

CN Introduction

CT **Toward a Constitutionalism of the Global South**

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The grammar of modern constitutionalism determines the structure and limits of key components of contemporary legal and political discourse. This grammar constitutes an important part of our legal and political imagination. It determines what questions we ask about our polities, as well as the range of possible answers to these questions. This grammar consists of a series of rules and principles about the appropriate use of concepts like *people*, *self-government*, *citizen*, *rights*, *equality*, *autonomy*, *nation*, and *popular sovereignty*.¹ Queries about the normative relationship among state, nation, and cultural diversity; the criteria that should be used to determine the legitimacy of the state; the individuals who can be considered members of the polity; the distinctions and limits between the private and public spheres; and the differences between autonomous and heteronomous political communities makes sense to us because they emerge from the rules and principles of modern constitutionalism. Responses to these questions are certainly diverse. Different traditions of interpretation in modern constitutionalism – liberalism, communitarianism, and nationalism, among others – compete to control the way these concepts are understood and put into practice.² Yet these questions and answers cannot violate the conceptual borders established by modern constitutionalism. If they do, they would be considered unintelligible, irrelevant, or useless. Today, for example, it would be difficult to accept the relevancy of a question about the relationship between the

legitimacy of the state and the divine character of the king. It would also be very difficult to consider valuable the idea that the fundamental rights of citizens should be a function of race or gender. The secular character of modern constitutionalism – as well as its egalitarian impulse – would sweep these issues to the margins of the legal and political discourse.

The origins of modern constitutionalism can be linked to the works of a relatively small group of philosophers.³ Thomas Hobbes, John Locke, Jean Jacques Rousseau, Charles Montesquieu, Immanuel Kant, and John Stuart Mill, among others, have contributed to the creation of the basic rules and principles that govern modern constitutionalism. These authors are ineludible references for understanding central political and legal issues of the modern and contemporary polities. Issues like the relationship between consent and legitimacy, law and politics, will and reason, the individual and the state, and freedom and diversity cannot be understood without exploring the works of these political theorists. Modern constitutionalism's contractualism, individualism, and rationalism, for example, are connected to one or several of these authors. A genealogy of modern political and legal imagination cannot be complete without examining the works of these thinkers.

The fundamental rules and principles of modern constitutionalism articulated by these authors are (and have been) continuously interpreted and reinterpreted. For these norms to provide specific conceptual tools for understanding, evaluating, and solving contemporary states' basic challenges, they have to be given more specific meaning. Yet the number of authoritative interpreters of this grammar is relatively

small. Only a few institutions – such as the Supreme Court of the United States, the European Court of Human Rights, and the German Constitutional Court – are considered paradigmatic operators and enforcers of modern constitutionalism’s basic rules and principles.⁴ These legal institutions are the ones that determine the paradigmatic use of modern constitutionalism’s basic norms.⁵ They are the ones responsible for defining and solving key contemporary political and legal problems by giving specific content to modern constitutionalism’s rules and principles. The answers that these institutions give to questions like “What are the limits of judicial review?,” “What is the meaning of the principle of separation of powers?,” “Are social and economic rights mere political aspirations?,” “How should cultural minorities be recognized and accommodated?,” “Can security trump individual rights?,” and “What are the rights of immigrants?” are considered by most legal communities to fundamentally enable the connection of modern constitutionalism to the realities of contemporary polities. Their answers to these questions usually become inevitable references for other legal and political institutions around the world. The jurisprudence of these institutions is widely read and quoted by scholars and legal institutions all over the globe.

Likewise, the work of major contemporary political philosophers like John Rawls, Robert Nozick, and Charles Taylor, to name only a few, is also considered authoritative for comprehending, transforming, and updating the basic components of modern constitutionalism. Their work brings up to date and sometimes transforms the grammar of modern constitutionalism. Rawls’s “original position” and “the veil of

ignorance,” for example, have been fundamental to discussions about the foundations of a modern liberal polity.⁶ His “overlapping consensus” has been key for thinking about how to accommodate diversity and make decisions about the norms that should govern a pluralistic polity.⁷ Nozick’s defense of a minimal state as a way of protecting autonomy has been crucial for imagining the structure that a state should have in order to protect one of modern constitutionalism’s most important values.⁸ The history of the modern self offered by Taylor has notoriously contributed to the understanding of the ways in which we think about the subject in general, and the legal subject in particular.⁹ Of course, beneath this first level of authoritative and well-recognized interpreters are several other levels of institutional and scholarly interpreters of modern constitutionalism. Countless other scholars and institutions interpret and use the language of modern constitutionalism. The number of publications on political theory and constitutional law is enormous all over the world; likewise, a great number of institutions around the globe use modern constitutionalism to understand and address key political issues in their polities. Yet most of them occupy a lower tier position in the dialogue that aims to give content to and use modern constitutionalism. The politics of constitutional legal and political knowledge has an unwritten but firmly entrenched hierarchy.

In this hierarchy, the scholarship and legal products created by the Global South¹⁰ occupy a particularly low level. It is extraordinary to hear the name of a scholar or a legal institution from the Global South in this dialogue. The jurisprudence of a Global South court is very seldom mentioned by the specialized

literature when discussing the meaning of key concepts of modern constitutionalism. It is very rare to see a course on comparative constitutional law in a North American or Western European university that includes a section about the constitutional law of a country in the Global South.

There are many reasons for this lack. First, the law of the countries of the Global South, historically, has been considered a secondary component of one of the major legal traditions of the world.¹¹ The majority of the legal systems of the Global South, the argument goes, reproduce or derive from continental European or Anglo-American law.¹² Latin America is a weak member of the civil tradition (French, German, Spanish, and Italian law, in particular);¹³ Africa is a young and naïve participant in the Anglo-American or civil law tradition;¹⁴ Eastern Europe uses a mixture of obsolete socialist law and recent imports from Anglo-American or Western European Law;¹⁵ and the majority of law in present-day Asia is a reproduction of the law of the colonial powers that dominated the region politically.¹⁶ Certainly, this official law coexists in many cases with one or more “native” legal systems. Nevertheless, native law is subordinated to the official law of foreign origin or else it is of inferior quality. At the same time, the dominant dialogue is colored by an assumption that the level of effectiveness of the law in the Global South is generally very low. The law is not a central instrument for social control in this region of the world, the thinking goes. Other kinds of norms – moral and political, for example – maintain order and social cohesion. From this perspective, the social,

economic, and political underdevelopment of these regions of the world is directly related to the underdevelopment of their legal systems.

It does not seem very useful, therefore, to study this weak academic production, which reflects on a set of norms that are merely rules on paper and subproducts of other legal traditions. At most, the law of the Global South – or rather its inefficiency and lack of originality – can be of interest to sociologists, anthropologists, and law professors interested in issues of social justice and the reforms needed to achieve it.¹⁷ These social scientists, legal academics, and activists may find an interesting object of study in the social norms that effectively regulate the lives of those living in the region. Similarly, trying to explain and evaluate the weakness of the law in the countries of the Global South, as well as proposing and implementing reforms to solve the problems facing them, can be a fertile field of research and action for the academia of the Global North. For legal academia in the North, the attractive object of study in the Global South is not the law itself, or even the local academic production examining it, but rather the failure of law in the region.¹⁸

Second, the view that Global South countries' law is merely an iteration of other legal communities' legal production has been consolidated by the influence that U.S. law and the U.S. legal academy have had in the region in recent decades.¹⁹ The impact of U.S. legal rules and scholarship during the past decades has been notable. Several countries in the region, for example, have imported the U.S. accusatory criminal system,²⁰ and several others have imported U.S.-inspired neoclassical liberal

labor laws aimed to increase the flexibility of labor markets.²¹ Additionally, the U.S. legal education model has been extremely influential in many Asian, Latin American, Eastern European, and African countries.²² The work of legal scholars such as Ronald Dworkin, Lawrence Tribe, and Carl Susstein has become familiar to an important number of Global South law students and professors.²³ The influence of U.S. schools of thought like law and economics, and law and development is strong in many law schools in the Global South. As a result, the Global North academy tends to assume there is little of value in the law of the Global South. To understand and evaluate the accusatory criminal system or liberal political and legal theory, the thinking goes, it is not necessary to look to the South. To formulate the normative criteria that should guide the transformation of law schools, it is not useful to explore the experiences of law schools in the South. To attain these aims, it is thought necessary only to focus on the academic production and legal practice of the United States – it is, after all, the original font of the doctrine and theory that has nourished the changes in the law of Global South countries during the past decades.

