

# Oxford Constitutional Law



## **Critical Legal Studies and Comparative Constitutional Law**

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## A. Introduction

1. This entry deals with the productive clash between Critical Legal Studies ('CLS') and comparative law, and its constitutional branch more specifically. Due to this clash, a number of discourses within comparative law came up—mostly concerning topics previously marginalized. CLS is a movement which has questioned and undermined central ideas of legal thought, namely objectivism and formalism, and suggested to put another conception of law in their place (Unger 1). The critique of formalism, ie a form of legal justification that contrasts with open-ended discussions over the basic terms of social life, lie at the core of CLS's critical enterprise (ibid.).

2. CLS has turned to comparative law at a relatively late stage: the 1997 Utah conference on 'New Approaches in Comparative Law' can be seen as a founding moment for critical stances of comparative law. While there have been important contributions to the field before 1997 (eg Frankenberg (1985)), critical views concerning constitutional law more specifically have come up only more recently.

3. CLS is named after a series of annual conferences in the United States ('US'), the first of which took place in 1977. Despite the great variety of CLS scholars, post-modernist developments in cultural studies have had a large impact on CLS (Chayes et al.). Many who identify with CLS thus stress historical contingencies and textual ambiguities in their own methods, and more generally see self-critique as equally important as critique of standard legal doctrines and principles. This entry, however, is not focussed on CLS as a US centred movement encompassing a specific network of people (for this approach see Mattei (2006) 816). It aims at shedding light on the way in which CLS has influenced and still influences discourses in comparative constitutional law in a broader geographical and theoretical context. Although its historical origins entail a certain prevalence of authors affiliated with the US, some of the authors cited for their critical views are surely not part of any US based network or consider themselves as critical in the sense of CLS in the first place. They have, however, previously worked or later picked up on the same topics as the 'Utah group', which itself is of course not homogenous. Most of the scholars cited are critical spirits in the sense that they are subjects who give themselves the right to question truth on its effects of power and to question power on its discourses of truth (Foucault (1997) 194). The majority of the issues discussed here stem from general comparative law rather than comparative constitutional law; sometimes, discourses in general comparative law are used as a foil for comparative constitutional law, without neglecting specific constitutional implications (for this approach cf. Saunders 4).

4. In its main part, this entry will single out three domains contested by critical stances of comparative constitutional law. Those challenging views share the aim to 'colonize the discipline' with different instruments, such as feminism, literary criticism, and postcolonial theory (Carozza 661–662). First, attention will be drawn to questions of methodology. The guiding question is whether methodology can be used as a critical tool, and if so, how. In a second step, the entry will focus on epistemological issues. Finally, we will turn to the narrative of politics and ideology, a discourse with enormous implications for the domain of comparative constitutional law.

## B. Contested Domains in Comparative Constitutional Law

### 1. Questions of Methodology

5. Methodology has been, and still is, a major point of interest for critical comparatists. However, those critics themselves point out that there has been a focus on method in comparative law as a whole, not only in critical circles (Frankenberg (2016) 77); comparatists very often do answer the central methodological question '*How to do comparative law?*'. The problem, critics point out, is rather that their answer is not convincing and that ignorance towards critical theory in methodological reflection is widely spread (Grosswald Curran 44). For comparative constitutional

law more specifically, methodology is arguably less developed (Saunders 4; Harding / Leyland 326); but even insofar as comparative constitutional law can resort to methodological debates in general comparative law, comparative constitutional law methodology is—allegedly—flawed.

**6.** Critical strands of comparative constitutional law are not confined to a mere problem description: there are proposals for comparativism to accept that perfect comparison is impossible (Grosswald Curran 90). For critical voices, it follows from this insight that comparative constitutional law must be seen as a learning experience: it cannot be adequately understood as a clear and easy-to-handle scientific method without ambiguities.

