COMPARATIVE MATTERS

The Renaissance of Comparative Constitutional Law

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How Universal is Comparative Constitutional Law?

"All cases are unique and very similar to others."

T. S. Eliot (*The Cocktail Party*)

In this chapter and the next, I attempt to disperse some of the mist surrounding comparative constitutional studies' epistemological and methodological matrix. To that end, I draw attention to core questions concerning the current state of that matrix, and outline a series of considerations that should be addressed in the conduct of comparative constitutional inquiry. The discussion proceeds in two main parts. I begin the discussion in this chapter by elucidating some of the existential tensions that have characterized comparative constitutional studies from the dawn of the 20th century onward, focusing on the debate between contexutalists and universalists and its implications for core methodological considerations such as case selection and research design. I will revisit this debate again in the next chapter by contrasting the approach taken by legal academics and political scientists to the same sets of comparative constitutional phenomena. Whereas some core distinctions of comparative inquiry (e.g. the distinction between contextualism and universalism) have crossed disciplinary boundaries, others (e.g. the distinction between a focus on formal rules and a focus on behavioral patterns) have been neatly demarcated along disciplinary lines.

In the second part of this chapter, I address what I term the "World Series" syndrome of comparative constitutional law: the pretense that insights based on the constitutional experience of a small set of "usual suspect" settings—all prosperous, stable constitutional democracies of the "global north"—are truly representative of the wide variety of constitutional experiences worldwide, and constitute a "gold standard" for understanding and assessing it. The question here is this: how truly

"comparative" or generalizable is a body of knowledge that seldom draws on or refers to the constitutional experience, law, and institutions of the global south? What are we to make of supposedly universal insights that are constructed by focusing mainly (and often solely) on a very small fraction of the world's constitutions? My aim is to unpack and evaluate the various claims raised by proponents of this "global south" critique of comparative constitutional law, and to assess the relevance of these claims to the epistemological and methodological challenges of comparative constitutional inquiry.

A key concern is the very definition of the term *comparative*. As we have seen, in the field of comparative constitutional law (and comparative law more generally) the term "comparative" is often used indiscriminately to describe what, in fact, are several different types of scholarship: (i) freestanding, single-country studies—often quite detailed and "ethnographic" in nature—that are characterized as comparative by virtue of dealing with a country other than the author's own (as any observer is immersed in their own (constitutional) culture, studying another constitutional system involves at least an implicit comparison with one's own); (ii) genealogies and taxonomic labeling of legal systems; (iii) surveys of foreign law aimed at finding the "best" or most suitable rule across cultures; (iv) references to the laws or court rulings of other countries aimed at engendering self-reflection through analogy and contrast; (v) concept formation through multiple descriptions of the same constitutional phenomena across countries; (vi) normative or philosophical contemplation of abstract concepts such as "constitutional identity," "transnational/supranational/global constitutional order," etc.; (vii) careful "small-N" analysis of one or more case studies aimed at illustrating causal arguments that may be applicable beyond the studied cases; and (viii) "large-N" studies that draw upon multivariate statistical analyses of a large number of observations, measurements, data sets, etc. in order to determine correlations among pertinent variables. These last two purport to draw upon controlled comparison and inference-oriented case-selection principles in order to assess change, explain dynamics, and make inferences about cause and effect. With a few notable exceptions, the study of comparative constitutional law by legal academics has focused on a small set of supposedly representative court rulings, while generally lagging in its adherence to the inference-oriented case-selection and research-design standards employed by social

scientists who engage in "small-N," "large-N," or "multi-method" research on constitutional law and courts.

Granted, this conceptual fuzziness around the term "comparative" is not unique to comparative law; it is quite prevalent in other "comparative" disciplines, from comparative literature to comparative religion.[1] Some comparative disciplines (comparative psychology is a good example) are more methodologically rigorous than comparative law, although even in these disciplines there is some ambiguity as to what qualifies as truly *comparative* work.[2]

A few existential tensions

Since its birth, comparative law has struggled with questions of identity: whether it is a method of inquiry or a substantive discipline, whether and how to move beyond descriptive accounts of the laws of others toward explanatory accounts that suggest why, how, and when laws change or evolve, and how to account for the dynamic between increasing global convergence and the enduring divergence of the world's legal systems. Unsurprisingly, the field of comparative law has excelled in self-reflection and, often, self-lamentation.[3] Most of

[1] E.g. a sample issue of *Comparative Literature* (a leading journal in that field) featured articles such as: David Quint, "The Genealogy of the Novel from the *Odyssey* to *Don Quijote*," *Comparative Literature* 59 (2007): 23–32—a genealogical study; Ilya Kliger, "Anamorphic Realism: Veridictory Plots in Balzac, Dostoevsky, and Henry James," *Comparative Literature* 59 (2007): 294–315—"concept formation" through multiple description; and Vivasvan Soni, "Trials and Tragedies: The Literature of Unhappiness: A Model for Reading Narratives of Suffering," *Comparative Literature* 59 (2007): 119–39—an attempt to develop an explanatory model.

[2] A sample issue of the *Journal of Comparative Psychology* (a leading journal in that field) features articles with a variety of "comparative" elements to them, such as: Anna Wilkinson et al., "Spatial Learning and Memory in the Tortoise (*Geochelone carbonaria*)," *Journal of Comaprative Psychology* 121 (2007): 412–18; Jan Langbein et al., "Learning to Learn During Visual Discrimination in Group Housed Dwarf Goats (*Capra hircus*)," *Journal of Comparative Psychology* 121 (2007): 447–56; Anthony Wright and Jeffrey Katz, "Generalization Hypothesis of Abstract-Concept Learning: Learning Strategies and Related Issues in Rhesus Monkeys (*Macaca mulatta*), Capuchin Monkeys (*Cebus apella*), and Pigeons (*Columba livia*)," *Journal of Comparative Psychology* 121 (2007): 387–97; or Carole Parron and Joël Fagot, "Comparison of Grouping Abilities in Humans (*Homo sapiens*) and Baboons (*Papio papio*) with the Ebbinghaus Illusion," *Journal of Comparative Psychology* 121 (2007): 405–11.

[3] A few notable examples are: James Gordley, "Is Comparative Law a Distinct Discipline?," *American Journal of Comparative Law* 46 (1998): 607–15; John Reitz, "How to Do Comparative Law," *American Journal of Comparative Law* 46 (1998): 617–36; George Fletcher, "Comparative Law as a Subversive Discipline," *American Journal of Comparative Law* 46 (1998):

the writings that have contributed to this are abundant with sophisticated analysis and highbrow jargon but ultimately do not feature a particularly attractive substance-to-ink ratio. They do, however, reflect the intellectual cul-de-sac in which traditional, encyclopedic, taxonomic-style, or legal families-based comparative law is stuck. A recent article went as far as to suggest that comparative law is not, and never will be, a distinctive academic discipline.[4]

The objective of the landmark congress held in Paris in July 1900 by the Société Française de Législation Comparée was "to seek to provide the science of comparative law with the precise model and the settled direction it requires if it is to develop."[5] Over a century later, that direction remains very much unsettled. Although intellectual interest in the laws and legal institutions of other countries has been growing steadily in recent years, surprisingly little has changed with respect to the basic epistemology and methodology of comparative law. We still find that much of the canonical contemporary comparative law scholarship replicates the formalistic and largely descriptive or taxonomic approach to comparative legal scholarship carried out a century ago, although there is a growing body of critical work from within the discipline.[6] All too often, knowledge is still pursued and presented as it was back in the 1920s and 1930s by scholars like John Wigmore, Roscoe Pound, Walther Hug, and Herman Kantorowicz.[7] Today,

683–700; Geoffrey Samuel, "Comparative Law and Jurisprudence," *International and Comparative Law Quarterly* 47 (1998): 817–36; James Gordley, "Comparative Legal Research: Its Function in the Development of Harmonized Law," *American Journal of Comparative Law* 43 (1995): 555–67; Pierre Legrand, "Comparative Legal Studies and the Matter of Authenticity," *Journal of Comparative Law* 1 (2006): 365–460.

