distinct constitutional experience of the Global South.

2. Themes: Socio-economic transformation, political organization, and justice

The constitutional experience of the Global South is characterized by three distinctive themes that recur both in the chapters of this volume and in the wider literature. The first theme relates to how constitutions are experienced as vehicles of socio-economic transformation (a). The second theme encompasses experiences of constitutionalism as site of state formative practices and of struggle about political organization between democratic and authoritarian forces (b). The third theme relates to the profoundly ambivalent nature of the state and its law, which leads to contradictory experiences of constitutionalism as both a denial of justice and as means of access to justice (c).

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[59] Jochen von Bernstorff and Philipp Dann (eds), *The battle for international law*: *South-North perspectives on the decolonization era* (Oxford Univ. Pr. 2019).
[60] Schwoebel-Patel, in this volume, #. See also Bonilla Maldonado, 'The political economy of legal knowledge' (n 45); Esquirol, *Ruling the law* (n 45).

a) 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 experience for the Global South, frequently associated with practices of exclusion based on gender, ethnicity, race, caste, geography or socioeconomic status. Southern states have been marked by high levels of internal economic inequality, much higher than within the North. And despite the rise of "emerging economies", the North-South divide still reflects significant economic disparities between states.

This socio-economic context has deeply shaped the nature of statehood and constitutionalism across the Global South. For one, Southern states have largely been developmental states.[61] Beginning with early 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 20th century, statehood became the universal vehicle for "modernization", industrialization and development across the Global South. State-led development policies (such as import substitution industrialization) sought to accelerate processes of socio-economic transformation that had taken over a century in Europe and North America. Inspired by dependency theorists and ideas for a New International Economic Order, some developmental states sought to achieve this aim and to overcome economic dependency by nationalizing key industries and natural resources.[62] Yet unlike 19th century Europe and North America, developmental states of the 20th century were defined and constrained by Eurocentric notions of development, external influence and internal legacies of colonial administration and social stratification.[63]

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[61] Meredith Woo-Cummings (ed), *The Developmental State* (Cornell University Press 1999). The notion of "developmental state" is sometimes limited to a few economically successful Asian states, but is used much more broadly here. See also, Pinar Bilgin and Adam David Morton, 'Historicising representation of "failed states"' (2002) 23 (1) Third World Quarterly 55.

[62] Marion Mushkat, 'The Needs of the Developing Countries and the Shifting Views of International Law' (1971) 4 (1), VRÜ/WCL 1; Zdenek Červenka, 'Africa and the New International Economic Order' (1976) 9 (2), VRÜ/WCL 187; Emmanuel G. Bello, 'The Pursuit of Rights and Justice in International Law by the Developing Nations' (1981) 14 (2) VRÜ/WCL 171.

[63] 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 Univ. Pr. 2019) 71; Merino, 'Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America' (n 48); Shalini Randeria, 'Cunning States and Unaccountable International Institutions' (2003) 44 (1)

In this context, constitutions and constitutional law in the Global South are conceived as symbols and instruments of fundamental social transformation, aimed at dismantling socio-economic hierarchies and inequalities.[64] In contemporary comparative debates, this dynamic dimension is captured in particular by the concept of transformative constitutionalism, but it has a much older and broader lineage. Many independence constitutions of postcolonial states aimed at a decisive break with the past and at the foundation of a new political community. The revolutionary constitutions of Haiti were an early attempt to replace colonial slavery with an emancipatory black citizenship.[65] The Mexican Constitution of 1917 envisaged socio-economic rights and land reform as proto-transformative elements.[66] Some postcolonial constitutions, especially in Asia and Africa, envisioned a socialist transformation, and many allowed for the nationalization of natural resources, constitutionalizing the idea of permanent sovereignty over natural resources.[67] Beyond socialism, the idea of a "directive constitution" (*constituição dirigente*), which drives a political, social and economic transformation, was influential especially in Latin America and embraced by Brazil's constitution of 1988.[68] In an exemplary fashion, the Indian constitution of 1950 was envisioned from the outset as an anti-colonial, transformative document. As Sujit Choudhry in this volume reminds us, it conferred on the state and its courts an express mandate to attack social hierarchies and to redistribute economic and political power away from elites toward the hitherto politically powerless and economically deprived majority.[69]

European Journal of Sociology 27; Marie von Engelhardt, *International Development Organizations and Fragile States* (Palgrave 2018).

[64] "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.

[65] Adom Getachew, 'Universalism After the Post-colonial Turn: Interpreting the Haitian Revolution' (2016) 44 (6) Political Theory 821.

[66] Gargarella, *Latin American constitutionalism, 1810-2010* (n 23) 101; Judith Schacherreiter, *Das Landeigentum als Legal Transplant in Mexiko*: *Rechtsvergleichende Analysen unter Einbezug postkolonialer Perspektiven* (Mohr Siebeck 2014); Schacherriater, 'Tierra y libertad. Trasplantes jurídicos y rupturas en el derecho agrario mexicano' (2009) 3 Cuadernos de Literatura Jurídica 188; Javier Garciadiego, 'The revolution' in Pablo Escalante (ed), *A new compact history of Mexico* (El Colegio de México 2013) 229, 255.

[67] Julian Go, 'A Globalizing Constitutionalism?' (2003) 18 (1) International Sociology 71.

[68] 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).

[69] Choudhry, in this volume, #; Baxi, 'Constitutionalism as a Site of State Formative Practices' (n 34) 1205; 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).