Third, the indifference of the Global North academy toward the law of the Global South is related to the formalism of the Global South.²⁴ The idea that law is a closed, complete, coherent, and univocal system has controlled the way in which an important part of the law in the Global South is thought about and practiced.²⁵ A significant part of Latin American,²⁶ African,²⁷ Asian,²⁸ and Eastern Europe²⁹ legal academia is still dominated by various forms of legal formalism. The formalist concept of law is certainly not very illuminating or useful. Many academics from the

Global South have argued so.³⁰ Its descriptive and normative weaknesses are well known: The mechanical theory of adjudication that it promotes does not describe the way in which judges really decide cases. In practice, syllogism is only one of the many tools that judges use to adjudicate. The distance between concepts, norms, and facts has to be bridged by judges' wills. There is no natural connection between law's concepts and mandates, and social reality. The supposed univocity of most legal norms defended by legal formalism contrasts with the ambiguity and vagueness that characterize many of these norms. The supposed coherence of the legal system is in tension with the contradictions found in contemporary legal systems. As a way of understanding law, formalism is analogous to the classical legal thought that predominated during the second half of the nineteenth century and first decades of the twentieth in the United States.³¹ This is a theoretical view that was radically debilitated by the attack mounted against it by legal realism.³² For a significant part of the U.S. legal academy, therefore, the legal systems of the Global South are only useful to study or illustrate the failure of law.³³ The law of the Global South countries, it is thought, is not a useful object of study if the aim is to understand the central issues of contemporary legal theory, doctrine, and practice.

Fourth, the academic communities in the North are more robust than the academic communities in the South. The quantity and quality of academic products³⁴ are much higher in law schools in the North than in the South. Similarly, the levels of academic rigor and criticism are much higher in the former than in the latter region of the world. The number of books and specialized journals produced in the legal

academia of the North, as well as their richness and complexity, is much greater than the number produced in the South, for example. Similarly, although the dynamics and rhythms of production and publication have been established and standardized in the North, they are just beginning to be structured and disseminated in the South. The number and type of products generated each academic year, the stability of specialized journals, and the institutional quality control recognized by the academic community, among others, are issues that are just beginning to be discussed or internalized in many of the academic communities of the Global South.

Fifth, the closed and parochial character of the U.S. legal academy, along with the selective openness of most of Western Europe's legal academy, discourages any dialogue with the legal institutions of the Global South.³⁵ Despite the evident strengths of U.S. law schools, for example, in matters like the quality and number of publications, qualified human resources, and available economic resources, these institutions tend to see law as a fundamentally *national* phenomenon. Law schools that emphasize educating students for the practice of law do not find much value in comparative law. Young professionals do not need to know foreign legal norms, doctrine, or theory to practice competently. The more "academic" law schools seem to believe that the most important objects of study can be found in the U.S. legal community. Foreign legal systems and doctrine produced in other polities are not very attractive to U.S. law professors. Western Europe's legal academy might be viewed as more open to comparative law. Even there, however, the legal systems considered valuable to the comparative enterprise tend to be located in Europe or

North America. Global South scholars or legal systems are seldom invited to the dialogue on comparative law.

These five arguments not only explain the marginal position that Global South scholars and legal institutions occupy in the interpretation, use, and transformation of modern constitutionalism, but also serve as the source of a set of unstated background assumptions that govern the production, circulation, and use of legal knowledge. Generally, these assumptions remain implicit: They are not often discussed openly among legal scholars and other legal operators like judges or practitioners. However, they firmly govern the relationship between the legal communities in the Global North and South. They determine, among other things, the dialogue about the interpretation and use of the grammar of modern constitutionalism. The first assumption that these five arguments generate is what I would like to call the argument of the “production well.” This states that the only context for the production of knowledge is the legal academia in the North. The intellectual production of the South is considered to be a weak reproduction of the knowledge generated in the North, a form of diffusion, or a mere local application of the same. It is argued that while legal academia and institutions in the North create original academic products, legal academia and institutions in the South only articulate products derived from other sources. Although the former opens up new descriptive, critical, and normative paths, the latter follows the routes already opened by the epistemological communities of the Global North.

Second, the arguments presented above generate what I call the assumption of “protected geographical indication.” This indicates that all knowledge produced in the North is worthy of respect and recognition per se, given the context from which it emerges. Even before it has been read or evaluated, the mere origin of the academic product generates positive qualifications. As a wine from Burgundy is considered to be a good wine, an article written in English by an American professor and published in a legal journal at a university in North America is considered to be of good quality, even before being read. Legal knowledge generated in the South is only legitimate when academics from the North have given it their approval. Legal products from the South are marked (negatively) by their origin. This seal can only be lifted when representatives from the production well of legitimate legal knowledge believe that it should be. The positive qualification of an academic product from the South on the part of Southern academics is, at best, an indication of its quality. Professors from the North, however, must confirm this characterization. The assumption of the production well is analytically distinguishable from the assumption of the protected geographical indication; in practice, however, the two assumptions are intertwined.

Third, the five arguments outlined above produce what I call the specific assumption of the “effective operator.” This unstated background assumption indicates that academics and legal institutions from the North are much better trained to make effective and legitimate use of legal knowledge than are academics and legal institutions from the South. The use of academic products, in this view, has ethical consequences. To ignore or violate the rules guiding the use of legal knowledge

questions the moral values that the academic community shares, may adversely affect third parties, and threatens the legitimacy of intellectual products. To illustrate this assumption, it might be useful to appeal to clinical legal education. The “effective operator” assumption is particularly thorny in the clinical legal setting. Clinical projects have an explicit political role, in that they usually involve and directly affect vulnerable groups. Thus, the improper use of legal knowledge will have negative consequences for clients of these clinics, as well as for the legitimacy of the projects themselves. Clinical professors in the North have the academic know-how³⁶ to make proper use of the academic products created. Similarly, they have access to networks and spaces of power to make effective use of this knowledge. On the other hand, the inexperience, lack of knowledge, or ingenuousness of clinical professors in the South with respect to the use of legal knowledge, it is thought, can lead clinical projects to ruin. Again, professors from the North must make the key decisions on the use of the knowledge that is created in or relevant to these clinical projects.

The foregoing factors explain the marginal place the Global South occupies in the discussion about the content and structure of law and the rules that govern the exchanges between Global North and Global South legal communities. These factors have two dimensions: one that illuminates and one that obscures reality. On the one hand, they describe and properly characterize one part of the reality of legal academic communities of the Global South and North. It is true, for example, that many sectors of the Global South legal academy have tended to reproduce and not to create legal knowledge.³⁷ Many of the legal norms that are issued, the doctrines that interpret

them, and the theories that substantiate, evaluate, or contextualize them are a local application of knowledge created in foreign legal communities. Similarly, it is true that legal formalism has controlled part of the Global South's legal conscience and that this is a poor concept of law. Many Global South legal scholars have argued so.³⁸ Finally, it is also correct to say that a good part of the Global North legal academy is centered on itself and is not very interested in what happens beyond its borders, particularly if crossing these borders takes it to a legal system of the Global South.³⁹

However, on the other hand, these arguments are questionable both from a descriptive point of view and from a normative standpoint. These arguments, along with the three assumptions they generate, homogenize a reality that is full of shades and hues. Thus, first, these general arguments ignore the heterogeneity of legal academic communities. There is no doubt that, overall, the law schools of the Global North, in North America particularly, have built stronger academic communities than those in the Global South. Nevertheless, there are internal weaknesses in both contexts, as well as nuances and exceptions to the rules noted in each. Legal academia in the North offers a wide range of schools, with varying levels of quality. For example, a law school located at the top of the various rankings that exist in the United States, Canada, or United Kingdom is not the same thing as a school in the middle of such rankings, or one at the bottom.⁴⁰ The differences are even more important when comparing the strengths and weaknesses of schools in the top tier with those in the second and third tiers of the hierarchy in the United States. The contrasts in the quality of the academic products generated, as well as the financial

resources available, are notable in many cases. The strength of journals published, the wealth of libraries, the number and quality of exchanges with academics from other parts of the world, and the conferences offered vary markedly between these schools. Finally, these arguments and rules obscure the fact that, even in good law schools, there are professors who are not academically strong or that the quality of the academic products written by any given professor varies, sometimes significantly. In sum, the arguments of the well of production, protected designation of origin, and effective operator ignore the differences in the quality of law schools. These arguments invalidate this diversity and identify “professor” and “quality academic product” with the law schools of the Global North, and with schools in the United States in particular.