[4] Stephen Smith, "Comparative Legal Scholarship as Ordinary Legal Scholarship," *Journal of Comparative Law* 5 (2011): 331–56.

[5] Georges Picot and Fernand Daguin, "Circulaire," in *Congrès International de Droit Comparé, Procèc-Vebaux des Sèances et Documents*, vol. 1 (LGDJ, 1905), 7–8.

[6] See, e.g., Günter Frankenberg, "Critical Comparisons: Re-thinking Comparative Law," *Harvard International Law Journal* 26 (1985): 411–55; Annelise Riles, ed., *Rethinking the Masters of Comparative Law* (Hart Publishing, 2001); Pierre Legrand and Roderick Munday, eds., *Comparative Law: Traditions and Transitions* (Cambridge University Press, 2003); Peer Zumbansen, "Comparative Law's Coming of Age? Twenty Years after *Critical Comparisons*," *German Law Journal* 6 (2005): 1073–84; Ugo Mattei, "Comparative Law and Critical Legal Studies," in Mathias Reimann and Reinhard Zimmermann, eds., *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006), 815–36.

[7] See, e.g., John H. Wigmore, *Panorama of the World's Legal Systems* (West, 1928); Roscoe Pound, "The Revival of Comparative Law," *Tulane Law Review* 5 (1930): 1–16; Walther Hug, "The History of Comparative Law," *Harvard Law Review* 45 (1932): 1027–70; Herman Kantorowicz, "Some Rationalism about Realism," *Yale Law Journal* 43 (1934): 1240–53.

the distinctions between foreign and comparative law remain unclear to many, as do the distinctions between description, taxonomy, and explanation. Much comparative legal literature is still pursued through a traditional case law approach or learned classifications of legal "traditions," "origins," and the like.[8] Over 150 years after its inception, tracing genealogies and the classification of legal systems is still a main organizing principle of virtually all leading textbooks on comparative law.

It is not uncommon to encounter in comparative law journals articles that engage in a predominantly encyclopedic pursuit of knowledge, without much attention to theoretical innovation per se. (Clearly, many articles, certainly those published in the discipline's leading journals, do not fit that description). Some of these pieces are single-country studies characterized as comparative only because they deal with a country other than the author's own. Others subscribe to Konrad Zweigert and Hein Kötz's description of the essence of the comparative inquiry as the comparing of "one's own home system" to a "foreign system of law."[9] While very informative and certainly helpful in developing a better understanding of one's own or of other legal systems, these works seldom amount to an inherently holistic and naturalistic, "thick description" of the sort advocated in social or legal anthropology.[10] The still-prevalent thread of taxonomic scholarship results in multi-tome legal genealogies that resemble 19th-century expositions of newly discovered flora and fauna, some of which focus on pseudo-exotic settings.[11] Other works are preoccupied with a quest to find the evolution of a given legal concept, or to determine the most efficient rule in order to suggest a "best practice" in a given area.[12]

[8] A paradigmatic example of this type of comparative scholarship is H. Patrick Glenn's classic and authoritative, now in its 4th edition, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford University Press, 2010).

[9] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, Oxford University Press, 1998), 32.

[10] See Clifford Geertz, "Thick Description: Toward an Interpretive Theory of Culture," and "Deep Play: Notes on the Balinese Cockfight," in *The Interpretation of Culture* (Basic Books, 1973).

[11] An example of this type of comparative scholarship is John H. Barton et al., *Law in Radically Different Cultures* (West, 1983).

[12] An illustration of this way of thinking about comparative law is provided in Bernhard Grossfeld, *Core Questions of Comparative Law* (Carolina Academic Press, 2005).

At the heart of comparative constitutional law's blurred epistemological and methodological matrix is the tension between universalism and particularism. This may take the form of fundamental disagreements among US Supreme Court justices about the status of foreign law as a valid point of reference for interpreting the US Constitution,[13] but is more vividly reflected in the different approaches to comparative constitutional scholarship taken by those favoring expansive "country studies" or other forms of *idiographic* knowledge (the prevalent mode of comparative constitutional law scholarship to date) and those who seek to produce more generalizable conclusions or other forms of *nomothetic*, presumably objective and transportable knowledge.

The debate between "universalists," who emphasize the common elements of legal systems across time and place, and "particularists" (or "culturalists") who emphasize the unique and idiosyncratic nature of any given legal system, has long characterized comparative law. This divide is clearly illustrated by the debate concerning "legal transplants." Universalists such as Alan Watson contend that inter-country pollination, borrowing, or migration of legal ideas has been a key element of legal change throughout history regardless of the concrete political, social, or cultural context in the "receiving" legal order.[14] Watson challenges the Montesquieuian view that law is a local phenomenon linked to the living conditions of a given society. Against this, Watson argues that in most cases legal rules are not peculiarly reflective of the particular society in which they operate. Legal borrowing (or "transplants" of rules, institutions, or doctrines) occurs primarily because existing law in a given polity is not in touch or in concert with current social or economic needs. As systemic needs evolve, critical gaps in existing laws call for completion, more often than not through borrowing. (This pattern reappears in different historical moments, as elucidated in Chapters 1 to 3).

On the other hand, "culturalists" (e.g. Pierre Legrand, David Nelken, Csaba Varga) take a position that is not qualitatively different than that expressed in Friedrich Nietzsche's famous maxim (*Notebooks*, 1886) "there are no facts, only interpretations." These interpretations,

[13] See, e.g., Antonin Scalia and Stephen Breyer, "A Conversation between Justices," *International Journal of Constitutional Law* 3 (2005): 519–41. See also the discussion in Chapters 1 and 3.

[14] See, e.g., Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press, 1974).

in turn, depend on "culture"—understood by Legrand as "the framework of intangibles within which an interpretive community operates, which has normative force for the community . . . and which, over the *longue durée*, determines the identity of a community as community."[15] The culturalist–relativist position suggests that since law is a complex cultural and linguistic construct, a given polity's laws are inevitably reflective of that polity's shared history, culture, and aspirations.[16] Legal rules in any given polity reflect its cultural habitus, that is, its distinctive mode of understanding reality (the "legal mentalité" that defines the frame of perception and understanding of a legal community, according to Legrand), as well as its shared, deeply embedded historical experience. Thus, "importation" of legal constructs may occur in a superficial or technical form, but is not in any substantive way reflective of the receiving polity's authentic legal evolution. With respect to comparison, the meaning of the culturalist–relativist position is that neutral or objective comparison is virtually impossible; inevitably, similarity and difference are dependent on the observer's subjective standpoint or perspective and thus cannot be measured on an absolute scale. The role of the comparativist is thus not to draw general conclusions about law across time and space, but to focus on understanding the deep contextual structure of a given legal culture, to decipher its "legal mentalité" and how that mentality is embedded in a specific context.

(The reader may think here of similar divisions in very different domains: think international corporate headquarters with a good grasp of the big picture versus small-town branch managers with an intimate acquaintance of individual customers. Similarly, recent baseball movies such as *Moneyball* (starring Brad Pitt) and *Trouble with the Curve* (starring Clint Eastwood) focus on the tension in professional sports scouting between sophisticated statistical analyses or predictive models, which are supposedly unaffected by clichés, common biases, and predispositions, and "old fashioned" scouts who lack this element of objectivity but bring to the table a deep understanding of the game, years of on-the-ground experience, and a "gut feeling" about certain players' talents and promises).