Today, "transformative constitutionalism" is sometimes conceived as a distinctive feature of constitutional states in the Global south and as a counter-concept to the "liberal constitutionalism" of the Global North.[70] One reason for this view is genealogical: The concept was initially used to characterize the South African post-apartheid constitution of 1996 (even though initially coined by US-American scholar Karl Klare). Transformative constitutionalism designates "an enterprise of inducing large-scale social change through nonviolent political processes grounded in law".[71] This idea travelled to other Southern constitutional orders with comparable contexts like India, Colombia, Brazil and Bolivia.[72] Since then, comparatists have also identified substantive commonalities that characterize transformative constitutionalism in the Global South: An interventionist state that actively promotes social change; a fundamental rights doctrine that emphasizes social and collective rights, positive state obligations and horizontal effect among private parties; an activist role of constitutional courts, including broad access and innovative remedies; and an anti-formalist interpretive and legal culture geared towards dynamic change.[73]

Taken together, these elements characterize a constitutional type that is distinct from preservative constitutions that emphasize stability, negative rights and a less interventionist state. The US federal constitution is maybe the clearest example of such a preservative,

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[70] Upendra Baxi, 'Preliminary notes on transformative constitutionalism' in Oscar 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), 19; David Bilchitz, 'Constitutionalism, the Global South, and economic justice' in Daniel Bonilla Maldonado (ed), *Constitutionalism of the global South*. *The activist tribunals of India, South Africa, and Colombia* (Cambridge Univ. Pr 2013), 41.

[71] Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 (1) SAJHR 146. 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, Mariela Morales Antoniazzi et al. (eds), *Transformative constitutionalism in Latin America*. *The emergence of a new Ius Commune* (Oxford Univ. Pr. 2017), 97.

[72] Oscar 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); Bonilla Maldonado (ed), *Constitutionalism of the global South* (n 1); Boaventura de Sousa Santos, *Refundacíon del Estado en América Latina* (Siglo XXI 2010); Bogdandy et al. (eds), *Transformative constitutionalism in Latin America* (n 46).

[73] Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South' (n 1) 540f.; Alun Gibbs, 'Theorizing Transformative Constitutional Change and the Experience of Latin American Constitutionalism' [2017] Law, Culture & the Humanities 1, 9f.; Oscar Vilhena Vieira, Upendra Baxi, and Frans Viljoen, 'Some concluding thoughts on an ideal, machinery and method' in Oscar 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) 617, 620.

structural-liberal type – but also probably rather exceptional.[74] In fact, transformative elements can be found in various liberal-democratic constitutions in the Global North, especially in continental Europe. Constitutionalism emerging from the French revolution aimed at the transformation of feudal society, replacing old status hierarchies with an egalitarian promise. Across Europe, certain elements of the welfare state, whether social-liberal or social-democratic in origin, have been constitutionalized over time. The German Basic Law not only guided a post-authoritarian transformation, but also envisage a social state actively shaping economy and society in an egalitarian direction.[75] Yet, these individual features remain less dominant in most Northern constitutional experiences and do not envisage the same kind of deep, constitutionally driven transformation. While constitutional courts play their role, the European welfare state remains, after all, primarily a legislative project. This difference becomes particularly evident in the area of socio-economic rights: Their judicialization is rightfully considered an innovative hallmark of Southern constitutionalism that remains unmatched by the case law of Northern constitutional courts.[76]

But then again, if the activist role of courts is a distinctive feature of transformative constitutionalism in the Global South, it is also a contested one. Recent literature has differentiated the court-centrism of early accounts and highlighted the interplay of all branches of government as feature of transformative constitutionalism. In his contribution to this volume, Diego Werneck Arguelhes echoes this point when he argues that the transformation in Brazil was driven as much by the political branches as by courts. He also cautions against generalizing the framework of transformative constitutionalism too easily: Relatively successful cases like the Colombian Constitutional Court are not necessarily representative, and constitutional texts, courts, lawyers and the political branches may diverge in the extent to which they embrace a transformative vision. What ultimately matters is whether transformative norms and judgements are actually implemented, which is much harder to assess. Heinz Klug develops this thought when he suggests that transformative constitutionalism may be a useful yardstick for sociological analysis of different constitutional

[74] Michael Dowdle and John Wilkinson, 'On the Limits of Constitutional Liberalism: In Search of Constitutional Reflexivity' in Michael W. Dowdle and Michael Wilkinson (eds), *Constitutionalism beyond liberalism* (Cambridge Univ. Pr. 2017) 17.
[75] This argument is forcefully made by Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South' (n 1) 541ff. See generally Michaela Hailbronner, *Traditions and transformations*: *The rise of German constitutionalism* (Oxford Univ. Pr. 2015).
[76] Klug, in this volume, #.

orders: is a constitution actually being implemented or floating meaninglessly above society? Is it used to support, challenge or change the status quo? Like Arguelhes, Klug emphasizes that transformative constitutionalism is not limited to rights enforcement but also depends on a progressive interpretation of the structural elements of the constitution that advance democratic participation and transformative politics.

Our authors' reflections point to two open questions that are relevant for both the distinctiveness and the success of 'transformative constitutionalism': For one, one has to ask whether transformative constitutionalism has a distinctive substance beyond court-enforced rights, namely with respect to the economic order it envisages? The constitutional history of the developmental state reminds us that economic constitutionalism can go well beyond the redistribution of (some) *public* resources through social rights litigation. Does TC with its frequent invocations of "economic justice" and the "democratization of the economy", have something distinctive to say about the structure of economic institutions that affect the initial distribution in the first place, such as private property, market economy and corporate capitalism?[77] A second and similar question can be asked with respect to the relationship between TC and the political system it envisages. As Roberto Gargarella argues, rights alone will not counter deeply entrenched inequality as long as the "engine room" of the constitution, the organization of political power, remains unreformed.[78] This raises constitutional questions about political representation and electoral systems, political parties and campaign finance, legislative process and public scrutiny, and the political economy of transformative constitutionalism – in short: does transformative constitutionalism have its own, distinctive "law of democracy" that favours a *transformative politics*?[79]

b) Constitutionalism as site of struggle about political organization

[77] On the one hand, TC is not socialism: all constitutions discussed under this label accept, in principle, private property, markets, and corporations. On the other hand, they incorporate a considerable variety of potentially transformative economic elements, ranging from the social function of property to indigenous land rights, public ownership over natural resources, mixed economies and state capitalist structures.