Similarly, it is important to note that these arguments eliminate a priori differences within the academic communities of the Global South. A Brazilian, Colombian, or Chilean “garage”⁴¹ law school is not the same thing as the law school at the University of the Witwatersrand, the law school of the National University of Taiwan, and the National Law School at the University of India, Bangalore. There are salient differences in the quality of professors and academic products, as well as in the economic resources at their disposal. It is true that the role still given to the legal academic in many parts of the Global South is the systematization of the legal order and that the production generated by this objective often leaves much to be desired.⁴² However, within the law schools of the Global South are nodes that meet high academic standards and that distance themselves radically from the various formalist

traditions found in the countries where they are located. In Latin America we can mention, for example, research groups within the law schools of the Fundação Getulio Vargas and University of São Paulo in Brazil, the University of the Andes and the National University in Colombia, ITAM and the Autonomous University of Mexico, and the Catholic University and Diego Portales University in Chile;⁴³ in Africa, nodes in the law schools at the University of Cape Town and University of the Witwatersrand in South Africa, American University-Cairo in Egypt, and the University of Nairobi in Kenya; in Asia, groups of scholars within the law schools at the National University of Taiwan, the National University of Seoul, and the University of Delhi; and in Eastern Europe, networks of academics within the law schools of the University of Eastern Europe and Warsaw University. Similarly, there are legal intellectuals and individual cases whose production is of the highest quality. Consider, for example, Carlos Santiago Nino, Albie Sachs, and Upendra Baxi.

These universities and scholars have often been engines of innovative research projects and legal publications. They have also explicitly and continuously criticized legal formalism and the epistemological dependence that weakens many of the region's legal communities.⁴⁴ But these examples, purely declarative, simply illustrate the general argument. They are not meant to weigh and evaluate the totality of legal academia in the Global North and South. They are only intended to demonstrate the weakness of the argument that homogenizes legal academia in the Global South at a low level and the academia of the Global North at a higher one.

These factors and rules also ignore the fact that the Global South has indeed formulated rich and valuable rules, theories, and doctrines. The jurisprudence of the Colombian Constitutional Court on social and economic rights,⁴⁵ the Brazilian doctrine of the social function of property,⁴⁶ and the contributions of Latin American lawyers like Álvaro Álvarez and Carlos Calvo to the creation of international law⁴⁷ and Mexican labor law, are just a few examples of complex legal products created in the region. The jurisprudence of the South African Constitutional Court on the use of comparative and international law for interpreting the South African Constitution and the Indian Supreme Court's Public Interest Litigation movement are two other examples of innovative legal products created in the Global South. Finally, the contributions to the history of international law and the law of the sea by R. P. Anand, the rich and complex Islamic legal tradition of countries like Egypt and Pakistan, the scholarship on duties and the rights of people written by African legal academics, and the intersections among Buddhism, Hinduism, and law illustrate the multifaceted and valuable contributions of the Global South to law.

The foregoing arguments and rules also obscure the fact that legal formalism has not been the only concept of law present in the many legal communities that exist in the Global South.⁴⁸ The concepts of law offered by legal positivism,⁴⁹ the free school of law,⁵⁰ and contemporary sociology of law,⁵¹ among others, have also been a part of Latin American legal consciousness. In many Asian countries, a Confucian concept of law has been influential.⁵² In North Africa, the legal imagination has been shaped, partially, by an Islamic concept of law. Within the Global South academy,

there is a great diversity of views working to understand, evaluate, and transform legal phenomena. Finally, it is important to indicate that, within the Global North legal academy, there are some sectors interested in the law created by other political communities. The Global Law Programs or the Comparative or Transnational Law Centers of universities like New York University (NYU),⁵³ Yale,⁵⁴ Harvard,⁵⁵ Georgetown,⁵⁶ Michigan,⁵⁷ Cornell,⁵⁸ Duke,⁵⁹ Virginia,⁶⁰ Columbia,⁶¹ and Texas⁶² show the interest that already exists in such a field.⁶³ The increasing number of European comparative and transnational law journals also makes explicit the interest in some Western European quarters for what happens beyond its borders.⁶⁴

Nonetheless, the conversation about modern law, and particularly about modern constitutionalism, is still too much centered in the Global North. The number of participants in this conversation should be increased, the doors of the places where this dialogue takes place should be opened to more southern interlocutors, and the default attitude toward the law of the Global South should be changed. Of course, I am not arguing that the legal products of the legal Global South should be valued *because of* their origin. This would promote an inverted application of the production well and protected geographical indication assumptions that I presented above. This would also obscure the deficiencies and shortcomings of the law of the Global South. Nor am I arguing in favor of a paternalistic attitude toward the law of the Global South. I am not arguing that Global South legal scholars and legal products should a priori be considered valuable participants in the conversation. Each legal product should be evaluated on its own terms to determine its originality and worth.

However, I do argue that a mindset that closes the door to all Global South legal materials or that opens it for paternalistic reasons is unjustifiable. There is no good reason for this kind of epistemic arrogance.

A **1. Three Courts from the Global South**

The Indian Supreme Court, the South African Constitutional Court, and the Colombian Constitutional Court have been among the most important and creative courts in the Global South. In Asia, Africa, and Latin America, these courts are widely seen as activist tribunals that have contributed (or attempted to contribute) to the structural transformation of the public and private spheres of their countries.⁶⁵ These courts' jurisprudence has dealt with problems that are important for and frequent in all contemporary liberal democracies. Issues about the interpretation and protection of civil and political rights, for example, have been addressed regularly by these three courts' case law.⁶⁶ Yet these courts' jurisprudence has also dealt with problems that are specific to or have special importance in the Global South, and they have done so through original and imaginative legal theories and political strategies. Issues related to political violence, poverty, and the consolidation of the rule of law have been an important part of these Courts' jurisprudence. These Courts, for example, have decided cases about the rights of internally displaced people,⁶⁷ how to recognize and accommodate adversary religious minorities,⁶⁸ the justiciability of social and economic rights in contexts with high levels of poverty,⁶⁹ and the limits that Congress has for amending the Constitution in innovative and appealing ways.⁷⁰

The jurisprudence of these three Courts certainly moves within and is supported by modern constitutionalism's basic rules and principles. These Courts use and comply with modern constitutionalism's grammar. Consequently, as happens with all courts, many of the cases that they decide are doctrinally unimportant – they merely reiterate standard interpretations of rules and principles. In many of these cases, furthermore, these three Courts replicate arguments offered by the jurisprudence of the dominant institutional and academic interpreters of modern constitutionalism, such as the Supreme Court of the United States and the European Court of Human Rights.⁷¹ However, some of the interpretations offered by these Courts present modern constitutionalism's basic components in a new light, or at least rearrange them in novel ways. The jurisprudence of these three Courts, therefore, has something to contribute to the ongoing global conversation on constitutionalism. It might be worthwhile to examine and criticize the jurisprudence of these three Courts. Constitutional law scholars and other participants in this dialogue would discover, for example, interesting ways of interpreting the principle of separation of powers,⁷² appealing forms of interpreting the practical consequences of connecting social and economic rights with the principle of human dignity,⁷³ and powerful strategies to allow poor individuals access to justice.⁷⁴

This exercise would generate some benefits. On the one hand, interpreters might use some of the tools formulated by these Courts, in appropriate circumstances, to understand or attempt to solve legal and political issues within their polities. On the other hand, it might allow interpreters to understand their own

constitutional systems more clearly or in a new light. In many cases, legal transplants are not possible. A functionalist approach to comparative law might not be useful in certain cases.⁷⁵ There might be substantial differences between legal systems; the political, economic, and cultural context might be too dissimilar; or the legal institutions of one country might be interpreted by other countries as morally or politically questionable.⁷⁶ However, by comparing our constitutional system to others', we might be able to refine the understanding of who we are.⁷⁷ Through understanding the other, we might be able to better comprehend our own legal and political community. The "other" can be a mirror in which we can find a more accurate image of ourselves. A precise understanding of the other's constitutional arrangements might be useful to comprehend our own constitutional institutions.