[15] Pierre Legrand, *Fragments on Law-as-Culture* (Kluwer, 1999), 27.

[16] See, e.g., Pierre Legrand, "European Legal Systems Are Not Converging," *International and Comparative Law Quarterly* 45 (1996): 52–81.

In the social and human sciences, the debate over epistemology and methods has been largely aligned along the positivism/relativism divide, with each camp developing its own research agendas, methods, acceptable types of evidence, and explanatory goals. The issues and claims informing this debate are complex and many. The hierarchy implied by the alignment of the positivist and nomothetic approaches, and its implied suggestion that contextual research is only useful insofar as it generates testable hypotheses, is one of the main bones of contention in contemporary social science. Ultimately, however, the trade-off seems to be between breadth and depth, with an accompanying claim by relativists that unlike in the core sciences, key determinants of human behavior or social processes are non-quantifiable, measurable, or even observable to begin with, and so the dependence of positivist research on actual observations makes it an inherently limited approach for studying politics and society. While certain branches of the human sciences (e.g. social psychology) express a clear preference for positivism and scientific, inference-oriented experiments, other disciplines (e.g. social anthropology) have remained committed to relativist, contextual, mostly qualitative scholarship. (This is not meant to suggest in any way that social anthropology lacks scientific rigor. Quite the contrary. In fact, Franz Boas, whose work spawned modern anthropology, is well known for applying the scientific method to the study of human cultures and societies, and for his rejection of the formulation of grand theories based on anecdotal and often unrepresentative knowledge). The epistemological and methodological matrix of some social sciences, most notably political science and sociology, have in effect been split into a quantitative hemisphere and a qualitative one.

In normative constitutional theory that addresses comparative matters, the tension between particularism and universalism is reflected in the different visions of the current "meta-constitutional" structure. At the contextual end stand *constitutional sovereigntists* who see the national demos as the ultimate constitutional sovereign; suggest that domestic constitutional traditions and institutions are unique and inherently more authentic than any external legal (or constitutional) order; and portray global law as lacking in legitimacy and moral authority, as suffering from chronic democracy deficit, and as imposing a certain set of moral values and policy preferences on national states.

At the universal end, stand *global constitutionalists* who stress the significance of universal values (e.g. human dignity or the right to be

free of torture or inhuman treatment), and the importance of supranational legal norms and quasi-constitutional regimes that commit and in effect subordinate national constitutional orders to an overarching cosmopolitan legal framework. When domestic constitutional orders "go astray" or become overly insular, transnational rights regimes may and often do function as a welcome force of progressive humanism. Some universalists have gone as far as suggesting that a given country's very constitutional legitimacy depends not only on the democratic quality of, and approach to rights in, its domestic constitutional practices, but also on "how the national constitution is integrated into and relates to the wider legal and political world."[17] Proponents of this position emphasize what they see as the taming power of such a regime and its human-rights-oriented aspirational and ideational commitments, while significantly downplaying if not altogether overlooking the non-trivial economic and political interests in promoting supranational legal and constitutional orders that often increase standardization yet weaken democratic voice and national fiscal autonomy.

The multi-layered, fragmented structure of the emerging pan-European constitutional framework has given rise to a third camp—*constitutional pluralists*. Building on the German Federal Constitutional Court's articulation of dual (EU and German) constitutional authority in its famous *Maastricht Case* decision (1993), proponents of this view describe a reality of, and provide normative justification for, a post-national, multi-focal constitutional order (at least with respect to the distribution of constitutional authority in Europe) in which there is no single legal center or hierarchy, and "where there is a plurality of institutional normative orders, each with its functioning constitution."[18]

[17] Mattias Kumm, "Constitutionalism and the Cosmopolitan State," *Indiana Journal of Global Legal Studies* 20 (2013): 605–28. Kumm argues, in a nutshell, that "the drawing of state boundaries and the pursuit of national policies generate justice-sensitive externalities that national law, no matter how democratic, cannot claim legitimate authority to assess." Whatever one might think of Kumm's substantive argument, it is fair to say that he is unlikely to be elected governor of Texas on this sort of platform.

[18] Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press, 1999), 104. See, generally, Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2010). For a recent variant on this position, see Vlad Perju, "Cosmopolitanism in Constitutional Law," *Cardozo Law Review* 35 (2013): 711–68. For critiques of "constitutional pluralism," see J. H. H. Weiler, "Prologue: Global and Pluralist Constitutionalism: Some Doubts," in Gráinne de Búrca and J. H. H. Weiler, eds., *The World of European Constitutionalism* (Cambridge University Press, 2011), 8–18; Martin Loughlin, "Constitutional Pluralism: An

In comparative constitutional jurisprudence, the debate between universalists and particularists has taken a somewhat different direction, focusing on the tension between supranational norms (e.g. gender equality or reproductive freedoms) and local traditions (e.g. Ireland or Poland's Catholic heritage). An effective illustration is the heated debate concerning the legitimacy of voluntary judicial reference to foreign sources (discussed in detail in Chapter 1), where proponents of the practice stress the *jus cogens*-like nature of certain constitutional norms and the universality of the human condition more generally, while its opponents stress the incompatibility of some such "external" norms with a given nation's unique constitutional identity and heritage.

The tension between local traditions and purportedly general values commonly manifests itself in legal battles concerning the cultural defense in criminal law or dilemmas of reasonable accommodation under a multicultural constitutional framework. It is vividly evident in the jurisprudence of trans- or supranational quasi-constitutional entities such as the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union. In 2009, to pick one example, the ECtHR overruled Bosnia and Herzegovina's consociational power-sharing arrangements in the case of *Sejdić and Finci v. Bosnia*, finding in favor of two applicants (one Roma, the other Jewish) who challenged the provision of the Bosnian Constitution restricting certain political offices to members of the three "constituent peoples" (Bosniaks, Croats, and Serbs) to the exclusion of "Others."[19] The ECtHR held that the constitutional restrictions on "Others" standing for office violated the European Convention's prohibition on discrimination in Article 14. In so doing, the Court assigned greater weight to general principles of equality than to a highly politicized and

Oxymoron?," *Global Constitutionalism* 3 (2014): 9–30. Hybrids of global trends and local values and traditions have emerged outside the European context. A good example is the idea of "Confucian constitutionalism" in Asia. See, e.g., Tom Ginsburg, "Confucian Constitutionalism: Emergence of Constitutional Review in Korea and Taiwan," *Law and Social Inquiry* 27 (2002): 763–99; Chaihark Hahm, "Conceptualizing Korean Constitutionalism: Foreign Transplant or Indigenous Tradition?," *Journal of Korean Law* 1 (2001): 151–96; Chaihark Hahm, "Ritual and Constitutionalism: Disputing the Ruler's Legitimacy in a Confucian Polity," *American Journal of Comparative Law* 57 (2009): 135–203; Ngoc Son Bui, "Beyond Judicial Review: The Proposal of the Constitutional Academy," *Chinese Journal of Comparative Law* (2013): 1–35.