[78] Gargarella, in this volume, #, and Gargarella, *Latin American constitutionalism, 1810-2010* (n 23) 172ff.

[79] See Samuel Issacharoff, 'Comparative Constitutional Law as a Window on Democratic Institutions' in Erin F. Delaney and Rosalind Dixon (eds), *Comparative judicial review* (Edward Elgar Publishing 2018) 60; Dann and Thiruvengadam (eds), *Democratic Constitutionalism in Continental Polities: EU and India compared* (n 46); also Dann and Riegner, 'Parliaments' in: De Feyter et al (eds), *Law and Development Encyclopedia* (Edward Elgar Publishing 2020).

Constitutionalism in the Global South also reflects the immense challenges of state-building and political organization in postcolonial, heterogenous and hierarchical societies. Constitutionalism is experienced not as stable order tending towards linear progress, but as site of state formative practices and of struggle about political organization between democratic and authoritarian forces.[80]

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 and modern constitutionalism, nation statehood was the only viable form of political organization to achieve self-determination.[81] Mimicking the European (nation) state offered colonized peoples a path to decolonization with a well-defined end point, but also implied limitations and difficulties for internal political organization and self-determination. For one, statehood implied the acceptance of colonial borders that imperial powers had imposed without regard to the diversity of groups and identities populating the territory, and it rejected alternative forms of political organization that would have undone colonial spatial ordering, such as pan-national federations based on religious, linguistic or cultural variables.[82] In this context, the idea of a homogenous nation as the subject of self-determination – one state, one nation etc. – clashed violently with the cultural, racial and religious diversity of postcolonial societies, contributing to internal divisions, violent conflict, civil war, secession and partition.

In addition, independent nation states inherited the authoritarian legacy of colonialism: repressive institutions and laws, 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. These authoritarian instruments and practices often remained in place after independence, and new elites deployed them to quell dissent and divisions within the heterogenous populace. As Weitseng Chen reminds us (in this volume), the sedition laws used today in Hong Kong against democratic protestors are

[80] Baxi, 'Constitutionalism as a Site of State Formative Practices' (n 34).
[81] Eslava, 'The developmental state: Independence, dependency, and history of the South' (n 62); Bonilla Maldonado and Riegner, 'Decolonization' (n 22).
[82] 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 Univ. Pr. 2011) 18ff.

of colonial origin.[83] Colonialism had also inhibited the emergence of the democratic culture and institutions thought to enable democracy Euro-America, such as a public sphere, political parties and civil society. Where they did evolve in the South, they took hybrid forms, e.g. political parties sometimes formed not along ideological but ethnic or religious lines.[84] The autonomous development of political institutions and culture was further inhibited by the Cold War tensions, foreign intervention, and the economic pressures and interdependencies of a globalized economy.[85]

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.[86] 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. In processes of hybridization, alternatives to the single-nation state emerged, namely the idea of state-nations and of pluri-national states.[87] Institutionally, federalism, territorial autonomies, legal pluralism and/or the recognition of collective linguistic and cultural rights became common strategies to accommodate diversity. At the same time, also in successful constitutional democracies like India, electoral processes, political representation and political parties reflect the diversity of postcolonial societies as much as they continue to struggle with the legacies of colonial subordination and exclusion.[88]

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[83] Chen, in this volume, #. See also Klug, in this volume, #; 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).

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

[85] Odd Arne Westad, *The global Cold War*: *Third world interventions and the making of our times* (Cambridge Univ. Pr. 2005); Prashad, *The darker nations* (n 11); Michael Dowdle, *On the regulatory geography of modern capitalism*: *Putting "rule of law" in its place* <https://www.law.ox.ac.uk/sites/files/oxlaw/dowdle_putting_rule_of_law_in_its_place.pdf> accessed 8 March 2020.

[86] Baxi, 'Constitutionalism as a Site of State Formative Practices' (n 34).

[87] 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 and Juan Linz and Yogendra Yadav, Crafting State-Nations (Johns Hopkins Univ. Press 2011).

[88] Dann and Thiruvengadam (eds), *Democratic Constitutionalism in Continental Polities: EU and India compared* (n 46), in particular Hailbronner and Thayyil therein.

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.[89] As Heinz Klug reminds us, "constitutions without constitutionalism"[90] or "thin constitutionalism" have been a long-standing feature of post-colonial statehood in Africa, along with weak administrations, patrimonial forms of governance, coups and authoritarianism. One explanation, according to Klug, lies in the distinctive nature of the postcolonial state and the institutional legacies of colonialism that remain dominant within societies and were not fundamentally transformed by negotiated independence constitutions that primarily facilitated the transfer of power to local elites.