### **(a) Methodology as a Critical Tool?**

**7.** A major methodological and epistemological issue in comparative constitutional law is that often, comparatists proceed from a presumption of similitude and ‘cannibaliz[e] difference’ (Frankenberg (2016) 76). Constitutional comparativism also tends to lack awareness of problems of perspective and bias. Most, if not all, of these issues arise not only with comparative constitutional law, although there might be specific implications for the constitutional sphere; they are problematic points for all fields of comparative law.

#### **(i) Focus on Difference Not for Difference’s Sake**

**8.** ‘Mainstream’ comparative law has a ‘theocratic point of view’: it seeks to find ‘commonalities *envers et contre tout*’ (Legrand (2001) 1036). Critical voices often challenge this presumption of similitude; for them, ‘to deny difference is to camouflage identity’ (Grosswald Curran 67). Often, critics claim, comparison operates between → *legal cultures* considered to be homogenous, without recognizing that most likely there are several legal, or even constitutional sub-cultures. Legal categories differ largely between and within legal cultures, and it is their premises critics aim to challenge (Saunders 4; Grosswald Curran 45).

**9.** Some of these premises and categories undergird legal cultures. They are so deeply entrenched that they go without saying and are the underlying, unarticulated foundations of categorization within legal (sub-)culture. For the comparatist and her methodology, this poses particular problems. She has to recognize those patterns. Once she has perceived the foundation of the legal culture in question, she can understand, critically deconstruct, and thus compare the surface.

**10.** A strand in comparative (constitutional) law methodology particularly criticized for its emphasis on similitude and its neglect of difference is functionalism. Critics claim that functionalism tends to neglect that any given question will itself have a different meaning in a different legal culture. This is so because cultural expressions are often undetermined by the external world, which hints to the limits of functional analysis (Graziadei 127). Difference does not only matter for the object of comparison, ie constitutional laws and cultures. It also matters in terms of political implications of methodology: Difference must be grasped in its full range because any presumption of similitude would lead to marginalization and exclusion (Grosswald Curran 83–84). For many, critical voices have exaggerated their focus on difference (Peters and Schwenke 811–812). The critics, in turn, point out that their focus is ‘not on difference for the sake of difference’ (Grosswald Curran 83). Heterodox practice, critical voices claim, can prevent comparative law from becoming a convenience of the powerful. In other words, it can help end an ‘imperialism of the Same’ (Baxi (2003) 64, 75). On the other hand, the focus on difference can endanger this aim because it can degenerate into a repudiation of the different (Grosswald Curran 83).

#### **(ii) Perspective and Bias**

**11.** The suggestion to recognize ‘the problems of perspective as a central and determinative element in the discourse of comparative law’ (Frankenberg (1985) 411) is as old as the productive clash between CLS and comparative law. It is a suggestion easily made and difficult to implement.

Perspective and bias inevitably shape comparisons, whether the comparatist is aware of it or not. On a more fundamental level, this is an epistemological problem; it links back to the question of how our knowledge is constructed. But it has important methodological implications, too. Can comparative constitutional law methodology presuppose incommensurability, eg a lack of common measure, the fact that one scheme cannot be comprehended by means of the other? Or would this necessarily amount to a methodology transforming constitutional comparison into an impossible enterprise? Incommensurability ultimately implies a total failure of comparison. Problems of perspective seem to evoke an irresolvable dilemma: either the comparatist interprets data from the 'unquestioned vantage point of one's own legal experience' (Frankenberg (2016) 85) or she is sceptical of how to determine an objective grid of comparison—and ultimately ceases to be a comparatist.

**12.** However, critical views need not imply the end of comparative constitutional law: 'In an important sense, comparison is the only way for us to encounter and enter into relationships with others—to enter into a world of similarities as well as differences, which in turn both provide boundaries for our subjectivity and allow us to connect with other subjects in the world' (Ruskola 54). Thus, to most critical comparatists, it seems exaggerated to claim that constitutions cannot be compared at all. Critical voices stress that absolute incommensurability is only true for a world of absolutes, a world of comparables versus incomparables. Instead of absolutizing this dichotomy, constitutional comparison could still foster an ideal of mutual comprehension with the recognition that some differences will remain (Grosswald Curran 91; Schacherreiter 306).