[19] *Sejdić and Finci v. Bosnia and Herzegovina*, Application Nos. 27996/06 and 34836/06 (ECtHR, Grand Chamber, judgment of Dec. 22, 2009) [Council of Europe].

contextualized multiethnic power-sharing pact that was reached following the vicious Bosnian war of 1992–95.[20]

In *Lautsi v. Italy* (2011)—to pick another ruling that vividly illustrates the tension between cosmopolitan theory and local traditions in comparative constitutional jurisprudence—the Grand Chamber of the ECtHR rejected the human rights claim of a Finnish-born mother residing in Italy who objected to the display of religious symbols (crucifixes) in her sons' public school.[21] Rather than requiring state schools to observe confessional neutrality, the Court upheld the right of Italy to display the crucifix, an identity-laden symbol of the country's majority community, in the classrooms of public schools.[22] Using the margin-of-appreciation concept, Europe's highest human rights court held that it is up to each signatory state to determine whether to perpetuate this (majority) tradition. The crucifix was taken to be so central to Italian collective identity that it was up to Italians themselves to decide on its status. Unlike the ECtHR ruling *Sejdić and Finci v. Bosnia* that gave priority to universal principles over local arrangements, the ECtHR's ruling in *Lautsi v. Italy* gave precedent to the particular over the universal, in part by ruling that in the EU context there was no "universal" line on the matter.

Interestingly, the Grand Chamber's hearing of the *Lautsi* case provided a stage for a poetical climax in the tension between universalism and particularism in comparative constitutional jurisprudence: Professor Joseph Weiler's pro bono intervention on behalf of eight European governments that opposed a ban on the display of crucifixes in Italian

[20] For a passionate critique of the ruling, see Christopher McCrudden and Brendan O'Leary, *Courts and Consociations* (Oxford University Press, 2013).

[21] *Lautsi and Others v. Italy*, Application No. 30814/06 (ECtHR, Grand Chamber, judgment of Mar. 18, 2011) [Council of Europe].

[22] In an earlier decision in this case, the Italian Consiglio di Stato interpreted the crucifix as a religious symbol when it is affixed in a place of worship, but in a non-religious context like a school. It was defined as an almost universal symbol (from the perspective of the majority) capable of reflecting various meanings and serving various purposes, including "values which are important for civil society, in particular the values which underpin our constitutional order, the foundation of our civil life. In that sense the crucifix can perform—even in a 'secular' perspective distinct from the religious perspective specific to it—a highly education symbolic function, irrespective of the religious professed by the pupils" (*Lautsi*, 2011, para. 16). No less revealing, the Italian administrative court ruled that: "it is easy to identify in the constant central core of Christian faith, despite the inquisition, despite anti-Semitism, despite the crusades, the principles of human dignity, toleration, and freedom, including religious freedom, and therefore, in the last analysis, the foundations of the secular State" (quoted in *Lautsi*, 2009, para. 30).

classrooms. Weiler is one of the greatest comparativists of our generation—a prominent academic, president of the European University Institute (EUI) in Florence, editor-in-chief of the *International Journal of Constitutional Law* and the *European Journal of International Law*, and one of the founding fathers of the study of the emerging pan-European constitutional order. His versatile work in comparative public law best captures the intellectual zeitgeist of, and the tensions embedded in, the age of global constitutionalism.

Arguing skillfully before a transnational constitutional tribunal that he deeply respects and has studied thoroughly, Weiler eloquently maintained that no consensus exists throughout Europe with respect to the accommodation of religious symbols in the public sphere. In France, a strict policy of secularism (laïcité) has long been in place; in Poland and Malta, Catholicism has been a part of the collective identity; in Scandinavia, the Evangelical Lutheran Church is the "state church"; in England, the monarch is "Supreme Governor" of the Church of England and "Defender of the Faith"; and the national flags of quite a few European countries, from Sweden to Switzerland and from Greece to Georgia, feature a Christian cross. In the face of such multiplicity, Weiler suggested, the ECtHR ought to avoid imposing a one-rule-fits-all policy on all Council of Europe member states (with their combined 800 million strong population), and ought instead to defer to local values and traditions. In short, the default in no-consensus situations should be a preference for national constitutional sovereignty.

Either way, neither contextualists nor universalists have a monopoly over the "right" or "correct" approach to comparative constitutional inquiry. Proponents of universalism tend to overemphasize cross-national similarities, while advocates of contextualism tend to overemphasize differences. Although they reach diametrically opposed conclusions, both sides seem to overstate their case. Neither side's arguments work equally well across the board. From an empirical standpoint, there are areas of constitutional law (e.g. basic rights) where contextualist concerns may be less powerful (and hence comparisons are more beneficial) as opposed to other areas (say, polity-specific aspirational goals or organic features of a constitution) where idiosyncrasies and contingencies may have more of a bite. Nevertheless, due to broad economic, technological, and cultural convergence processes; the dramatically improved availability of comparative constitutional jurisprudence; and the growing number of constitutional "engineers" ready

to hop on a plane to any of the four corners of the world to provide expert advice as to how to draft a constitution—jurisprudential cross-fertilization and the globalization of certain aspects of constitutional law more generally seem inevitable.[23] However idiosyncratic or rooted in local traditions and practices a given polity's constitutional law may be, it is unavoidably more exposed to such global influences.[24] As Vicki Jackson suggests, jurists, scholars, and policymakers must accept that constitutional law, in the United States and elsewhere, now operates in an increasingly transnational legal environment of international treaties and supranational human rights, trade, and monetary regimes.[25] The outcome of this new reality is what may be poetically described as "difference in similarity," or alternatively, "similarity within difference."

Clearly, an old water well and the concept of infidelity are hardly comparable. But a duck and a stork are. To restate my University of Toronto colleague Catherine Valcke's powerful point, comparability requires unity *and* plurality.[26] Plurality is essential as there is not much sense in comparing things that are perfectly identical; little would be gained by such a comparison. Likewise, there is hardly any utility in comparing things that share little or nothing in common (e.g. a shiitake mushroom and a sewing machine) other than some highly abstract or random attributes (e.g. both are objects, words, or things that begin with the letter S). Contrary to the old saying, apples and oranges share enough in common yet are sufficiently different from each other to be fruitfully (think about it . . .) compared.[27] By contrast, the analytical or theoretical yield of comparing two mid-size broccoli florets (too

[23] Mark Tushnet, "The Inevitable Globalization of Constitutional Law," *Virginia Journal of International Law* 49 (2009): 985–1006.

[24] Greater exposure does not necessarily translate into acceptance. It may engender instead a "reactive" response *against* such influences, as we have seen in Chapter 2. Originalism in American constitutional law is arguably a contemporary example of this pattern at work. Even a reactive pattern is not simply an expression of a pure unalloyed culture, so much as the result of a cross-fertilization that has already occurred. On the pattern of "reactive culturalism," see Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press, 2001), 35–44.

[25] See, generally, Vicki Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press, 2010).

[26] Catherine Valcke, "Comparative Law as Comparative Jurisprudence—The Comparability of Legal Systems," *American Journal of Comparative Law* 52 (2004): 713–40, 720–1.

[27] Valcke, "Comparative Law as Comparative Jurisprudence" (n 26). For an actual chemical comparison of apples and oranges (they turn out to be quite similar), see Scott Sandford, "Apples and Oranges—A Comparison," *Annals of Improbable Research* 1 (1995).

similar), or a broccoli floret and a manual transmission gearbox (too different) is not likely to be high.

It is undisputed that a considerable convergence of constitutional structures, institutions, texts, and interpretive methods has taken place over the past few decades. At the same time, few constitutional norms are truly universal.[28] The increased constitutional similarity alongside patterns of persisting divergence opens up new comparative horizons. To follow the metaphor, it presents us with an orchard filled with ripe apples and oranges, different yet similar and, most importantly, perfectly suitable for comparison. With the exception of uber-totalitarian North Korea and a small handful of other outlier polities, there is copious similarity alongside sufficient degrees of difference in the world of new constitutionalism to allow for some productive comparison, at least in theory. As I shall argue in Chapter 6, the sensibility and rationality of such comparisons boil down to the concrete perimeters of any given comparison, the scope and nature of the substantive claim they purport to advance, and whether the case-selection criteria deployed is properly tailored to suit the theoretical or empirical question a given comparative study is set to address.