Colombia, India, and South Africa are very different countries. It might be argued then that to compare their highest courts would not be useful; the exercise would not render many profits. The "cases" under examination would run parallel to each other, not intersecting at any point. Geographically, economically, and culturally, there are important dissimilarities among these countries. For one, they are located on three different continents. The size and importance of their economies vary widely. Colombia's gross domestic product (GDP) in 2010 was nearly US\$288.2 billion,⁷⁸ India's was over US\$1.7 trillion,⁷⁹ and South Africa's was about US\$363.7 billion.⁸⁰ In Colombia, the majority of the population is Spanish-speaking⁸¹ and Catholic,⁸² whereas in India, the majority of the population speaks Hindi and professes Hinduism.⁸³ In South Africa, Zulu is the most common language spoken at

home but English is the dominant language in government and the media.⁸⁴ Christianity is the dominant religion in South Africa.⁸⁵ Colombia's legal system, moreover, belongs to the civil law tradition,⁸⁶ India's to the common law tradition,⁸⁷ and South Africa's is a mixture of the civil law and common law traditions.⁸⁸ The institutional and contextual differences among these three countries are certainly many.

The three countries, however, have some important similarities. All three are liberal democracies in the process of consolidation, their levels of inequality are some of the highest in the world, their history has been marked by political violence, and their cultural diversity is notable. Likewise, these three countries have legitimate and activist constitutional or supreme courts that have addressed these political, economic, and cultural issues in rich and complex ways. In these three countries, the constitutional courts have played an important role in the protection of the rule of law and the realization of individuals' constitutional rights.

The constitutions of Colombia, South Africa, and India are structured around liberal democratic values.⁸⁹ The idea that human beings are autonomous and equal individuals is central to these constitutions. The worth of all persons is a function of their humanity. Human dignity is a fundamental value in these three countries' legal systems.⁹⁰ These constitutions also contain a wide Bill of Rights that includes civil and political rights, social and economic rights, and collective rights.⁹¹ All these rights are understood as fundamental tools for the protection of autonomy and equality. The constitutional frameworks of these three countries also include the

principle of separation of powers and a system of checks and balances that limit the power that can be concentrated in each branch of government. Additionally, the constitutions of Colombia, India, and South Africa are committed to democracy, and therefore to the idea that the government should be held accountable through multiparty, open, and regularly organized elections. Finally, the constitutions of these three countries establish that economic relations should be organized in the form of a market economy.

The constitutional commitment to liberal democracy has not yet been completely realized in Colombia, India, or South Africa. Political violence has created serious obstacles to its consolidation. In Colombia, the armed conflict between leftist guerilla groups and the government, fueled by drug trafficking, has ravaged the country for more than four decades. In India, the violence between Hindus and Muslims has weakened the polity since independence. And in South Africa, the apartheid system and the struggle against its formal and informal rules have caused tremendous unrest.

The weakness of these three countries' political systems is also linked to economic matters. The promises of economic justice and prosperity for all made by the 1991 Colombian Constitution, the 1996 South African Constitution, and the 1948 Indian Constitution have not been realized. Colombia's Gini coefficient is 0.578, India's is 0.368, and South Africa's is 0.65.⁹² The percentage of the population currently living under the poverty line in Colombia is 45.5 percent, in India 25 percent, and in South Africa 50 percent.⁹³ The levels of unemployment in 2011

reached 11.2 percent in Colombia, 9.8 percent in India, and 23.9 percent in South Africa. Poverty and inequality, no doubt, limit the legitimacy and stability of these three countries' political system.

Similarly, the appropriate recognition and accommodation of these three countries' cultural minorities is an aim that has not been achieved. The levels of discrimination against cultural minorities are still high. The result has been religious unrest, political violence, and the alienation and marginalization of many individuals and groups. Cultural minorities' rights are still very much paper rules in these countries. Yet the cultural diversity that characterizes Colombia, India, and South Africa is also one of their great assets. In Colombia, there are eighty-seven indigenous communities that speak thirty-four different languages.⁹⁴ There are vibrant, culturally diverse black communities on the Atlantic and Pacific coasts, and the Roma people have a small but strong presence in the country.⁹⁵ Small European and Middle Eastern communities enrich (and have historically enriched) Colombia's culture. In India, Hinduism, Buddhism, Jainism, Christianity, Zoroastrianism, and Sikhism have a significant number of followers.⁹⁶ The Muslim population, at around 149 million, constitutes the second largest Muslim community in the world. In India, 630 Scheduled Tribes are recognized by the state. Linguistically, India is similarly rich: 114 languages are spoken by more than 10,000 persons, and more than 1 million persons speak 14 of these languages.⁹⁷ In South Africa, 79 percent of the population is black, 8.9 percent colored, 2.5 percent Indian or Asian, and 9.6 percent white.⁹⁸ The black population is divided into four major ethnic groups: Nguni, Sotho,

Shangaan-Tsonga, and Venda. South Africa recognizes eleven official linguistic communities. Cultural diversity is, surely, a salient component of the past, present, and future of Colombia, India, and South Africa.

The similarities among these three countries – consolidating liberal democracies, political violence, high levels of inequality and poverty, and cultural diversity – are notable. However, these are characteristics that they share with other countries of the Global South. What makes these three countries relevant and attractive for a comparative constitutional law analysis is that they have legitimate, creative, and regionally prestigious constitutional courts that have addressed the foregoing common issues. These three Courts have contributed to understanding and confronting the challenges that these matters create. Surely, the jurisprudence of these Courts has dealt with many other issues. However, their case law has been particularly interesting and innovative when dealing with the many dimensions that compose these key subjects. If this is true, several interesting questions should be raised and answered: What are the contributions that these Courts have made to the understanding, development, or transformation of modern constitutionalism? Are the Colombian Constitutional Court, the Indian Supreme Court, and the Constitutional Court of South Africa slowly creating a constitutionalism of the Global South? If so, what are the differences and similarities between this emerging constitutionalism and mainstream, Global North, constitutionalism? Is a constitutionalism of the Global South needed?

These questions cannot be answered in this book. They are too broad, complex, and difficult. They should be addressed collectively, as part of a long-term comparative law project and within the ongoing global conversation on constitutionalism. Nevertheless, *Constitutionalism of the Global South* does address some issues directly related to these questions. The book aims to open the discussion about the jurisprudence of the Constitutional Court of Colombia, the Indian Supreme Court, and the South African Constitutional Court. The chapters gathered in this book explore the jurisprudence of these courts on three matters: social and economic rights, cultural diversity, and access to justice. These three topics are directly related to poverty and inequality, political violence, cultural minorities, and the consolidation of the rule of law – issues that are fundamental in these three countries. The book also aims to bridge the gap that exists between the Global South and Global North on constitutional matters. Finally, it aims to make explicit the need to widen the number of authoritative interpreters of modern constitutionalism.

A **2. The Structure of the Book**

The book is divided into three sections: social and economic rights, cultural diversity, and access to justice. These issues have been central to the jurisprudence of the Colombian Constitutional Court, the Supreme Court of India, and the South African Constitutional Court. Each section is composed of three chapters, one written by a Colombian, one by an Indian, and one by a South African scholar.

The first section of the book, “Socioeconomic Rights,” begins with a chapter by David Bilchitz. In Chapter 1, he explores the relationship among distributive

justice, social and economic rights, and the Constitutions of South Africa, India, and Colombia. His line of argumentation can be divided in three parts. First, he argues that there is an important difference between these three Constitutions and the Constitutions of the Global North: while the former emphasize social and economic rights, the latter emphasize liberties. Bilchitz contends that the Constitutions of Colombia, India, and South Africa are especially committed to substantive equality – although they also recognize and value autonomy. Second, he analyzes the role that the Constitutional Court of South Africa, the Supreme Court of India, and the Constitutional Court of Colombia have had (and should have) in enforcing social and economic rights, grounding his analysis in the particular political, economic, and social conditions of each country. Bilchitz indicates that these Courts have played and should continue to play an important role in protecting the individual's right to equality. Without real access to material resources, the distributive justice aims pursued by the Constitutions of South Africa, India, and Colombia would not be achieved. These Courts, Bilchitz argues, have stepped up to protect the social and economic rights of all members of the polity; the work of these Courts is especially significant given the weaknesses that the legislative and executive branches have in these three countries. Third, Bilchitz studies the jurisprudence of the Constitutional Court of South Africa, the Supreme Court of India, and the Constitutional Court of Colombia on social and economic rights. He examines the legal theories and political strategies used by these Courts to give content to and, ultimately, to realize these rights. Bilchitz concludes that the jurisprudence of these Courts – although

promising, insofar as it has given new content to the principle of separation of powers and formulated novel remedies and procedures to enforce social and economic rights – has not yet created a true constitutionalism of the Global South.