### **(b) Comparative Constitutional Law as a Learning Experience**

**13.** Critical comparisons call for a rigorous analysis of and tolerance for ambiguity: domestic legal consciousness needs to be re-evaluated in a radical fashion (Frankenberg (1985) 441). Critical tools like feminism and critical race studies and their experience with marginalization and over-inclusiveness can help improve comparative constitutional law methodology.

**14.** Critics stress that transcultural dialogue, and dialogue within one constitutional culture is vital for comparative constitutional law. Oversimplification in comparison will ultimately entrench bad methodological practices. Generalizations thus need to be challenged and corrected by comparatists with different perspectives aware of their biases. To recognize difference and the importance of perspective can but need not lead to a skeptic position.

**15.** In this regard, it has been suggested to draw an analogy between the operation of comparison and of translation (Grosswald Curran 54): comparison and translation both also operate within one culture, within the different and context-specific discourses embedded in them. Translation and comparing constitutions both involve categorization and generalization. Perception depends on the specific prism through which the observer sees the object of translation or comparison. The aim is to understand another legal culture in its untranslated form, through the prisms that shape perceptions in this legal culture. The experience of learning is thus an essential part of comparing constitutional cultures (Frankenberg (1985) 412–413): no legal culture can perfectly be perceived through the prisms of *another* one, neither can it be perfectly expressed in terms of *another* one. However, the learning experience consists in an awareness of imperfection, and the need to learn about constitutions prior to comparing them.

## **2. Epistemological Framework**

**16.** Critical comparatists are not only concerned with methodology, ie the question '*How to do comparative constitutional law?*'. Important critique is directed towards the epistemological framework, too. Those two frameworks, the methodological as well as the epistemological one, are deeply intertwined and interwoven, and critical comparisons more often than not do not differentiate in their critique. The epistemological question '*What do we know, and how is the*

*subject of knowledge constructed?*' will be treated separately in this entry. This may lead to neglecting overlaps between the frameworks; the sake of clarity, however, outweighs this concern.

### **(a) Legal Knowledge as Context-Dependent**

**17.** Important critique points to the epistemological conditions which determine the engagement with foreign law. Critical comparatists reject the idea of objective legal knowledge and highlight that knowledge is contingent on the historical, political and cultural contexts in which the comparatist works. Building on postmodern theory, critical comparatists regard knowledge and facts as socially constructed by language and influenced by power relations.

**18.** This view also concerns the way the comparatist looks at 'the other': knowledge about foreign cultures is not considered to be a result of purportedly neutral observations but as dependent on how 'the other' is represented in one's own culture. Edward Said's idea of 'Orientalism' (Said (1978)) has significantly influenced this strand of thought. He famously argued that our ideas about 'the other' cannot be grounded in empiricism but are deeply interwoven with popular imaginations and discursive constructions. Just like other comparative disciplines, comparative law is in constant danger of sliding into orientalist depictions of the other (Ruskola 42) and to essentialize and exoticize its object of study (Schacherreiter 304–305).

**19.** Yet, this does not mean that it is completely impossible to gain knowledge about 'the other'. Critical comparatists have pointed to strategies which might at least minimize the danger of essentializing and exoticizing. These include, for instance, abandoning any concept of culture as coherent and unified and to acknowledge the split and hybrid character of any culture (Berman 281). In a similar vein, Teemu Ruskola has suggested to develop an 'ethic of comparison' which might help the comparatist to manage his prejudices, as completely abandoning them might be an impossible enterprise. In other words, the comparatist has the ethical responsibility to acknowledge that his comparison might subject 'the other' and limit his possibilities because any object of comparison is not a given fact but is constructed by the very act of comparing (Ruskola 55). The discussion about orientalism points to one of the main points of epistemological critique: that of ethnocentrism, which is deeply intertwined with the contextualist assumptions just presented.