The "World Series" syndrome and the "global south" critique

Turning to the literature as it stands, one is compelled to ask how truly "comparative" a field is when its canon draws principally on the constitutional experience of half a dozen (on a good day) politically stable, economically prosperous, liberal democracies? Is this (or should it be) a concern? Should it qualify or limit the applicability of canonical scholarship, perhaps even requiring an "epistemic break" within comparative legal studies, in order to provide "equal discursive dignity to non-European-American traditions"?[29] Or does it merely point to the relativism of lessons that are purportedly universal?

[28] See Zachary Elkins, Tom Ginsburg, and Beth Simmons, "Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice," *Harvard International Law Journal* 54 (2013): 61–95.

[29] Upendra Baxi, "The Colonial Heritage," in Pierre Legrand and Roderick Munday, eds., *Comparative Legal Studies: Traditions and Transition* (Cambridge University Press, 2003),

As any North American sports fan knows, the finals of Major League Baseball is called "The World Series." This is a rather pretentious and presumptuous title. The league includes 30 teams, 29 of which are based in the United States, with the remaining team (the Toronto Blue Jays) based in Canada. The vast majority of players come from either the United States or one of a handful of Central American nations. Odd, then, that this final is called, of all possible titles, the *World* Series. Informing this choice of title is an attitude that—to borrow from a famous charity song—"We are the World."

This "World Series" syndrome is certainly not limited to baseball. How many comparative accounts of constitutional law in Cameroon, Paraguay, or the Gambia can the readers of this book recall seeing of late? Chances are, not many. This, in a nutshell, is the essential question posed by the "global south" critique of comparative constitutional law's intellectual foundations: how universal, representative, or generalizable are the lessons of a body of knowledge that seldom draws on or refers to constitutional experience, law, and institutions in over 95 percent of the constitutional universe (at present comprising of approximately 200 national constitutions, hundreds of sub-national unit constitutions, and several supranational quasi-constitutional regimes, not to mention a large number of past constitutions, thousands of constitutional amendments, and hundreds of thousands of constitutional court rulings)? From this, other questions follow. Does the selective "northern" (or "western") emphasis in comparative constitutional law qualify or limit the applicability or value of canonical scholarship in the field? (Answer: it hinges on the concrete question being asked). Might it be that the focus on the constitutional "north" betrays not only certain epistemological and methodological choices, but also a normative preference for some concrete set of values the constitutional north is perceived to uphold? (Answer: yes, certainly!) In the following pages I unpack these issues. I begin by presenting the core contentions of the global south critique, before turning to assess some of its methodological implications for comparative constitutional studies.

50; cited in Robert Blitt, "The Bottom Up Journey of 'Defamation of Religion' from Muslim States to the United Nations: A Case Study of the Migration of Anti-Constitutional Ideas," *Studies in Law, Politics and Society* 56 (2011): 121–211.

(i) The "global south" critique

The divide between the global north and the global south is commonly linked to the global socioeconomic and political divide, a divide once commonly expressed in the slightly pejorative terminology of "first world" versus "third world" and now often expressed in terms of the "developed world" versus the "developing world." The global north as a geopolitical reference point is taken to include North America, most of Europe, and parts of Oceania (Australia, New Zealand) and East Asia (Japan), whereas the global south habitually refers to Africa, Latin America, and much of Asia and the Middle East. Although there are no formal definitions of the "north" and "south," the understanding is that countries in the global north generally sport higher levels of democracy, government capacity and accountability, economic development, and human development (e.g. as measured by United Nations Development Programme (UNDP) human development indices). Membership in several global organizations reflects this divide: the countries in the global north are commonly classified by the International Monetary Fund (IMF) as having an "advanced" economy, rather than a "developing" economy as in much of the south. All nations in the G7 are located in the global north; of the 34 members (as of early 2014) of the Organisation for Economic Co-operation and Development (OECD), only four (Chile, Israel, Mexico, Turkey) are not located in regions associated with the global north.

In international political economy literature, the acronym BRICS is often used to refer to an association of five major emerging nations (Brazil, Russia, India, China, and South Africa) that are newly industrialized, fast-growing, and very large in scale both population-wise (over 3 billion people combined) and economically (a combined nominal GDP of over $17 trillion per annum). The BRICS countries and their smaller counterparts—think Singapore, Hong Kong, and Taiwan—are increasingly difficult to place on a dichotomous north/south matrix of socioeconomic and political development. But these fuzzy north/south boundaries notwithstanding, there is no doubt that there remain considerable differences between Switzerland and Swaziland in terms of key socioeconomic, political, and human development parameters.

Thus, a common argument raised in debates about global justice is that inequality between life opportunities in the global north and in the global south is increasing, and that the wealthy northern nations do not

do enough to deal with problems such as "Third World" debt, global climate change, mass forced relocation, natural disaster relief, ethnic cleansing, the AIDS epidemic, or extreme poverty. Those who put forward the global south critique commonly point to the underrepresentation, marginalization, or exclusion of the south and the corresponding apathy, disregard, and paternalism demonstrated by the north, with these latter tendencies perhaps informed by the legacies of colonialism, imperialism, racism, Eurocentrism, and fear of the "Other."[30]

The privileging of the global north and the view that it upholds the most advanced and most desirable set of values and practices is as common in comparative legal and constitutional inquiry as it is in economic or political development circles. As David Trubek and Mark Galanter argued in 1974 in their pivotal "Scholars in self-estrangement" essay, the set of ideas known as "law and development" is built on the questionable assumption that American law, and Western law more generally, can be exported abroad to catalyze legal and economic development.[31] The field, they argue, is more an adjunct to development policy organizations than an autonomous academic enterprise. Law and development initiatives, they claim, often amount to little more than the transplanting of legal concepts from the global north into the global south. Others have argued that "law and development" evolved, at least in part, in the context of the Cold War and in alignment with the Western interest in promoting a certain breed of political and economic order in the developing world.[32]

[30] There is also a growing body of scholarship within international law that raises some similar concerns and traces the genealogy of the field as both constituting and constituted by the history of colonialism, imperialism, and the inequalities that followed. See, e.g., Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press, 2004); Anne Orford, ed., *International Law and its Others* (Cambridge University Press, 2006); Brado Fassbender and Anne Peters, eds., *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012).

[31] David Trubek and Mark Galanter, "Scholars in Self-estrangement: Some Reflections in the Crisis in Law and Development Studies," *Wisconsin Law Review* 4 (1974): 1062–104. See also Kevin Davis and Michael Trebilcock, "The Relationship between Law and Development: Optimists versus Skeptics," *American Journal of Comparative Law* 56 (2008): 895–946; Brian Tamanaha, "The Lessons of Law-and-Development Studies," *American Journal of International Law* 89 (1995): 470–86; Brian Tamanaha, "The Primacy of Society and the Failure of Law and Development," *Cornell International Law Journal* 44 (2011): 209–48.

[32] See Jedidiah Kroncke, "Law and Development as Anti-comparative Law," *Vanderbilt Transnational Law Journal* 45 (2012): 477–555. See also, Jedidiah Kroncke, "An Early Tragedy of Comparative Constitutionalism: Frank Goodnow and the Chinese Republic," *Pacific Rim Law and Policy Journal* 21 (2012): 533–90.