Besides, constitutions have thus also been instruments of authoritarian legality. This aspect has regained prominence in recent comparative debates about constitutions in authoritarian regimes and the resurgence of illiberal governments across North and South.[91] In this literature, "authoritarian constitutionalism" designates a system of political rule in which constitutions do not effectively constrain the political leadership but nevertheless perform certain governance functions, such as coordinating ruling elites, controlling lower-level agents, incentivizing economic activity and providing political legitimacy.[92] A primary example are the economically successful developmental states in Asia, analysed by Weitseng Chen in his chapter on constitutionalism and legality in Asian hybrid regimes.[93] These constitutional systems have proved relatively stable and functional. Moreover, they have become less authoritarian over time as they incorporate elements of liberal democratic constitutionalism, at least on paper. In practice, however, they remain characterized by a distinct form of

[89] Gargarella, *Latin American constitutionalism, 1810-2010* (n 23); Jose Cheibub, Zachary Elkins, and Tom Ginsburg, 'Still the Land of Presidentialism? Executives and the Latin American Constitution' in Detlef Nolte and Almut Schilling-Vacaflor (eds), *New constitutionalism in Latin America. Promises and practices* (Ashgate 2012) 73; Prempeh, 'Africa's "constitutionalism revival": False start or new dawn?' (n 24).

[90] Okoth-Ogendo, 'Constitutions Without Constitutionalism: Reflections on an African Political Paradox' in Douglas Greenberg, Stanley Nider Katz, Melanie Beth Oliviero et al. (eds), *Constitutionalism and democracy. Transitions in the contemporary world* (Oxford Univ. Pr. 1993) 65.

[91] Tom Ginsburg and Alberto Simpser (eds), *Constitutions in authoritarian regimes* (Cambridge Univ. Pr. 2014); Mark A. Graber, Sanford Levinson, and Mark V. Tushnet (eds), *Constitutional democracy in crisis?* (Oxford Univ. Pr., 2018); Helena Alviar García and Günter Frankenberg (eds), *Authoritarian constitutionalism*: *Comparative analysis and critique* (Edward Elgar Publishing 2019).

[92] Tom Ginsburg and Alberto Simpser, 'Introduction: Constitutions in Authoritarian Regimes' in Tom Ginsburg and Alberto Simpser (eds), *Constitutions in authoritarian regimes* (Cambridge Univ. Pr. 2014) 1; Mark Tushnet, 'Authoritarian Constitutionalism' (2015) 100 (2) Cornell Law Review 392.

[93] See Cheng, in this volume #.

authoritarian legality, marked by a pragmatic, instrumental commitment to constitutionalism that promotes governmental performance and economic development. This stabilizes the system and makes a linear transition to liberal democratic constitutionalism anything but assured. For Chen, studying these constitutional orders uncovers alternative, sometimes functionally equivalent constitutional concepts and mechanisms that pluralize our understanding of constitutionalism in all its variants.

The dichotomy between liberal and authoritarian constitutionalism is complicated by Roberto Niembro Ortega (in this volume) on the constitutional development of Mexico.[94] According to Niembro, what makes a constitution authoritarian is not necessarily its content but the mentality of those who wield power under it. Even a constitution with power-limiting features on paper, like the Mexican one, can thus become authoritarian in practice. This observation is all the more salient as authoritarian tendencies resurface within liberal constitutional states in Europe and even in the US. This further unsettles the dichotomy between liberal and authoritarian constitutions and opens conceptual space for comparison of other forms of hybrid arrangements and overlaps, for instance the transitional justice approaches to authoritarian legacies in democratic constitutional states, or the "liberal authoritarianism" seen by some as undemocratic imposition of economic liberalization, austerity and structural adjustment, be it within the EU or the Global South.[95] These debates across the globe question the narrative of linear progress inherent in some accounts of liberal constitutionalism. While Euro-America may not necessarily be evolving towards the South, Southern constitutionalism appears to offer a more complicated, and possibly more realistic, narrative of constitutional development.

c) Constitutionalism as denial of and access to justice

The two earlier elements 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 thus experienced as both a denial of justice, and as means of access to justice.

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[94] Niembro, in this volume, #.

[95] Michael A. Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?' (2015) 21 (3) ELJ 313; Hermann Heller, 'Authoritarian Liberalism?' (2015) 21 (3) ELJ 295.

States in the Global South are often two-faced in that they are, on the one hand, strong states: as "developmental states" they organize economic activity, they keep together extremely heterogeneous societies without a strong unitary identity, and they use the repressive and authoritarian instruments inherited from the colonial state. On the other hand, many Southern states were often "instant states", created over-night, 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, privatization and structural adjustment have weakened state capacity to provide public services and governance.

As much as there is an ambivalence in the state, there is an ambivalence in the perception of its law. On the one hand, 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).[96] Transformative constitutionalism embodies this emancipatory face of law. On the other hand, law is often also perceived as instrument of oppression, subordination and exploitation – for societies, social groups and individuals alike. Constitutionalism is also perceived as entrenching these structures of subordination and exploitation and insulating them from democratic change.

This ambivalence is not exclusive to the South. It is in fact a core of Marxist critique of the state and its law in general. [97] 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. For one, the social legitimacy and normativity of law is more precarious. The Latin American adage – "obedece mas no cumple" (one obeys but doesn't comply) – illustrates the fraught relationship of citizens and public officials with state law across many parts of the Global South. Law is

[96] On this ambivalence see Baxi, 'Postcolonial Legality: A Postscript from India' (n 47); on the historical roots of attitudes towards the law, see Yves Dezalay and Bryan Garth, *Asian Legal Revivals* (University of Chicago Press 2010).