### **(b) Ethnocentrism and Marginalization of the Global South**

**20.** Is comparative constitutional law an ethnocentric enterprise? Ethnocentrism refers to a fixation on one's own legal categories and standards in order to apply them universally (Schacherreiter 292). Approaches from the Global North are particularly often suspected to 'put the Western legal culture at the top of some implicit normative scale' (Frankenberg (1985) 422). By these means, Western legal culture is not only the starting point for comparative legal research but also the yardstick to access, systemize, and evaluate foreign legal systems. Instead of being sensitive to heterogeneity, ambiguities, and ambivalences, foreign law is measured in simple dichotomies such as modern/primitive, developed/developing, or Western/Eastern (Frankenberg (1985) 422). In the same vein, prominent classifications of legal systems into legal families have been criticized for applying genuinely European legal categories as universal standards and therefore not being capable of including 'radically different' conceptions of law (Mattei (1997) 6). This concerns, for example, new forms of indigenous and 'plurinational' constitutionalism in Latin America. Some authors contrast them to Western constitutionalism as distinctively different approaches (de Sousa Santos 67; Oklopcic 2080). As a result, 'the dominant tradition of doing comparative law still reproduces binary contrasts between the 'common'- and 'civil'-law cultures or the 'bourgeois' and 'socialist' ideal-types, thus reducing the diversity of the world's legal system to a common Euro-American measure' (Baxi (2003) 49).

**21.** It is important to note that the criticized dominance of the West also affects the structure of generating knowledge. Scholars from the Global South have observed a geographic concentration of the epistemic community of comparative lawyers in the Global North, which leads to a

marginalization of the role of Southern legal institutions and specialized journals in the generation of comparative legal knowledge (Bonilla Maldonado 10). Especially with regard to constitutional courts in the Global South, scholars claim that

the revival of comparative constitutionalism studies almost always ignores the remarkable achievements of decolonized public-law theory, whether as regards the fifty years of Indian judicial and juridical creativity or the extraordinary developments of the South African constitutional court (Baxi (2003) 53).

**22.** The reasons for this marginalization are manifold. Some blame the on-going perception that legal systems in the Global South only reproduce Euro-American law (Bonilla Maldonado 6). Others point to language barriers, lack of access to resources in Southern universities, and in—some cases—simple prejudice that ‘denies that the South is developed enough to be a basis for useful comparison’ (Hailbronner 255).

### **(c) Critique of Universalism**

**23.** → *Universalism*, ie the belief that there are general truths to be discovered by and common to all humankind, is one major point of critical deconstruction which concerns the epistemological framework. Why is that so? Critical comparatists emphasize that it is wrong to assume that any comparison is objective and thus leads to universal truths if only guided by a—purportedly—neutral criterion (Frankenberg (1985) 415). The latter criterion itself, they argue, is always determined by the comparatist’s specific perspective. This perspective may come under the guise of neutrality and objectivity but in fact, it is never neutral or objective. The ‘mainstream’, however, pretends to transcend biases to compare in a non-ethnocentric and neutral fashion (Frankenberg (1985) 425).

**24.** The problem is thus how to determine abstract criteria apt to guide comparative endeavours. More briefly and concisely, comparability is the issue at stake. In comparative constitutional law, comparability lies at the heart of several discourses dealing with central problems of the discipline. They all touch on at least two questions: how to determine the referent, the standard(s) by which the comparison is conducted, the so-called *tertium comparationis*? And, not less important, who is to determine these standards?

**25.** The forceful problem description of comparability by critical comparatists does not imply—as is often suggested—that they necessarily confine themselves to ‘radical skepticism’. On the contrary, what seems to be the logical consequence of rejecting universalism, is in fact rejected just as clearly. In other words, rejecting universalism is only half of the story. Radical skepticism, ie the belief that comparison is impossible because the comparatist’s vision is inescapably predetermined by her specific experiences, is not regarded as a solution, either (cf. Frankenberg (1985) 415; Schacherreiter 296). The question remains: what exactly follows from the critique of universalism for comparative constitutional law? Is generalization possible at all?