A similar epistemic vision also informs the comparative constitutional economics literature. As is well known, Max Weber suggested that from a legal standpoint, the West had a key advantage in the early development in European societies of formal–rational legal systems alongside rational systems of political authority. The resulting constellation of formal and rational structures and norms provided fertile ground for the development of capitalism. In a similar fashion, Douglass North and Robert Thomas argued that efficient economic organization is the key to growth; the development of a rational economic organization in Western Europe accounts for the rise of the West, suggesting that the lack of such organization may be responsible for backwardness in other parts of the world.[33] "Efficient organization," they argue, "entails the establishment of institutional arrangements and property rights that create an incentive to channel individual economic effort into activities that bring the private rate of return close to the social rate of return . . . [I]f a society does not grow, it is because no incentives are provided for economic initiative."[34] The West's rationality and efficiency have led it to adopt legal mechanisms that enhance investors' trust, most notably the constitutional protection of property rights, which in turn has led to economic growth in various historical contexts.

Along roughly similar lines, it may be argued that while the "constitutional design" literature has been traditionally focused on fostering values such as "democracy" or "stability" in deeply divided, post-conflict, or post-authoritarian polities, the vast majority of which happen to be in the global south, it has seldom taken the widening socioeconomic gaps, growing anti-immigrant sentiment, or deep democratic deficits within North America or Europe as challenges that may be remedied through constitutional "engineering" promoted by external actors (as occurred in Afghanistan in 2004 and Iraq in 2005, and to a large extent half a century earlier in Japan). This literature, too, rests on an assumed exportability of key Western constitutional concepts and ideals to troubled and often idiosyncratic settings.

The concept of "human rights" has also drawn its fair share of criticism by advocates of a distinct global south version of human

[33] Douglass North and Robert Thomas, *The Rise of the Western World: A New Economic History* (Cambridge University Press, 1973).

[34] North and Thomas, *The Rise of the Western World* (n 33), 2–3.

rights.[35] The traditional account of human rights outlines three categories or generations of rights: civil and political rights; economic, social, and cultural rights; and collective rights. However, Upendra Baxi, among others, challenges this conceptualization, arguing that it presents human rights in a Western-centric manner. Baxi suggests instead that human rights are the product of real, on-the-ground human struggles against suffering and that they should therefore be viewed as consisting of two generations: modern and contemporary.[36] The modern era of human rights was characterized by the use of international law to perpetuate human suffering through colonialism and other hegemonic practices. During that era, only a small subset of human beings was considered worthy of international law's protection, with others deemed to be mere heathens and barbarians.[37] The contemporary era is characterized by a more individual-focused and universal conception of human rights. The categorization of human rights, argues Baxi, should be based not on a sterile "functionality" but rather on the political context in which they emerged and developed. Moreover, human rights discourse should first and foremost be interpreted and used to further the interests of the worst-off.

Christine Schwöbel forcefully argues that global constitutionalism discourse (which she conceptualizes as part of international law theory), and perhaps canonical international law theory more broadly, is marred by significant omissions and biases "caused by investment in a particular kind of political practice and thought, namely the unquestioned extrapolation of liberal democratic precepts, poorly suited for global constitutional purposes."[38] The theory of global constitutionalism, she argues, falsely assumes universality, is heavily premised upon Western conceptions and structures of law, and fails to account for local constitutional realities. Schwöbel advocates a more organic approach to global constitutionalism (again, understood as part of international law) that would take account of local needs and ideas, treat global

[35] See, e.g., Upendra Baxi, *The Future of Human Rights* (3rd edn, Oxford University Press, 2012); William Twining, "Human Rights, Southern Voices: Francis Deng, Abdullahi An-Na'im, Yash Ghai, Upendra Baxi," *Review of Constitutional Studies* 11 (2005): 203–79; Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, 2010).

[36] See Twining, "Human Rights, Southern Voices" (n 35), 258–74.

[37] A particularly (in)famous example of this pattern at work is found in James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (William Blackwood and Sons, 1883).

[38] Christine E. J. Schwöbel, "Organic Global Constitutionalism," *Leiden Journal of International Law* 23 (2010): 529–53, 529.

constitutionalism as an inescapably political domain, and void it of fixed, quasi-universal, one-size-fits-all content.

Similarly, James Tully has advanced a vision of constitutional democracy as an "empire of uniformity"—a modern form of imperialism that sanctifies impartiality and sameness, disregards genuine cultural diversity, and assumes an embedded right, perhaps even a duty, to convert everyone to its values and perspective.[39] According to Tully, constitutional democracy sees itself as a force of reason against what it portrays as irrational, different (as in the "Other"), "ethnic," "radical," and everything else that does not subscribe to the mainstream liberal vision of the modern. The global spread of constitutional democracy, Tully argues, is not always voluntary, and often follows what in earlier days was perceived as a "right of the self-proclaimed civilized imperial powers to extend colonial and international modern constitutional regimes around the world correlated with a 'sacred duty to civilize' the indigenous peoples under their rule."[40]

Writing within the field of comparative law, authors such as Werner Menski suggest that a close look at some global south polities (in his discussion, India), may show that due to their colonial legal heritage and long history of ethnic and religious diversity, these countries' legal frameworks, in particular personal status laws, are better equipped for dealing creatively with today's dilemmas of multiculturalism and diversity than most Western countries that adhere to stricter legal uniformity. Yet, Menski writes, "non-Western legal systems and concepts have been systematically belittled over the past centuries"; although there has been an increased awareness of legal systems beyond Europe, the rethinking "remains shackled by 'white' colonial presuppositions."[41]

With respect to comparative constitutional law per se, the northern selection bias seems even more engrained. The constitutional experiences of entire regions—from sub-Saharan Africa to Central America and Eurasia—remain largely a *terra incognita*, understudied and generally overlooked. While there are widespread scholarly accounts of constitutional matters in a handful of "usual suspect" settings that are mainly of the Western, liberal-democratic breed, the constitutional

[39] See James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995); James Tully, "Modern Constitutional Democracy and Imperialism," *Osgoode Hall Law Review* 46 (2008): 461–93.

[40] James Tully, "Modern Constitutional Democracy and Imperialism" (n 39), 484.

[41] Werner Menski, "Beyond Europe," in Esin Örücü and David Nelken, eds., *Comparative Law: A Handbook* (Hart Publishing, 2007), 191–216, 191.

experience, law, and institutions elsewhere—say, in Indonesia (population 250 million), Pakistan (185 million), Nigeria (160 million), Bangladesh (155 million), Mexico (120 million), the Philippines (100 million), or Vietnam (90 million)—is seldom even referred to, let alone thoroughly studied, in mainstream European or North American comparative constitutional scholarship. How many comparative accounts of constitutional law in Russia (the most populous country in Europe and Eurasia) or Brazil (population 200 million, the second most populous country in the Americas, and the host nation of the 2014 World Cup and the 2016 Summer Olympics) immediately come to readers' minds, let alone countries like Botswana (the most prosperous economy in Africa) or Kazakhstan (larger in size than the entirety of Western Europe)? Very few, I would guess. The unfortunate yet inevitable result of this is that purportedly universal insights concerning constitutions and constitutionalism are based, more often than not, on a handful of frequently studied and not always representative settings or cases.

A small number of recent monographs and edited collections attempt to address this substantive gap, mainly by focusing on constitutionalism and judicial review from a regional perspective, for instance by looking at constitutionalism in Asia, in Latin America, or in Africa.[42] However, very few of the leading "state of the discipline" collections contain substantial analysis of the north/south gap as such, although some do feature chapters that address the gap indirectly by analyzing constitutions outside the global north and beyond the beaten track.[43] The "Methodologies" chapter of the *Oxford Handbook of Comparative Constitutional Law* (2012) alludes to challenges in comparative constitutional inquiry that contribute to the bias in favor of countries in the global north (e.g. language and legal education), although this point is

[42] See, e.g., Albert Chen, ed., *Constitutionalism in Asia in the Early Twenty-first Century* (Cambridge University Press, 2014); Tom Ginsburg and Rosalind Dixon, eds., *Comparative Constitutional Law in Asia* (Edward Elgar, 2014); Roberto Gargarella, *Latin American Constitutionalism* (Oxford University Press, 2013); "Symposium: The Changing Landscape of Asian Constitutionalism," *International Journal of Constitutional Law* 8 (2010): 766–976; and "Perspectives on African Constitutionalism," *International Journal of Constitutional Law* 11 (2013): 382–446.