Shylashri Shankar writes the second chapter of this section. In Chapter 2, she argues that political commentators and scholars argue both that the Supreme Court of India is an activist and a nonactivist tribunal. To support both of these views, academics and political observers usually appeal to the Court's jurisprudence on social and economic rights. For some, the fact that the Court has transformed directive principles (nonenforceable social rights) into judicially enforceable fundamental rights shows the activist character of the Court. For others, the fact that the Court has reached agreements with the executive branch to protect the status quo and has not really enforced social and economic rights provides evidence of the nonactivist character of the Tribunal. However, Shankar contends that both approaches are wrong; they are based on fuzzy concepts of "activism." Shankar argues that a Court can be called "activist" only when it violates the borders of the legislature's and executive's jurisdictions. Shankar also notes that an analysis of the Court's jurisprudence on health and education rights between 2006 and 2011 shows that the Court has been neither strictly activist nor strictly nonactivist. What an analysis of the Supreme Court of India's jurisprudence on health and education rights does show is that it has transformed itself into a negotiator between the state and its citizens. Shankar argues that the Court has assumed the role of an embedded negotiator in order to realize social and economic rights. In Shankar's interpretation,

the Court's jurisprudence clarifies the content of the rights – creating no new duties in the process – and facilitates a dialogue between the state and its citizens concerning the ways in which social and economic rights should be realized.

The first section of the book ends with the chapter written by Libardo Ariza. In Chapter 3, Ariza examines the unconstitutional state of affairs (USOA) doctrine formulated by the Colombian Constitutional Court. This doctrine can be used to stop massive and systematic violations of fundamental rights caused by an institutional blockage. This doctrine, which has been used to address the situation of the millions of internally displaced people in Colombia (among other things), has been widely considered as progressive by constitutional law scholars for two reasons. On the one hand, it has allowed the Court to distance itself from a traditionally functional interpretation of the principle of separation of powers. The Court, therefore, has been interpreted as an institution that is willing to cross the borders that determine the jurisdictions of the executive and legislative branches in order to protect the Bill of Rights. On the other hand, the USOA doctrine shows the Court's commitment to the enforcement of social and economic rights – a key issue in a country plagued by inequality and poverty. However, Ariza argues that this doctrine has been problematic when applied to the prison system. Ariza argues that, in this case, the USOA has not helped to stop the systematic violation of prisoners' rights and has instead helped the implementation of neoliberal punitive perspectives that focus on the construction of more prisons and increasing mandatory minimum terms in prison. The slow implementation of social and economic rights that the USOA doctrine allows by

sponsoring a traditional interpretation of these rights, Ariza argues, collides with the inhumane conditions in which inmates are forced to live within the Colombian prison system.

The second section of the book, “Cultural Diversity,” begins with a chapter by Cathi Albertyn. In Chapter 4, she explores the tension between customary law and gender equality that cuts across the South African Constitution, and she also evaluates the jurisprudence developed by the South African Constitutional Court’s jurisprudence in response to this tension. Albertyn explores the strengths and weaknesses of the Courts’ main argument in the relevant case law: that the concept of living law and custom should solve the conflicts between cultural diversity and individual rights. She argues that the Courts’ approach has rightly protected gender equality, but has not always properly recognized and accommodated cultural diversity. Albertyn argues against a universalist interpretation of the South African constitution, which would impose liberal values across all cultures. Instead, she argues for an interpretation that gives priority to deliberation and that balances cultural diversity, on the one hand, and autonomy and equality, on the other. For Albertyn, this aim is achievable if we accept that cultures are entities in constant flux and are susceptible to different interpretations, and that liberal values are open-textured norms that can reasonably be given different contents. Cultures, she notes, are contested, flexible, and permeable. Liberalism, she also points out, is not a monolithic, unidimensional political philosophy; liberal values, Albertyn contends, are both disputed and capable of change. These arguments, together with a contextual

approach that takes into account the particular characteristics of each conflict, will probably attain, Alibertyn argues, an adequate balance of the constitutional values that constitute this conflict.

Grupeet Mahajan, in the second chapter of this section, explores the Indian Supreme Court's jurisprudence on freedom of religion. In Chapter 5, she argues that the Court has tried to protect religious diversity by balancing the interests of religious minorities and majorities, as well as the interests of the community and the individual. The Court, Mahajan states, has not favored an approach that gives priority to the Hindu religious majority, nor has it valued the individual over religious congregations. The Court has tried to balance interreligious equality with diversity and autonomy, while at the same time balancing individual equality with cultural diversity. Throughout this process of balancing competing values, the Court has taken into account the particularities of each case, the consequences of its decisions, public order issues, and religious history and practices. The Court, from Mahajan's perspective, has also moved beyond interpreting the law to interpreting sacred texts and has ruled in favor of state intervention on decisions made by religious organizations. The Court, in Mahajan's interpretation, has thus become a peacekeeper among competing religious creeds – Hinduism, Islam, and Christianity – and the protector of a democratic and stable India.

In the last chapter of this second section (Chapter 6), Daniel Bonilla Maldonado analyzes the Colombian Constitutional Court's jurisprudence on the right to prior consultation. This jurisprudence, in Bonilla's perspective, explores the

tension between cultural diversity and cultural unity that structures the Colombian 1991 Constitution. In particular, the relevant case law examines the tension between cultural minorities' self-government rights and the principle of political unity. Bonilla Maldonado divides the jurisprudence of the Court into three stages and critically examines their philosophical foundations. In the first stage, the Court defines the characteristics that give structure to the right to prior consultation and formulates the criteria that should guide its development; in the second stage, the Court determines the rules that should govern the consultation of legislative and administrative measures that directly affect cultural minorities; in the last stage, the Court reiterates the first two stages of its jurisprudence, but rules that the right to prior consultation includes cultural minorities' right to veto the decisions made by the state when these decisions put at risk their survival as distinct cultural communities. Bonilla Maldonado argues that the Court's jurisprudence on the right to prior consultation can be supported by appealing to three philosophical models: multicultural liberal monism, procedural liberal monism, and multicultural liberal pluralism. Bonilla questions the first two models and states that the third one offers a better interpretation of the right to prior consultation. This model appeals to a pluralistic structure of the state, as well as to intercultural equality, corrective justice, self-government rights, and cultural integrity in order to justify and give content to the right to prior consultation.

The third section, "Access to Justice," begins with a chapter by Jackie Dugard. Chapter 7 is structured around the following question: Has the Constitutional

Court of South Africa become a voice for the poor? Dugard, assuming what she calls a pro-poor approach, argues that this has not been the case. The Court, on the one hand, has not opened a dialogue with the citizenry – particularly with the South African poor. The Court, Dugard states, has not allowed poor South Africans to gain direct access to justice, and, when they do arrive before the Court, poor individuals and groups have often faced important jurisprudential obstacles to receiving protection for their rights and interests, such as a weak interpretation of the right to legal representation. On the other hand, the Court has not been willing, Dugard argues, to enforce robustly social and economic rights. This is particularly problematic, Dugard indicates, given the history of oppression and the structural poverty that negatively affects the majority of South Africans. As a consequence, Dugard contends, the South African Constitutional Court is increasingly losing legitimacy and becoming an isolated and distrusted institution among poor South Africans.

Menaka Gurusmany and Bipin Aspatwar are the authors of the second chapter of this section. In Chapter 8, Gurusmany and Aspatwar explore the Supreme Court of India's jurisprudence on access to justice. The authors analyze the celebrated Public Interest Litigation Movement led by the Indian Supreme Court and examine the Court's flexible interpretation of standing rules. The Court's jurisprudence on the right to access to justice, the authors argue, has opened the Court's door to many poor and vulnerable sections of the population, including prisoners, women, and members of cultural minorities. The so-called epistolary jurisdiction, for example, has allowed

common citizens to get to the Court and to establish a dialogue with the Supreme Tribunal. However, the authors also argue that, although the flexible interpretation of *locus standi* has been widely applied by the Court in major constitutional cases where the public interest is clearly at stake, it has not been applied by the Court in ordinary cases. In these cases, the Court has formulated a more rigid interpretation of standing rules, with negative consequences for both individual litigants and constitutional justice in general.