**26.** These questions are at the epistemological core of any comparative enterprise and shall be illustrated by one of the most controversial issues in comparative constitutional law: the debate on whether constitutional transplants are possible. The transplant debate has polarized comparative law as a whole. It was an impulse for comparative constitutional law to conduct on-going analyses of the phenomenon that remarkably often, constitutions in different polities share the same vocabulary (Frankenberg (2013) 7). Different terms have been suggested to capture this phenomenon of ‘law reception’ in general comparative law: these include borrowing (Whitman (2003)), transplant (Watson (1974)), transfer (Frankenberg (2010) and (2013)), and migration (Choudhry (2006); → *borrowing and migration of constitutions*). In comparative constitutional law, critics have regarded the scientific treatment of this phenomenon as particularly problematic: analyses often tend to neglect imperialistic structures and hegemonic influences but also cultural differences (Frankenberg (2013) 8).

**27.** Alan Watson, a legal historian and private law scholar, most prominently argued legal transplants to be the most important source of legal change. Although he confined his findings to private law (Watson (1977) IX), his research has had a large impact on comparative constitutional law as well. Pierre Legrand, on the other side of the spectre, has forcefully claimed that in 'any meaningful sense of the term, "legal transplants" ... cannot happen.' (Legrand (2001) 63). This overt attack on the idea of 'transplanting' law is by no means a mere question of terminology. Legrand criticizes legal transplants because they imply an understanding of law as rules, which are defined as propositional statements only (Legrand (2001) 56–57). He then goes on to criticize an understanding of rules as context independent and self-explanatory: the meaning of any rule, Legrand argues, is also a function of the application of a rule by its interpreter, and thus his epistemological assumptions. Those are, in turn, conditioned by historical and cultural facts. In a similar vein to translations, he argues, in order to translate a text without any change in meaning, one would have to transport its audience as well. Legrand is by no means the only one doubtful about 'legal transplants': much earlier, before CLS even turned to comparative law, traditional comparative law scholars had already argued that 'we cannot take for granted that rules or institutions are transplantable' (Kahn-Freund 27): there is always a risk of rejection. Comparative law must not be informed by a legalistic spirit which ignores the context of the law in question.

**28.** So far, the argument goes that any form of 'legal transplants' depends on radically different epistemological assumptions that are context specific and cannot be translated themselves. Thus, the debate seems to lead into radical scepticism. However, raising doubt about the possibility of 'transplanting' legal institutions is only one possible first step in a critical enterprise. It is also fundamentally important to acknowledge that legal systems permit transcultural discussion and transcultural change, and that in fact, they permanently undergo such transcultural change (Whitman 342). The critical examination of 'legal transplants' has thus led to asking questions differently: how can such transcultural discussion and change be described without neglecting existing differences? The critical aim is to deconstruct tacit assumptions in order to set the stage for in-depth questions about how and under what circumstances different frameworks are constituted, and how they can interact and communicate. Constitutional transplants also raise the question of the relation of constitutional arrangements to constitutional theory: constitutional systems are often closely intertwined with theories informed by specific historical experiences. Apparent textual or institutional similarity of constitutions may thus mask vast differences in the underlying premises (Saunders 22–23; Frankenberg (2013) 25).

**29.** The search for general terms apt to guide comparison may, as the transplant debate shows, not be an impossible endeavour. But its general possibility does not imply that it is an easy enterprise, either. Critical stances within comparative constitutional law stress that transcultural interaction needs to be analysed carefully, without epistemological naïveté.