[43] See, e.g., the chapters on "Islam and the Constitutional Order" and "Constitutionalism in Illiberal Polities," in *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012), and chapters on "Federalism, Devolution and Secession: From Classic to Post-conflict Federalism" and "Socio-economic Rights" in *Research Handbook on Comparative Constitutional Law* (Edward Elgar, 2011).

not made explicitly. The introductory essay in another major collection, the *Research Handbook on Comparative Constitutional Law* (2011), acknowledges the need for a broader empirical base: "It is probably the case," the editors state, "that 90% of comparative work in the English language covers the same ten countries, for which materials are easily accessible in English."[44] Leading constitutional comparativists agree. Sujit Choudhry observes that "[f]or nearly two decades," comparative constitutional law has been "oriented around a standard and relatively limited set of cases: South Africa, Israel, Germany, Canada, the United Kingdom, New Zealand, the United States, and to a lesser extent, India."[45] In his chapter in the *Research Handbook* on anti-terrorism laws, Kent Roach notes that "[c]omparative constitutional law scholarship needs to expand its horizons by examining countries beyond the usual Anglo-American axis,"[46] arguing that while India and Israel have provided fertile ground for anti-terrorism scholars, Arab states' responses to terrorism are still seldom covered in the literature. Similarly, in the introduction to his important book on the rise of judicial review in Asian democracies, Tom Ginsburg describes his attempt to expand the theoretical and empirical basis of comparative constitutional law outside its past "core areas" of the United States and Europe and notes that "[s]tudies of non-western countries have been less frequent" than studies of Western countries.[47]

Likewise, Cheryl Saunders, a prominent Australian scholar of comparative constitutional law, notes that "one [assumption] which seems obvious enough to need little justification, is that the discipline does not presently [take full account of the global experience]. Much of the discourse of comparative constitutional law," she explains, "focuses on the established constitutional systems of North America and Europe and a few outrider states with similar arrangements, based on similar assumptions."[48]

[44] Rosalind Dixon and Tom Ginsburg, "Introduction," in *Research Handbook on Comparative Constitutional Law* (n 43), 13.

[45] See Sujit Choudhry, "Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies," in Sujit Choudhry, ed., *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press, 2008), 3–31, 8.

[46] Kent Roach, "Comparative Constitutional Law and the Challenges of Terrorism Law," in *Research Handbook on Comparative Constitutional Law* (n 43), 545.

[47] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003), 15.

[48] Cheryl Saunders, "Towards a Global Constitutional Gene Pool," *National Taiwan University Law Review* 4 (2009): 1–38, 3.

Prescriptively, Saunders laments that "[o]ne consequence of the concentration on North America and Europe is that constitutional law and practice in other regions, where the majority of states is located, is not factored into mainstream comparative constitutional law and is, in effect, marginalised." She explains that "[m]arginalisation may take a variety of forms: overlooking the constitutional experience of particular states and regions; assuming their effective similarity with western constitutional systems; reserving them for specialist study by those with anthropological or sociological interests and skills."[49]

As we saw in Chapter 1, voluntary judicial reference to foreign sources tends to center on jurisprudence from a handful of constitutional peak courts. Even those outside the "club" of heavily cited courts, such as constitutional judges from Pakistan to Colombia to Uganda, cite northern jurisprudence much more often than comparable southern jurisprudence. In addition to the conceptual marginalization effect that such one-way traffic of constitutional ideas may have, overlooking constitutional experience in certain regions may also lead to the mischaracterization of certain constitutional developments in the global constitutional north as novel or groundbreaking when in fact they have already occurred in one of the many constitutional settings in the global constitutional south. In his review of David Dyzenhaus's edited collection *The Unity of Public Law* (2004), for instance, Upendra Baxi makes the following point:

> The statement by David Dyzenhaus that *Baker* [a major Supreme Court of Canada ruling] "establishes for the first time in the common law world a general duty for administrative decision-makers to give reasons for their decisions and . . . imposes a reasonable standard for the criterion of evaluating the legality of exercises of official discretion" is plainly and surprisingly wrong. The Indian Supreme Court has already, and reiteratively, further with multiplier impacts in South public law jurisprudence, performed this feat ever since 1950! So has the Botswana Supreme Court in the *Unity Dow* (1992) decision. It is simply pointless to multiply instances of the global south public law juridical creativity. Surely, notions framing a "unity of public law," and oriented to a fashioning of a new *jus cosmopoliticum, at least* ought to take more fully into account the creative jurisprudence of the Commonwealth of Coloured Peoples![50]

[49] Saunders, "Towards a Global Constitutional Gene Pool" (n 48).

[50] Upendra Baxi, "Review of David Dyzenhaus, ed., *The Unity of Public Law*," *Law and Politics Book Review* 14 (2004): 799–804, 804.

From a methodological point of view, an exclusive focus on the global constitutional north may likewise lead to the entrenchment of misconceptions and false generalizations. Countless books and articles are devoted each year to the study of religion in the West, often with an eye to American constitutional law on religion or the accommodation of religious difference (or lack thereof) in the supposedly neutral European public sphere. The reality, however, is that even if we leave aside claims à la Charles Taylor that Western secularism has never really banished religion, as of 2014 approximately half of the world's population, perhaps more, lives in polities that do not subscribe to the Franco-American doctrine of strict structural and substantive separation of religion and state, and where religion continues to play a key role in political and constitutional life. Of this population, approximately one billion people now live in polities in which religion is strongly entrenched. In the past four decades, for instance, at least 30 of the world's predominantly Muslim polities, from Mauritania to Oman to Pakistan, have declared Shari'a (Islamic law) "a" or "the" source of legislation, meaning that all legislation must comply with principles of Islam. As recent developments in Tunisia and Egypt indicate, this type of constitutionalism is not likely to vanish following the so-called Arab Spring. In several other countries precepts of Islam have been incorporated into the constitution, penal code, and personal status laws of sub-national units, most notably in 12 Nigerian states, Pakistan's North-West Frontier Province, Indonesia's Aceh, to varying degrees in two Malaysian states, and to an increasing extent in Russia's Chechnya and Dagestan. In half a dozen Indian states, to highlight another example, harsh restrictions on conversion from Hinduism have been introduced into law by the Hindu nationalist Bharatiya Janata Party (BJP). A further billion people, perhaps more, live in countries such as Thailand where religious affiliation is a pillar of collective identity, or in countries such as Israel or Sri Lanka, where a single religion is granted preferential status.[51] Despite all this, little is known about the "other models" of governing relations between the state and religion. With

[51] On the resurgence of religion in world politics, see, e.g., John Micklethwait and Adrian Wooldridge, *God Is Back* (Penguin Books, 2009); Gabriel Almond et al., *Strong Religion: The Rise of Fundamentalisms around the World* (University of Chicago Press, 2003); Peter Berger, ed., *The Desecularization of the World: Resurgent Religion and World Politics* (Eerdmans, 1999); Hent de Vries and Lawrence Sullivan, eds., *Political Theologies: Public Religions in a Post-Secular World* (Fordham University Press, 2006). See, generally, Charles Taylor, *A Secular Age* (Belknap Press of Harvard University Press, 2007).

few exceptions, the world of constitutional law and religion that lies beyond the separation-of-religion-and-state paradigm has remained a "black hole" of sorts, a whole slice of the comparative constitutional law universe that is seldom explored or theorized.