[97] At the same time, one has to point out the Northern stereotype about the presumed inefficacy of law in the South, from which many Northern scholars conclude that it is worthless to study them. The question of laws' efficacy strikes us as a gradual question (and many examples of ineffective Northern laws could be gathered). This point is forcefully made by Daniel Bonilla Maldonado, 'Introduction: Toward a Constitutionalism of the Global South' in Daniel Bonilla Maldonado (ed), *Constitutionalism of the global South. The activist tribunals of India, South Africa, and Colombia* (Cambridge Univ. Pr. 2013) 1; Jorge Esquirol, 'The Failed Law of Latin America' (2008) 56 (1) AmJCompL 75. It is also implicit in Trubek and Galanter, 'Scholars in self-estrangement: some reflections on the crisis in law and development studies in the United States' (n 26).

enforced and complied with selectively. Informal rules, institutions and practices gain a distinct importance in understanding how law on the books really works in action. Citizens often turn to non-state collectives and their norms, such as religious or ethnic groups, indigenous peoples, social movements, trade unions or business associations.[98] The result are diverse forms of legal pluralism and non-state justice systems, which are increasingly recognized by constitutions across the South. One example are personal laws in India, another self-governed indigenous territories in Bolivia.[99] Even without formal recognition, such intermediary collectives play an important role in struggles about the interpretation and application of constitutions, as debates about societal constitutionalism or "constitutionalism from below" attest.[100]

Another distinctive element of Southern constitutionalism is the emergence of alternative and partly collectivized avenues and instruments to use the law but also to resist the law and the state.[101] These avenues can often be found under the notion of "access to justice".[102] As David Bilchitz argues in his chapter, access to justice is a core capability citizens need for realizing substantive claims to socio-economic rights. In the context of poverty and inequality, access is facilitated by innovative procedural devices that "bring justice within the reach of the poor masses".[103] Examples for such procedures are the "tutela"/"amparo" in Latin America or "public interest litigation" in India.[104] Often, these instruments are used in strategic litigation

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[98] 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).

[99] 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; Merino, 'Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America' (n 48).

[100] Schwoebel-Patel, in this volume, #; 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 Univ. Pr. 2005); Bonilla Maldonado, 'Introduction: Toward a Constitutionalism of the Global South' (n 96).

[101] Julia Eckert (ed), *Law against the state*: *Ethnographic forays into law's transformations* (Cambridge Univ. Pr. 2014); Partha Chatterjee, *Lineages of the Political Society* (Columbia Univ Press 2011).

[102] See only David Mason, 'Access to Justice in South Africa' (1999) 17 Windsor Yearbook of Access to Justice 230; Mauro Cappelletti and Bryant Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective* (A. W. Sijthoff 1978).

[103] *People's Union for Democratic Rights v Union of India*, 1982 AIR 1473.

[104] Anuj Bhuwania, *Courting the People*: *Public Interest Litigation in Post-Emergency India* (Cambridge Univ. Pr. 2017); Allan Brewer-Carías, 'The Amparo as an Instrument of a Ius Constitutionale Commune' in Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi et al. (eds), *Transformative constitutionalism in Latin America*. *The emergence of a new Ius Commune* (Oxford Univ. Pr. 2017) 171. As early as 1970, an article in VRUe/WCL discussed the "amparo"-remedies in Latin America, see Juan Jose Reyven, 'Der Grundrechtsschutz (Habeas Corpus, Recurso de Amparo) im argentinischen Recht' (1970) 3 (2) VRÜ/WCL 179.

by civil society organizations or social movements that seek to defend and enforce collective rights of the groups they represent. A similar function is performed by state institutions constitutionally empowered to represent citizens' and collective interests, such as the Ministério Publico in Brazil or the Public Protector in South Africa.[105] But access to justice can also refer to dispute settlement within non-state justice systems, such as religious institutions, indigenous tribunals or the Nyaya Panchayats in India. In these situations, access to justice leads away from the state and may be a way of resisting its law.[106]

Again, it is useful and necessary to juxtapose presumed Southern experiences against those in the North. And yes, Northern legal systems also know instruments like legal aid and clinics. But then again, such devices are hardly at the core of their constitutional identity.[107] It seems that "access to justice" responds to distinctly Southern experiences with law and constitutionalism. At the same time, it is increasingly recognized in international and comparative discourse, most prominently in Sustainable Development Goal 16 of the UN's Agenda 2030.[108] From a Southern perspective, this globalization is ambivalent. On the one hand, access to justice risks becoming a narrow technical term or a broad superficial label for rule of law promotion projects.[109] On the other hand, it can also provide an opportunity for what Florian Hoffmann in this volume calls "meridionalization"[110], in this case of the global rule of law discourse. Access to justice can, and should, be understood as a conceptual space for rethinking key constitutional concepts *from* the South, by rooting them in concrete experiences of injustice *in* the South. These injustices only begin with the lack of access to the legal system; they also relate to the entire enterprise of pursuing justice by legal means. "Justice" thus acquires multiple meanings – social justice, distributive justice, racial justice, gender justice, environmental justice, climate justice etc. Those who are denied "access to justice" are excluded from this entire enterprise of pursuing justice through law. Understood

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[105] Klug, in this volume, #.
[106] Souza, 'Non-State Justice Systems' (n 97). As early as 1968, an article in VRUe/WCL discussed the "Nyaya Panchayats" in India, see Detlef Kantowsky, 'Indische Laiengerichte. Die Nyaya Panchayats in Uttar Pradesh' (1968) 1 (2) VRÜ/WCL 140.
[107] But see on the underlying problems Deborah L. Rhode, *Access to justice* (Oxford Univ. Pr. 2004).
[108] SDG 16 reads: "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels …". See also Michael Trebilcock and Ronald Daniels, *Rule of law reform and development*: *Charting the fragile path of progress* (Edward Elgar Publishing 2008) 236ff.
[109] Critically Günter Frankenberg, *Comparative law as critique* (Edward Elgar Publishing 2016) 205ff.
[110] Hoffmann, in this volume, #.

in this broader sense, access to justice evokes diverse social struggles for justice and subaltern perspectives on constitutionalism, a "constitutionalism of the wretched".[111] At the same time, "access" to justice emphasizes that constitutionalism is not identical with justice, but can only, and ideally, provide a path towards it. Making access to justice a central constitutional concept thus opens up a critical and emancipatory horizon within comparative constitutional law, all while acknowledging its inherent limitations.