Manuel Iturralde, in the third and last chapter of this section (Chapter 9), explores the Colombian Constitutional Court's jurisprudence on access to justice. In particular, Iturralde examines the Court's flexible interpretation of the *tutela* legal action and the *actio popularis*. The first action has allowed common Colombians to protect their fundamental rights through a fast, cheap, and uncomplicated legal process. This legal action can be, in principle, brought before any judge in the country to protect a fundamental right from an act or omission of the administration. The second action has allowed common citizens to protect the coherence of the legal system and exercise control over the executive and legislative branches. This legal action allows any citizen to question the constitutionality of almost any law before the Constitutional Court. Iturralde also analyzes the ways in which social organizations and legal clinics have used these legal actions and the Court's jurisprudence on access to justice to promote the protection of the rights of vulnerable and discriminated-against sectors of the population. Finally, Iturralde studies the serious conflicts that the Constitutional Court's access to justice

jurisprudence has created with the Supreme Court and the State Council. In this analysis, Iturralde uses a sociolegal approach that utilizes Bourdieu's concept of the legal field.

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1 Footnotes

See James Tully, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* 62–79 (Cambridge University Press [\[AQ? Publisher?\]](#) 1997) (Eng.).

2 See *id.* at 36.

3 See *id.* at 42, 59–60, 79–80; Charles Howard McIlwain, *CONSTITUTIONALISM ANCIENT AND MODERN* 3–24 (Cornell University Press [\[AQ? Publisher?\]](#) 1940).

4 In 2003, the *International Journal of Constitutional Law* published a symposium issue on constitutional borrowing. The articles published in this volume mainly analyze cases about borrowing *from* Western Courts (U.S., German, French, for example) or Constitutions. The overwhelming majority of the cases explored are those of non-Western institutions borrowing from Western institutions. See D. M. Davis, *Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience*, 1 INT'L J. CONST. L. 181–95 (2003); Lee Epstein and Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 INT'L J. CONST. L. 196–223 (2003); Yasuo Hasebe, *Constitutional Borrowing and Political Theory*, 1 INT'L J. CONST. L. 224–43 (2003); Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1 INT'L J. CONST. L. 244–68 (2003); Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT'L J. CONST. L. 269–95 (2003); Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence through Negative Models*, 1 INT'L J. CONST. L. 296–324 (2003).

5 See generally 1 INT'L J. CONST. L. 181–324 (2003) (analyzing various aspects of constitutional borrowing while overwhelmingly limiting the analyses to borrowings *from* Western institutions).

6 See John Rawls, *A THEORY OF JUSTICE* 15–24 (Harvard University Press rev. ed. [\[AQ? Publisher?\]](#) 1999).

7 See *id.* at 387–8.

8 See generally Robert Nozick, *ANARCHY, STATE, AND UTOPIA* ([Basic Books [\[AQ? Publisher?\]](#) 1974) (arguing in favor of a minimal state for the best protection of individual rights).

9 See generally Charles Taylor, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (Harvard University Press [\[AQ? Publisher?\]](#) 1989) (inquiring into the nature of identity and humanity in the modern West).

10 I use the words “Global South” and “Global North” as less pejorative synonyms of the words “developing countries” and “developed countries,” respectively.

11 See Boaventura de Sousa Santos, *Three Metaphors for a New Conception of Law: The Frontier, the Baroque and the South*, 29 L. SOC'Y. REV. 569, 579–82 (1995); Mark van Hoecke and Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT'L. COMP. L.Q. 495, 498–99 (1998).

12 See de Sousa Santos, *supra* note 11, [\[AQ? Supra note 11?\]](#) at 579–82; Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5, 10–12 (1997); van Hoecke and Warrington, *supra* note 11 at 498–99. [\[AQ? Supra note 11?\]](#)

13 See Jorge L. Esquirol, *The Fictions of Latin American Law (Part I)*, 1997 UTAH L. REV. 425, 427–28 (1997); Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41, 42 (2003); Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75, 94–95 (2008).

14 See Kwame Nkrumah, *Law in Africa*, 6 AFR. L. J. 103, 105 (1962).

15 See René David and J. E. Brierley, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY*, 222–4 (Simon and Schuster 2nd ed., [\[AQ? Publisher?\]](#) 1978).

16 This inherited or imported law from the colonial cities coexists with the religious legal traditions in many countries in the region, Islamic or Buddhist ones in particular. See Lama Abu-Odeh, *The Politics of (Mis)recognition: Islamic Law*

Pedagogy in American Academia, 52 AM. J. COMP. L. 789, 806–8 (2004).

17 See Brian Z. Tamanaha, “The Primacy of Society and the Failures of Law and Development,” p. 6, St. John’s Univ. Legal Studies Research Paper Series, Paper No. 09–0172 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1406999; Jorge L. Esquirol, *Writing the Law of Latin America*, 40 GEO. WASH. INT’L L. REV. 693, 706, 731 (2009). It is interesting to contrast this argument with the fact that, in other fields, such as literature and art, the production of the South is considered relevant and valuable. Literature and art departments in the United States and Europe, for example, usually offer courses on Latin American, Asian, or African literature or art. The faculties of these departments often include professors from the South or those specialized in the artistic production of the South. In the same way, the work of authors like Gabriel Garcia Marquez, J. M. Coetzee, and Gao Xingjian has contributed to the creation of the grammar of contemporary literature. It would be important to explore the reasons that explain the “universality” of southern art and the marginality of southern law.

18 See Esquirol, *id.*

19 See John Henry Merryman and Rogelio Pérez-Perdomo, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 57, 60 (Stanford University Press [\[\[AQ? Publisher?\]\]](#)2007); R. Daniel Kelemen and Eric C. Sibbitt, *The Globalization of American Law*, 58 INT’L ORGANIZATION 103, 103–36; John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline, and Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 484–89 (1977); Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, in THE NEW LAW AND ECONOMIC DEVELOPMENT 203, 203–52 (D. Trubek and A. Santos eds., Cambridge University Press [\[\[AQ? Publisher?\]\]](#)2006).

20 See Pilar Domingo and Rachel Sieder, *Rule of Law, in LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM 1* (Pilar Domingo and Rachel Sieder eds., Institute of Latin American Studies [\[\[AQ? Publisher?\]\]](#)2001) (Eng.); Andrés Torres, “From Inquisitorial to Accusatory: Colombia and Guatemala’s Legal Transition,” p. 2, Law and Justice in the Americas Working Paper Series, Paper no. 4 (2007), available at <http://lawdigitalcommons.bc.edu/ljawps/4>.

21 See María Victoria Murillo, *Partisanship Amidst Convergence: The Politics of Labor Reform in Latin America*, 37 COMPARATIVE POLITICS 441, 441–3; Graciela Bensusán, “La efectividad de la legislación laboral en América Latina, Instituto de Estudios Laborales,” pp. 13–22, Organización Internacional del Trabajo (2007), available at <http://www.ilo.org/public/spanish/bureau/inst/download/dp18107.pdf>.

22 See Haim Sandberg, *Legal Colonialism – Americanization of Legal Education in Israel*, 10 (2) GLOBAL JURIST, (Topics), article 6.

23 See Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383, 447 (2003); Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195 (1994); Wolfgang Wiegand, *Americanization of Law: Reception or Convergence?*, in LEGAL CULTURE AND THE LEGAL PROFESSION 137 (Lawrence M. Friedman and Harry N. Scheiber eds., Westview Press [\[\[AQ? Publisher?\]\]](#)1996).

24 See Carlos Peña González, “Characteristics and Challenges in Latin American Legal Education,” Conference of International Legal Educators 1, 1–3 (2000), available at <http://www.aals.org/2000international/>.

25 See Carlos Santiago Nino, INTRODUCCIÓN AL ANÁLISIS DEL DERECHO 36–37 (Astrea [\[\[AQ? Publisher?\]\]](#)1984) (Arg.).

26 See Merryman and Pérez-Perdomo, *supra* note 19, at 66. [\[\[AQ? Supra note 19?\]\]](#)

27 See generally Martin Chanock, THE MAKING OF SOUTH AFRICAN LEGAL CULTURE 1902–1936: FEAR, FAVOUR AND PREJUDICE (Cambridge University Press [\[\[AQ? Publisher?\]\]](#)2001) (Eng.); Samuel C. Nolutshungu, *Constitutionalism in Africa: Some Conclusions*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD (Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatley eds., Oxford University Press [\[\[AQ? Publisher?\]\]](#)1993) (Eng.).