### **3. The Role of Ideology**

**30.** A third and final topic of critical comparatists to be highlighted here is the role of ideology in comparative constitutional law. Building on insights from the CLS movement, critical comparatists reject ideas of a non-political, formalistic conception of law and call for an 'ideological critique of the academic discipline of comparative law' (Kennedy 2012, 37). In many cases, such calls for ideological critique will in particular address the role of political beliefs in framing legal arguments. However, the notion of 'ideology' can be defined more broadly as a theory that 'combines claims of particular groups or interests with the universalizing claim that people who do not share the interest, or will be hurt by its success, should nonetheless agree to that success' (Kennedy (2012) 40).

#### **(a) Ideology as a Blind Spot**

**31.** Critical comparatists assert that comparative constitutional law scholarship lacks a serious

scholarly self-reflection about its ideological underpinnings. Quite the contrary, as Duncan Kennedy has recently formulated, the field is still marked by a 'categorical exclusion of the ideological factor in constructing explanatory schemes' (Kennedy (2012) 37). In comparative constitutional law, such an exclusion might be even more pronounced than in public international law for at least two reasons: firstly, due to comparative law's origins in private law, the field evolved in a traditional 'distance from governance' (Kennedy (1997) 588). Secondly, the self-perception of comparative constitutional law as a scientific method is still quite dominant. This often comes along with a depiction of the method as objective and neutral, and thereby outside the range of politics (Frankenberg (2016) 37).

**32.** In a simplified scheme, the role of ideology in comparative constitutional law may be divided into two parts: firstly, critical comparatists highlight that the objects of comparative law, eg legal documents and their interpretation in courts, cannot be analysed properly without taking into account hidden ideological beliefs of its agents. Secondly, they accuse the scholarly community of comparative constitutional lawyers as such to be driven by normative preferences and implicit agendas, such as pushing forward a specifically Western model of → *liberalism*.

### **(b) Constitutional Law and Ideology**

**33.** At the first level, critical comparatists apply the general critique of the critical legal studies movement of legal formalism to comparative constitutional law. Against the idea that legal reasoning is determined by pure reason and that constitutional norms have a 'plain meaning', critical comparatists stress not only the radical indeterminacy of law but also that its interpretation is highly strategic, embedded in a context of concurring ideologies, and ultimately political. These ideological contexts differ from country to country (or even within one legal system)—and it is the comparatists' task to decipher them in a comparative manner. In comparative constitutional law such an analysis is all the more important as authority and effectiveness of the law depend to a much higher degree on extra-legal factors than, for instance, in private law (Saunders 10). A currently debated issue of comparative constitutional law which may serve as an example here is the spread of proportionality balancing across various legal systems (Stone Sweet and Matthews). While proponents of proportionality balancing highlight the instrument's value in navigating judges through the complex terrains of overlapping and conflicting rights, critical comparatists assert that the legal doctrine lacks both objective standards and transparency in judicial reasoning. Far from being a 'technical' exercise, proportionality balancing operates within a 'shadow of ideology' (Kennedy (2012) 38). Understanding how the application of supposedly universal terms in balancing operations varies from country to country thus requires the comparatist to look for differences along ideological spectra in both the society and the person of the judge herself.

**34.** The practical consequence for the comparatist is that it is not sufficient anymore to examine foreign constitutions as a mere survey of competences and fundamental rights. A full and deep understanding of foreign constitutions requires the comparatist rather to include the symbolical, cultural, and political dimensions of constitutions in her research and to structure her inquiry as a 'layered narrative' (Frankenberg (2006)). What is at stake is first and foremost a quest for more context. In this regard, the demands of the critical stream in comparative constitutional law may overlap with other theoretical movements like legal realism or the 'law and society' movement. Indeed, in the field of comparative law, sharp distinctions between those approaches are not always possible. Yet, what distinguishes critical comparatists from other theoretical strands is that the most important building block of the 'context' of law is precisely a critique of hidden or unconscious ideology (and not, for instance, a mere examination of institutions, geography, or economics).