D. Implications for comparative constitutional scholarship

So far, we have argued that the concept of the Global South is useful to understand a distinctive constitutional experience that can pluralize and enrich comparative constitutional law. In the following section, we take this argument further and contend that taking the Global South seriously has implications for comparative constitutional scholarship as a whole: The Southern turn also implies an approach to *doing* comparative law that improves our understanding of constitutional law in both North and South. In other words, the "Global South" also denotes a specific epistemic, methodological and institutional sensibility of the comparatist. This sensibility reinforces three movements that are already underway in the discipline: towards epistemic reflexivity (1.), methodological pluralism (2.) and institutional diversification (3.).

The Global South thus acquires a double meaning: It is not only a concept that captures a distinct constitutional *experience*, but also an epistemic, methodological and institutional *approach* to doing comparative law. This double understanding also promises new insights for constitutional law in the Global North. For one, our notion of distinctiveness highlights features that are particularly salient for the (self)description of the South, but may equally be present in the North and deserve closer attention there. Besides, the entangled nature of North and South means that one cannot be understood without the other. Finally, 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. To achieve a deeper understanding of the distinctiveness and entanglements of both North and South, we thus need an epistemically, methodologically and institutionally sensitive approach to doing comparative constitutional law generally. In that sense, the Southern turn is also a double

[111] Vidya Kumar, 'Towards a Constitutionalism of the Wretched: Global Constitutionalism, International Law and the Global South' (*Völkerrechtsblog*, 27 July 2017) <https://voelkerrechtsblog.org/towards-a-constitutionalism-of-the-wretched/> accessed 8 March 2020.

turn: After the pivot to the South, it turns back to the North and to the world as a whole. We sought to capture this double turn when we gave our journal, formerly the "Law and Politics in Asia, Africa and Latin America", the new English name in 2018, namely "World Comparative Law".[112]

1. Epistemic reflexivity

The first implication of a Southern turn for comparative constitutional law is the need for epistemic reflexivity. Epistemic reflexivity concerns the way in which the comparatist approaches the foundations of knowledge production – the very grammar of our discipline, the basic concepts and theoretical assumptions, the voices that speak, and the silences this entails. It describes a particular research ethos that does not rush to find "solutions" to pre-defined "problems" but rethinks the questions we ask, the categories we use, the perspectives we take. Reflexivity requires us to complete several epistemic moves already under way in the discipline.

The first is the move from epistemic hierarchy to recognizing epistemic injustice and aiming for epistemic equality. It is important to step back first and reflect how constitutional scholarship has so far neglected and subordinated Southern forms of knowledge at great cost for individuals, collectives and scholarship at large.[113] A recognition of this injustice and its proactive correction strikes us as an important first step to then reach some kind of epistemic equality. As a global discipline, comparative constitutional law must accord "equal dignity" to all constitutional discourses in North and South.[114] This implies that Southern and Northern authors, texts, concepts, histories are equally legitimate reference points in constitutional discourse. Noting *distinctive* features or differences does not imply a hierarchization, and the comparatist needs to take into account the "power effects of history" on both theories and

[112] For a parallel formulation and partial demonstration of this approach, see Dann and Thiruvengadam, 'Framing a Comparative Law of Democracy: An Introduction' in Dann and Thiruvengadam (eds), *Democratic Constitutionalism in Continental Polities: EU and India compared* (n 46) 1.
[113] Daniel Bonilla Maldonado, 'The political economy of legal knowledge' in Colin Crawford and Daniel Bonilla Maldonado (eds), *Constitutionalism in the Americas* (Edward Elgar Publishing 2018) 29; Boaventura de Sousa Santos, *The end of the cognitive empire*: *The coming of age of epistemologies of the South* (Duke University Press 2018)
[114] Baxi, 'Constitutionalism as a Site of State Formative Practices' (n 34) 1210. See also Bonilla Maldonado, 'Introduction: Toward a Constitutionalism of the Global South' (n 96).

socio-political constellations.[115] Epistemic equality also demands fundamental conceptual openness, requiring us to accept phenomena as "constitutional" that may not qualify as such from the perspective of Western liberal constitutionalism.[116] This may include, for instance, various forms of societal constitutionalism from below, indigenous approaches to constitutionalism including rights of nature, or a rethinking of the nation state as a vehicle for collective self-determination in plurinational contexts.[117] Such openness includes the willingness of Northern scholars to effectively learn from and import Southern institutions, concepts and theoretical approaches, and transform their own.[118] This point is also forcefully made by Jedidiah Kroncke in his contribution to this volume when he argues that the role of the comparatist ought to be that of a "indigenizer" of foreign legal knowledge, scanning globally for legal innovations and adapting them to one's own legal context.[119] The second move is towards multiperspectivity: There is no one privileged standpoint for comparison, and the comparatist must adopt multiple perspectives. This implies, as Florian Hoffmann argues in this volume, a decentering of Euro-American perspectives – not only by addition of new materials, but by provincializing its theoretical approach with respect to the scope of their claims to validity and applicability; by engaging in inter-contextual dialogue; by decentering thematic focus or agenda setting in order to go beyond constellations of Euro-Atlantic world.[120] This requires "distancing" and "differencing" on the part of the Northern comparatist.[121] It may require, for instance, taking a subaltern perspective that **"**define[s] the experience of constitutional development from the standpoint of constitutional losers, not

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[115] Ina Kerner, 'Beyond Eurocentrism: Trajectories towards a renewed political and social theory' (2018) 44 (5) Philosophy & Social Criticism 550.