28 See generally ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA (Tom Ginsburg and Albert H. Y. Chen eds., Routledge [\[\[AQ? Publisher?\]\]](#)2009) (Eng.); Tom Ginsburg, JUDICIAL REVIEW IN NEW DEMOCRACIES:

CONSTITUTIONAL COURTS IN ASIAN CASES 42 (Cambridge University Press [AQ? Publisher?]) 2003) (Eng.).

29 See, for example, Marcin Matczak, *Judicial Formalism and Judicial Reform: An Example of Central and Eastern Europe* (Jul. 25, 2007) (unpublished paper presented at the annual meeting of The Law and Society Association, Berlin, Germany) (describing the persistence of formalist-inflected adjudication in Poland).

30 See generally Carlos Santiago Nino, *ETICA Y DERECHOS HUMANOS* (Astrea [AQ? Publisher?]) 2003) (Arg.); Eugenio Bulygin, *EL POSITIVISMO JURÍDICO* (Fontamara [AQ? Publisher?]) 2006) (Mex.); Carlos Alchourrón and Eugenio Bulygin, *INTRODUCCIÓN A LA METODOLOGÍA DE LAS CIENCIAS JURÍDICAS Y SOCIALES* (Astrea [AQ? Publisher?]) 1974) (Arg.); Boaventura de Sousa Santos, *TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION* (Cambridge University Press [AQ? Publisher?]) 2002) (Eng.).

31 See, for example, Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (articulating the antiformalist bases for which legal realism came to be known).

32 See, for example, John Dewey, *Logical Method and the Law*, 10 CORNELL L. Q. 17 (1924); Karl Llewellyn, *Some Realism about Realism – Responding to Dean Pound*, 44 HARVARD L. REV. 1222 (1931). See also NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY (Brian Leiter ed., Oxford University Press [AQ? Publisher?]) 2007); Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?* 16 LEGAL THEORY 111 (2010).

33 See generally Jorge L. Esquirol, *Fictions of Latin American Law (Part 1)*, 1997 UTAH L. REV. 425 (1997) (exploring how the failure of law has been used to understand Latin American law and highlighting the antiformalist strains in Latin American law). It is interesting to note the parallels between the failure of law argument and the birth and early development of some social sciences, like anthropology. Two arguments are of special importance in this context. On the one hand, the idea that the only valuable local knowledge is the one that can be translated into the categories of the “universal” knowledge – that is, the knowledge produced in the center. On the other, the thought that there is a difference between the space where knowledge is produced – the center – and the space where fieldwork is done – the periphery.

34 This chapter understands academic products as those created by nonclinical professors, as well as those generated by legal clinics. There are remarkable differences between an article published in an academic journal and some of the typical products of the clinics – a lawsuit or report on human rights, for example. However, I simply want to note in this chapter that both products are the result of intellectual work generated in a law school.

35 See Ugo Mattei, *An Opportunity Not to Be Missed: The Future of Comparative Law in The United States*, 48 AM. J. COMP. L. 712 (1998).

36 This academic know-how includes familiarity with and use of the ethical rules that should guide the use of legal knowledge.

37 See generally DERECHO Y SOCIEDAD EN AMERICA LATINA: UN DEBATE SOBRE LOS ESTUDIOS JURIDICOS CRÍTICOS (César Rodríguez and Mauricio García, eds., ILSA [AQ? Publisher?]) 2003) (Colom.).

38 See generally Carlos Santiago Nino, *ETICA Y DERECHOS HUMANOS* (Astrea [AQ? Publisher?]) 2003) (Arg.); Eugenio Bulygin, *EL POSITIVISMO JURÍDICO* (Astrea [AQ? Publisher?]) 2006) (Mex.); Carlos Alchourrón and Eugenio Bulygin, *INTRODUCCIÓN A LA METODOLOGÍA DE LAS CIENCIAS JURÍDICAS Y SOCIALES* (Astrea [AQ? Publisher?]) 1974) (Arg.); Boaventura de Sousa Santos, *TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION* (Cambridge University Press [AQ? Publisher?]) 2002) (Eng.).

39 See Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal System*, 45 AM. J. COMP. L. 5, 7 (1997).

40 The two best-known publications in which law schools in the United States are classified are *US News and Law School 100*. See *Best Law Schools*, U.S. NEWS AND WORLD REPORT, available at <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools> (last accessed Feb. 2, 2012). For Canadian law school rankings, see *Ranking Canada's Law Schools*, MACLEANS.CA, available at <http://www2.macleans.ca/2009/09/16/ranking-canada%E2%80%99s-law-schools/> (last accessed Feb. 2, 2012). For rankings of law schools in the United Kingdom, see *University Guide 2011: Law*, THE GUARDIAN, available at

<http://www.guardian.co.uk/education/table/2010/jun/04/university-guide-law> (last accessed Feb. 2, 2012). Law schools have criticized these classifications from various perspectives. Law school administrators and professors argue, for example, that the criteria used by *U.S. News* to rank law schools are vague, irrelevant, or incomplete. I agree with these critiques. However, for the purposes of this essay, they are useful for showing the overall differences within legal academia in the United States. I would say that many in the U.S. legal community agree in that there are notable differences between the first fifteen law schools and the last fifteen law schools in the top 100, or between first-tier law schools and third-tier law schools. Yet even these broad differences are obscured by the arguments of the production well, protected geographical indication, and effective operator.

41 “Garage universities” are those whose primary goal is the profit of their founders and whose standards of quality are very low. Generally, their infrastructure is very poor.

42 A portion of legal academia in Latin America, Africa, Asia, and Eastern Europe, therefore, continues to believe that the work of an academic should be to define the content of the principles and rules that comprise the legal system, as well as how to resolve their inconsistencies. Hence, in many of these law schools, the treatise is considered to be the product *par excellence* of law professors. In the best of cases, the basic units of the national legal systems of the Global South are judiciously systematized in this type of academic product. Nevertheless, in most cases, these academic products are nothing more than glosses to the law. In these texts, the professor of law repeats the content of legal norms in different wording and makes comments that are more or less marginal to guiding professional practice or morally evaluating the contents of the law. The weak products of parts of the legal academia in the Global South can be partially explained by the fact that the professionalization of the legal academy is a very recent event in most of the region. Historically, judges and practitioners have constituted law faculties in most of the Global South. These part-time law professors, although many times incredibly competent and committed to teaching and writing, can only dedicate a few hours in the morning or at night to their academic endeavors. Likewise, the weaknesses of legal academia in the Global South are related to the weaknesses of the university system in many of the region’s countries. The economic resources received by the public university system have never been very high and have recently declined in many of them.

43 The universities of Sao Pablo, Andes, Católica, and Autónoma are among the ten best universities in Latin America. See *World’s Best Universities: Latin America*, U.S. NEWS AND WORLD REPORT, available at <http://www.U.S.news.com/education/worlds-best-universities-rankings/best-universities-in-latin-america> (last accessed Jan. 17, 2012).

44 Of course, the legal products created by these (and other) universities are not formulated in a vacuum. They are nourished by preexistent legal concepts and practices – many of which were not locally created. Yet this is the case with the creation of all legal knowledge. The contributions of U.S. legal liberalism, for example, are nourished by the European liberal tradition. Locke, Mill, and Kant are key figures in the work of authors like John Rawls and Ronald Dworkin. Equally, many of the contributions of the Critical Legal Studies are based on the oeuvre of European authors like Marx and Gramsci. New legal knowledge, as with all knowledge, is created only on the edges of the discipline, and it is based on the preexisting conceptual structure. For understanding the process through which legal knowledge is produced in the South, it is key to understand the process through which legal academic elites have been created recently in the region. An important number of the members of these elites have studied in universities in the Global North and, thus, have knowledge of both the local and global legal academic contexts.

45 See generally Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 539 (2004).

46 See generally Alexandre dos Santos Cunha, *The Social Function of Property in Brazilian Law*, 80 FORDHAM L. REV. 1171 (2011).

47 See generally Liliana Obregón, *Noted for the Dissent: The International Life of Alvaro Alvarez*, 19 LEIDEN J. INT’L L. 983 (2006) (Eng.).

48 See Alexandra Huneeus et al., *Introduction in CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA* 3, 3–5 (Alexandra Huneeus, et al., eds., Cambridge University Press [AQ? Publisher?]) 2010).

49 See generally Carlos Santiago Nino, *INTRODUCCIÓN AL ANÁLISIS DEL DERECHO* (Astrea [AQ? Publisher?]) 1984 (Arg.); Genaro Carrió, *NOTAS SOBRE DERECHO Y LENGUAJE* ([AQ? Publisher?]) 1965 (Arg.).