### **(c) Comparative Constitutional Lawyers and Ideology**

**35.** It is not only constitutions and courts which are suggested to be examined in a comparative

ideological analysis. In the same manner, the global epistemic community of comparative constitutional lawyers itself is said to follow certain hidden agendas. This means that the comparison of constitutions is driven by implicit or explicit normative preferences and might even be part of specific hegemonic projects. Uncovering and criticizing those underlying political agendas in comparative law is another leitmotiv in critical comparative scholarship.

**36.** This, for instance, concerns a critical analysis of claims for ‘global convergence’ of certain legal standards. The most prominent example is the case of human rights: despite claims for their universality, critical comparatists allege that in fact a very particular, western liberal vision of rights is globalized. This does not mean that human rights in their present form are considered ‘bad’ or ‘good’, or that the alternative can be found in cultural relativism. The critique rather stresses that the global community of comparative constitutional lawyers pushes forward a very specific ‘ideology of human rights’ (Mutua) which might go at the expense of other experiences of emancipation and non-western conceptions of human rights (Kennedy (2002) 114).

**37.** A second example to illustrate this point is claims for the global convergence of certain → *rule of law* standards. Again, critical comparatists stress that it is of crucial importance to ask who is advocating why for what kind of rule of law reform: do they focus on formalizing and protecting property rights in order to foster free markets or on protecting communal land tenure? Do ‘good governance’ programmes advocate legal reforms to benefit the ‘business climate’ or to strengthen access to justice of marginalized groups? As different legal terms can be loaded with very different meanings, critical comparatists try to show that the decision for a specific interpretation of a legal term is often made along geographical, ideological, and cultural axes.

**38.** However, uncovering ideology is only one side of the coin. Critical comparison can also be a way to provide interventionist strategies by searching for those common legal frames of reference which can be deployed for a common emancipatory project (Berman (1997) 281, 286).

## C. Conclusion

**39.** CLS has turned to the field of comparative law more than 30 years ago. The questions posed by this scholarly branch have not only addressed the very foundations of the field but have also set in motion a process of innovative renewal from within. Today, unlike 30 years ago, critical stances towards over-simplistic uses of comparative methods or towards eurocentrism are not limited to small US-American CLS-circles anymore—they have widely spread over the globe. Yet, in their self-perception, critical comparatists still remain only a tiny spot in comparative constitutional law’s theoretical landscape.

**40.** The reasons for this—purportedly—marginal role in comparative constitutional law scholarship are complex and manifold. An important factor which can easily be identified is that the discipline of comparative law is still marked by a weak theoretical framework and a dispersion of the field into many different approaches. This split character makes it difficult to initiate any form of broad paradigm shifts in comparative law (Reimann (2002) 687). Substantive reforms within a scientific discipline require a minimum degree of coherence and theoretical self-reflection which in present comparative law is still relatively weak (Hirschl). Moreover, implementing critical methodological and epistemological insight in a constructive way is challenging and requires time. Any work that seriously tries to implement ideological, historical, or cultural contexts or to engage in complex methodological self-reflection requires the comparatist to engage with methodological toolkits from other disciplines. However, crossing methodological boundaries is not only challenging but also time-consuming and hardly compatible with the pressure to publish in academia.

**41.** Last but not least, evaluating the success of comparative law’s critical stream crucially depends on the chosen notion of ‘critical’. If we apply a narrow notion in the sense of, say Marxist approaches, then it might be simply due to this narrow yardstick that critical approaches still

perceive themselves as being marginalized within an uncritical mainstream. Yet, unlike 30 years ago, the present landscape of comparative law is enriched by a remarkable plurality of different approaches, be it contextual approaches (Jackson 67), comparative anthropology of law (Mertz and Goodale), or recent work on constitutionalism in the Global South (Bonilla Maldonado; Vilhena et al; Oklopcic). These approaches are not always critical in the narrow sense of CLS, but it is safe to say that without the turn of CLS to comparative law there would have been far less innovation within the field. However, 30 years after the emergence of 'critical comparisons' (Frankenberg (1985)) any division of comparative law into a critical stream and an uncritical 'mainstream' might itself be an uncritical dichotomy.

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