[116] Oklopcic, in this volume, #; Schwoebel-Patel: "A constitutionalism from below may stretch the term so far that it becomes unrecognizable" 17.

[117] See e.g. Merino, 'Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America' (n 48); conceptualizing India and the EU as continental polities, see contributions in Dann and Thiruvengadam (eds), *Democratic Constitutionalism in Continental Polities: EU and India compared* (n 46).

[118] For example, it might be productive to ask what can be learned from post- and decolonial approaches and experiences in the South for understanding contemporary constellations of post-authoritarian constitutionalism and its struggle with foreign overbearance, especially in areas of former European land empires in East and Southeast Europe. See e.g. Fowkes and Hailbronner, 'Decolonizing Eastern Europe: A global perspective on 1989 and the world it made' (n 56); Bonilla Maldonado and Riegner, 'Decolonization' (n 22); J. Komarek, 'Waiting for the existential revolution in Europe' (2014) 12 (1) ICON 190; Ivan Krastev and Stephen Holmes, *The light that failed*: *A reckoning* (Allen Lane 2019).

[119] Kroncke, in this volume, #.

[120] Hoffmann, in this volume, #; Kerner, 'Beyond Eurocentrism: Trajectories towards a renewed political and social theory' (n 114).

[121] Günter Frankenberg, 'Critical Comparisons: Rethinking Comparative Law' (1985) 26 (2) HarvIntlLJ 411.

winners".[122] To do so, one might try to develop the idea of access to justice, as we have suggested above.

A third move is towards relationality. Even though we study other jurisdictions as "foreign", it would be wrong to think of each other as separate entities with fixed identities. (Legal) Culture, as postcolonial legal theory teaches us, is an inherently hybrid thing, marked by conflicts, contradictions, and global entanglements.[123] This puts the comparatist in a somewhat precarious position: on the one hand, the hybrid character of culture requires us to avoid essentialist and fix 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. Comparative constitutional law thus might be described as a navigating exercise between those two poles, as an endeavour which uses this tension to understand similarity and difference. [124]

2. Methodological pluralism

The second implication is the need for methodological pluralism. This means several things: First, doctrinal and formalist approaches alone are not sufficient to understand the constitutional experiences in either North or South in their multiple contexts. Despite its limitations, an enlightened functionalist approach can still be a useful starting point.[125] As *Weitseng Chen* demonstrates in his chapter, functional analysis of non-liberal legal orders may uncover functional equivalents to liberal constitutional institutions that help us understanding both the functioning of authoritarian systems and its democratic counterparts.[126] But ultimately this functionalism must be contextualized.

Second, while hardly anyone disputes anymore that a meaningful comparative endeavour requires us to embed the law in its societal contexts, it is far less obvious to which

[122] Baxi, 'Constitutionalism as a Site of State Formative Practices' (n 34) 1185.
[123] Daniel Bonilla Maldonado, 'The Concept of Culture and the Cultural Study of Law. An Essay' (2019) 52 (3) VRÜ/WCL 297.
[124] 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.
[125] See for a convincing reconstruction of functionalist thought, Ralf Michaels, 'The Functional Method of Comparative Law' in Reinhard Zimmermann and Mathias Reimann (eds), *The Oxford handbook of comparative law* (Oxford Univ. Pr. 2006) 340.
[126] Chen, in this volume, #.

neighbouring disciplines we should talk to when doing comparative legal research.[127] At first glance, the answer to this question seems obvious: the discipline we talk to depends on the questions we ask and the research design we pick. Yet, looking at the distinct constitutional experiences we have mapped in part three of this introduction, some neighbouring disciplines impose themselves for context-sensitive comparison from and with the South more than others. Understanding the impact of colonialism and formal decolonization on the state, for instance, is not possible without reference to various fields of history, be it political history, economic history, or history from below. Likewise, once we have acknowledged the central role of global and domestic inequality for the constitutional systems in the Global South, there is no way around deepening our conversation with political economy. Though political economy has reflected for a long time on many of the questions that are at the heart of the socio-economic dimension of constitutional law (put simply: who gets what), the interaction between law and political economy has only recently began to intensify.[128] And finally, the need to capture the emic perspective on Southern constitutional *experiences* makes anthropology another important partner for contextual comparison. No matter if 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. [129]

It is important to emphasize that these methodological tools are to be deployed with respect to constitutional experiences in South and North alike: To understand entanglements and interdependencies between Southern and Northern constitutional experiences, we need to understand the *global* history of colonialism and decolonization; the *global* political economy;

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[127] For the need of interdisciplinarity in comparative constitutional scholarship see Hirschl, *Comparative matters* (n 10).

[128] 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 Univ Press 2019); David Singh Grewal and Jedediah Purdy, 'Introduction: Law and Neoliberalism' (2014) 77 (4) Law and Contemporary Problems 1; David Singh Grewal, Amy Kapczynski, and Jedediah Purdy, 'Law and Political Economy: Toward a Manifesto' (*Law and Political Economy*, 6 November 2017) <https://lpeblog.org/2017/11/06/law-and-political-economy-toward-a-manifesto/> accessed 8 March 2020.

[129] 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. Munshi, 'Comparative Law and Decolonizing Critique' (n 35).

and the processes of *glocalization* of norms that are ongoing across the North South divide. Given what we have said about epistemic reflexivity, interdisciplinarity should not become a tool of othering the South yet again by means of methodology.