50 See generally Diego López Medina, *TEORÍA IMPURA DEL DERECHO* (Legis [AQ? Publisher?]) 2004 (Col.).

51 See Marcelo Gomes Justo and Helena Singer, *Sociology of Law in Brazil: A Critical Approach*, AM. SOCIOLOGIST, Summer 2001, at 10–25.

52 See Werner Menski, *Comparative Law in Global Context*, in THE LEGAL SYSTEMS OF ASIA AND AFRICA 531–34 (Cambridge University Press[[AQ? Publisher?]]2006).

53 Hauser Global Law School Program, Institute for International Law and Justice, Center for Human Rights and Global Justice, Center on Law and Security, Global Public Service Law Project, Jean Monnet Center for International and Regional Economic Law and Justice, Project on Transitional Justice.

54 China Law Center, Global Constitutionalism Seminar, Center for International Human Rights, Latin America Annual Seminar, Middle East Legal Studies Seminar, The Honesty and Trust Project (Eastern Europe), and Yale Center for the Study of Globalization.

55 East Asian Legal Studies Program, European Law Research Center, Human Rights Program, International Center for Criminal Justice, Islamic Legal Studies Program, Program on International Financial Systems, International Law Library.

56 Center for Transnational Legal Studies, London Summer Program, Asian Law and Policy Studies, Center for the Advancement of the Rule of the Law in the Americas (CAROLA), Georgetown Human Rights Institute, Institute of International Economic Law, Program on International Business and Economic Law.

57 Center for International and Comparative Law, Program in Refugee and Asylum Law, Program for Cambodian Law and Development, European Legal Studies Program, Chinese Legal Studies, Japanese Legal Studies Program, South Africa and Geneva Externship Programs.

58 The Berger International Legal Studies Program, The Clarke Center for International and Comparative Legal Studies, The Clarke Program in East Asian Law and Culture, Mori, Hamada and Matsumoto Faculty Exchange, The Clarke Middle East Legal Studies Fund.

59 The Global Law Workshop and Center for International and Comparative Law.

60 Center for National Security Law, Center for Oceans Law and Policy, International Human Rights Law Clinic, Immigration Law Program.

61 Center for Contract and Economic Organization, Center for Chinese Legal Studies, Center for Japanese Legal Studies, Center for Korean Legal Studies, European Legal Studies Center, The Center for Global Legal Problems, Human Rights Institute, Parker School for Foreign and Comparative Law, International Moot Court.

62 Immigration Clinic, Transnational Worker Rights Clinic, Center for Human Rights, Institute for Transnational Law, International Moot Court Competitions, Lozano Long Institute for Latin America Studies.

63 For a general analysis of the best programs in international law, see Denisse Romero, “Top Ten International Law Schools in the U.S.A.,” MACQUIL.COM GLOBAL PORTAL (Oct. 5, 2010), available at <http://www.macquill.com/articles/topintlwp.php>.

64 The *International and Comparative Law Quarterly*, the *Electronic Journal of Comparative Law*, and the *European Journal of Legal Studies* are prime examples of this tendency.

65 See Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 529, 529–75, 649–91 (2004); Lynn Berat, *The Constitutional Court of South Africa and Jurisdictional Questions: In the Interest of Justice?*, 3 INT’L J. CONST. L. 39 (2005); Burt Neuborne, *The Supreme Court of India*, 1 INT’L J. CONST. L. 476 (2003).

66 See, for example, junio 26, 2009, Sentencia C-417 /09, M. P. Juan Carlos Henao Pérez (Col.) (freedom of speech); Maneka Gandhi v. Union of India, AIR 1978 S.C. 597 (India) (limits to government’s restrictions to personal liberties); Minister of Home Affairs and Another v. Fourie and Another, 2005 ZACC 19; 2006 (3) BCLR 355; 2006 (1) SA 524 (S. Afr.) (gay rights); Lesbian and Gay Equality Project and Others v. Minister of Home Affairs and Others, 2005 ZACC 20; 2006 (3) BCLR 355; 2006 (1) SA 524 (S. Afr.) (gay rights).

67 See Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04, M. P. Manuel José Cepeda Espinosa.

68 In the Indian context, see M. H. Quraishi v. State of Bihar, A.I.R. 1958 S.C. 731; Abdul Jalil and Ors. v. State of U.P. and Ors. on February 14, 1984, A.I.R. 1984 S.C. 882; Commissioner of Police and Ors v. Acharya J. Avadhuta and Anr. on March 11, 2004, A.I.R. 2004 S.C. 2984. See also Gurpreet Mahajan, *Indian Exceptionalism or Indian Model: Negotiating Cultural Diversity and Minority Rights in a Democratic Nation-State*, in MULTICULTURALISM IN ASIA 1–20 (Will Kymlicka and Baogang He eds., Oxford University Press [AQ? Publisher?]) 2005).

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In the South African context, see Soobramoney v. Minister of Health (Kwazulu-Natal) 1997 ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC); Government of the Republic of South Africa and Others v. Grootboom and Others 2000 ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC); Minister of Health and Others v. Treatment Action Campaign and Others (No 1) 2002 ZACC 16; 2002 (5) SA 703 (CC); 2002 (10) BCLR 1075 (CC); Khosa and Others v. Minister of Social Development and Others, Mahlaule and Another v. Minister of Social Development 2004 ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).

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The Colombian Constitutional Court, for example, has used the U.S. and European case law and literature on balancing. See Corte Constitucional [C.C.] [Constitutional Court], septiembre 26, 1995, Sentencia T-425/95, M. P. Eduardo Vargas Muñoz; C.C., mayo 9, 1996, Sentencia T-198/96, M. P. Abelardo Gómez Restrepo; C.C., septiembre 18, 1997, Sentencia C-448/97, M. P. Alejandro Martínez Caballero; C.C., septiembre 25, 1997, Sentencia C-475/97, M. P. Eduardo Cifuentes Muñoz; C.C., mayo 20, 1998, Sentencia SU-225/98, M. P. Eduardo Cifuentes Muñoz; C.C., octubre 20, 1998, Sentencia T-588/98, M. P. Eduardo Cifuentes Muñoz; C.C., diciembre 16, 1998, Sentencia T-801/98, M. P. Eduardo Cifuentes Muñoz; C.C., octubre 6, 1999, Sentencia C-741/99, M. P. Fabio Moron Diaz; C.C., febrero 9, 2000, Sentencia C-110/00, M. P. Antonio Barrera Carbonell; C.C., marzo 29, 2000, Sentencia C-371/00, M. P. Carlos Gaviria Díaz; C.C., abril 25, 2001, Sentencia C-648/01, M. P. Jaime Araujo Rentería; C.C., abril 10, 2004, Sentencia T-1031/01, M. P. Rodrigo Escobar Gil; C.C., diciembre 5, 2001, Sentencia C-1287/01, Marco Gerardo Monroy Cabra; C.C., octubre 29, 2002, Sentencia C-916/02, M. P. Manuel José Cepeda Espinosa; C.C., agosto 9, 2005, Sentencia C-818/05, M. P. Rodrigo Escobar Gil; C.C., agosto 10, 2005, Sentencia C-822/05, M. P. Manuel José Cepeda Espinosa; C.C., septiembre 7, 2005, Sentencia T-933/05, M. P. Rodrigo Escobar Gil; C.C., mayo 10, 2006, Sentencia C-355/06, M. P. Jaime Araujo Rentería; C.C., marzo 21, 2007, Sentencia C-210/07, M. P. Marco Gerardo Monroy Cabra.

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See, for example, the Colombian Constitutional Court cases about the vital minimum and the principle of dignity. See Corte Constitucional [C.C.] [Constitutional Court], enero 16, 1995 Sentencia T-005/95, M. P. Eduardo Cifuentes Muñoz; C.C., enero 23, 1995, Sentencia T-015/95, M. P. Hernando Herrera Vergara; C.C., marzo 30, 1995, Sentencia T-144/95, M. P. Eduardo Cifuentes Muñoz; C.C., mayo 8, 1995, Sentencia T-198/95, M. P. Alejandro Martínez Caballero; C.C., octubre 4, 1996, Sentencia T-500/96, M. P. Antonio Barrera Carbonell; C.C., junio 4, 1998, Sentencia T-284/98, M. P. Fabio Morón; C.C., febrero 4, 1999, Sentencia SU-062/99, M. P. Vladimiro Naranjo Mesa.

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