This epistemic concern also leads to a third methodological consideration, namely the equal relevance of formalist and doctrinal comparison with and from the South. While interdisciplinarity 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.[130] Law has a relative autonomy and internal rationality that should be taken seriously across the North-South divide. 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 multifaceted contexts beyond the law.[131]

3. Institutional diversification, collaboration, slow comparison

The third and final implication concerns the institutional and organisational dimension of doing comparative constitutional law research. The epistemic and methodological requirements we describe above make comparison a complex and demanding enterprise that an individual comparatist will struggle to pursue well in a short amount of time. There are thus certain institutional and organisational pre-requisites that are rarely discussed but highly important in practice. What is required are a diversification of the scholarly infrastructure of comparative law, new modes of collaboration and slow comparison.

Up to date, the overall number of prestigious law schools, widely cited journals, or powerful think tanks remain in the Western hemisphere. Southern voices, by contrast, are still 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.[132] This begins

[130] Jorge Esquirol, 'The geopolitics of constitutionalism in Latin America' in Colin Crawford and Daniel Bonilla Maldonado (eds), *Constitutionalism in the Americas* (Edward Elgar Publishing 2018) 79.
[131] Günter Frankenberg, 'Comparing constitutions: Ideas, ideals, and ideology—toward a layered narrative' (2006) 4 (3) ICON 439; Baxi, 'Constitutionalism as a Site of State Formative Practices' (n 34) 1188-9.
[132] Dann and Thiruvengadam (eds), *Democratic Constitutionalism in Continental Polities: EU and India compared* (n 46) 1; Annelise Riles, 'From comparison to collaboration: Experiments with a new scholarly and political form' (2015) 78 (1) Law and Contemporary Problems 147.

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 organisation 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". Making such collaborative settings work is not only a question of time and 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.[133] All this can be a challenging exercise – as is perhaps best demonstrated by this book. While we succeeded to convene authors from diverse geographies across the Global South, the volume does not reflect the diversity of experiences in other dimensions in the same way that our journal has done over the years.[134]

Taken together, the epistemic, methodological and institutional demands and challenges of sophisticated comparative constitutional scholarship require one particularly valuable thing that is in particularly short supply in today's academia: 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".[135] Like slow food, the notion of 'slow comparison' emphasizes the process, in which comparative knowledge emerges, as a necessarily longer, often difficult and cumbersome process, in which 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.

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[133] We recognize that the dominance of English in global academic conversations is a major barrier to other voices and traditions. At the same time, we aim to contribute to a common and global discussion, not one separated by region and language. In this dilemma, we opted for English – but we try to complement this with funds for the translation of works from other languages for publication in our journal.

[134] In particular, female scholars and scholars of color remain underrepresented among our authors in this book. We had invited a higher number of them as contributors to this book and to the conference on which it is based than are now represented in the final volume. There are many reasons for this, which require further efforts to overcome obstacles to diversification.

[135] Dann and Thiruvengadam, 'Framing a Comparative Law of Democracy: An Introduction' in Dann and Thiruvengadam (eds), *Democratic Constitutionalism in Continental Polities: EU and India compared* (n 46) 4-7.

E. Conclusion

This volume in general and our introductory chapter in particular call for a plural, "worldlier" approach to comparative constitutional scholarship. This call starts with a reconsideration of the notion 'Global South' that we consider a useful lens to understand better constitutional experiences around the world; it continues with an attempt to capture what is distinct about the constitutional experience in the South, including its entanglement with the North; and it leads finally beyond the South to a re-focused understanding of constitutional scholarship in general, i.e. in the South as much as in the North.

The Southern turn also raises an important question that we have avoided so far: What is the position and role of us as authors of this text and editors of this volume, who happen to be three white male scholars writing from a privileged position in the North? Such a self-reflection triggers questions about 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. Our own views and assumptions are necessarily shaped by the socialisation we have received, the circumstances under which we work and live. Recognizing the particularity of our perspective is a necessary step to engage with other voices in mutual respect.

But in our view, the consequence of our positionality cannot be that we remain on the side lines as bystanders of the Southern turn. We believe that scholars like us can perform four useful roles in global constitutional conversations: As listeners, enablers, contributors and translators. As listeners, we should be receptive to Southern experiences and voices and engage in a conversation with, not about, the South.[136] In this vein, we chose not to speak at the 50th anniversary conference of our journal which formed the basis for this volume, but rather listened first. As enablers, we offer fora for exchange and procure necessary resources,

[136] Michael Dowdle, 'Constitutional Listening' (2012) 88 (1) Chicago-Kent Law Review 115.

be it as organizers of conferences or editors of our journal or this book. As contributors, we offer the results of our own intellectual engagement with Southern constitutionalism, by authoring this chapter all while reflecting our own positionality as much as we can. Finally, as translators we seek to promote mutual understanding of various scholarly communities hampered by linguistic, national, methodological or ideological barriers. This may include literal translation from and to English, for which our journal will make available some extra resources. But it also includes translation between different scholarly traditions and "camps" often pitted against each other, be it formalists against crits, liberals against conservatives etc. While many value-based differences of opinion may be irreducible, remaining in a conversation across dividing lines remains a value in itself in times of increasing polarization and "filter-bubbles".

We attempt to fulfil these four roles in various individual projects but also and importantly in our common endeavour, which is the editing of the journal VRUe / WCL. The journal has a long tradition in organizing such a plural and respectful exchange about law and politics in the Global South. And it can serve as a major (and perhaps unique) archive of the difficulties and complexities of such conversation. At the same time, we are working to make it a more inclusive, plural organ – on various fronts: while it has always had a plurality of voices, this plurality has increasingly become reflected in the board of editors. In sum, we hope that our journal makes a modest contribution to the research field and agenda we have laid out in this chapter. The renaming of our journal expresses this hope and approach, and we cordially invite you all to contribute to this adventure of World Comparative Law in the future.