Perhaps the most systematic articulation of the global south critique in comparative constitutional law is that offered by Daniel Bonilla Maldonado in his 2013 edited collection on the constitutional jurisprudence of the Supreme Court of India, the South African Constitutional Court, and the Constitutional Court of Colombia.[52] The book as a whole is a study of judicial activism outside the better known contexts of the United States and Western Europe. It compares three high-capacity courts operating in distinct political contexts but with similar problems. It shows how courts in developing countries are wrestling with newer topics like socioeconomic rights and indigenous rights. Further, it raises interesting normative questions about the judicial role. It is ultimately unclear to what extent there is a distinctive constitutional jurisprudence of the global south and, if there is, to what extent these three highly touted and sometimes West-gazing courts actually represent it—but, nonetheless, the book raises important research questions and epistemological challenges.

As a backdrop to this collection, Maldonado describes comparative constitutional law as a field that excludes the legal communities of countries outside the United States and Europe. He begins with the noncontroversial claim that there is a grammar of modern constitutionalism that circumscribes how we talk about the field, originating in European Enlightenment philosophers and currently dominated by a handful of courts and contemporary Anglo-American philosophers. The effect of this is that contributions from scholars and courts in global south countries are excluded from canonical constitutional scholarship, or at least ranked very low in its hierarchy. A main reason for this, Maldonado argues, is that those countries' legal systems are seen as merely derivative of European common or civil law systems, even where European-derived law is mixed with native legal orders. It is assumed that global south legal systems are less effective than those in the north, and that this contributes to the legal and economic underdevelopment of global south countries. Study of these systems is

[52] Daniel Bonilla Maldonado, "Introduction: Towards a Constitutionalism of the Global South," in D. B. Maldonado, ed., *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa and Colombia* (Cambridge University Press, 2013), 1–37.

therefore often limited to describing their failures and prescribing improvements.

Maldonado then describes how the peak courts in India, South Africa, and Colombia have dealt with both issues that are important to all liberal democracies and with issues that have special significance in the global south. Despite their differences, India, South Africa, and Colombia share key traits: they are all diverse, unequal societies with a history of political violence and of attempts to consolidate democracy. They also each have a constitution that entrenches a panoply of rights and checks and balances, but that is juxtaposed with a weak political system, a largely impoverished population, and widespread discrimination. For Maldonado, because these challenges are all common in the global south, recounting how these courts have grappled with them is an important step in bringing the south properly into comparative constitutional law.

All told, the importance of the piercing global south critique to the understanding of the field's contemporary epistemological and methodological matrix is obvious. Indeed, it is surprising that it has not received due scholarly attention to date. More than anything else, the global south critique questions the genuineness of the "comparative" in comparative constitutional law, and poses a serious challenge to the universality and general applicability of the field's main insights. At the same time, the global south critique may plausibly be understood as advancing a number of different arguments, closely related yet dissimilar, not all of which appear to pose an equally strong or valid challenge to the comparative constitutional canon. Some unbundling of what exactly is claimed, and on what theoretical and empirical grounds, may be helpful.

(ii) Unraveling the "global south" critique

The global south critique poses at least two major challenges to contemporary comparative constitutional inquiry: (i) it highlights the obvious methodological problem with generalizing from a small and consistently unrepresentative sample, and of presenting these false generalizations as common knowledge and universal truth; and (ii) it underlines the prioritization in comparative constitutional scholarship of concepts such as liberal rights and freedoms or limits on government action, and the corresponding neglect of concepts particularly relevant to the global south, such as the realization of human development,

progressive notions of distributive justice, and the enhancement of state capacity via the constitutional domain. The critique also emphasizes the stark imbalance in reporting and media attention. For example, during the same week in March–April 2013 that the US Supreme Court began hearing arguments concerning gay marriage, the Supreme Court of India released a landmark decision on the copyright of cancer and HIV/Aids drugs that may well be the most important ruling ever made by a court in the area of public health and the eradication of poverty more generally.[53] The former development preoccupied virtually all mainstream media outlets in the West even though at least a dozen Western countries, including Canada, Spain, and Portugal, had already legalized and confirmed the constitutionality of gay marriage. The Indian ruling, by contrast, despite its obvious significance, was reported in far fewer international media outlets, and even then only in a cursory fashion.

Having said that, the global south critique has analytical challenges of its own. One difficulty is over-inclusiveness, that is, the idea that the global south may reasonably be taken to refer to over 160 polities which demonstrate tremendous constitutional variance. Ultimately, it is unclear whether there is a single, unified character of the constitutional south that holds this category together, or whether it is merely useful as a rhetorical alternative—south as "non-north"—to the self-professed constitutional mainstream. In other words, the multiplicity of constitutional experiences in the global south casts doubt on whether the term refers to a single, coherent alternative to the liberal-democratic model of constitutionalism, which itself is multi-varied and nonuniform.

Consider the heterogeneity within merely one subject matter in one corner of the global constitutional south: the comparative constitutional law of religion in Asia. Asia—the birth place of many faith traditions—is not only the most populous continent, but also the most religiously diverse. Hundreds of millions follow Islam, Christianity, Hinduism, and Buddhism. Crude estimates suggest that followers of Islam account for approximately 28 percent of Asia's population (with Islam the majority religion in 26 of the 48 Asian countries); 24 percent follow Hinduism (the vast majority of them in India and Nepal); 18 percent follow varieties of Buddhism (which is the majority religion in eight countries); and the remaining 30 percent follow

[53] *Novartis v. Union of India and Others*, Civil Appeal No. 2706–2716 of 2013 (decision released on Apr. 1, 2013) [India].

another religion.[54] The various post-colonial legacies influencing Asia—British in India and Pakistan, French in Vietnam, Spanish in the Philippines, Portuguese in Macao and East Timor, and Dutch in Indonesia—alongside postwar (as in Japan) and post-Soviet (in the six Asian nations that were once part of the USSR) reconstruction, add another layer of complexity. It is hardly surprising that when it comes to the constitutional law of religion, Asia has it all. It sports the entire array of "religion and state" models, from India's secularism to Iran's constitutional theocracy, and from North Korea's atheism to the transplantation of the American constitutional ideas of "free exercise" and "(dis)establishment" in the predominantly Catholic Philippines.

In fact, it is hard to think of a single pertinent factor that is common to Oman (an Islamic sultanate), Laos (which features a mix of communist atheism and Buddhism), and East Timor (a predominantly Catholic new democracy) other than the classification of all three as Asian countries. This multiplicity and lack of a substantive common denominator defies attempts to identify a common "Asian" approach to constitutional law and religion, and calls into question the intellectual merit of concepts such as "Asian values" when dealing with law and religion on that continent. The lesson to be applied to the considerably broader area of the global south is obvious: given the tremendous diversity of constitutional experiences in the global south, it is difficult to see what holds this category together from an analytical standpoint other than its being contrasted with and offering a purported alternative to the north. More than anything else, the global constitutional south is essentially the global constitutional "non-north."

A second difficulty plaguing the global south concept in comparative constitutional inquiry is that it is not entirely clear what exactly is meant by the "south." At the simplest of levels, the "south" may refer to constitutional settings in the southern hemisphere. But when we move away from that basic criterion, things get considerably blurrier. The "south" may mean "non-canonical," "peripheral," "underrepresented," "marginalized," or "excluded"—that is, it may refer to constitutional settings that are not commonly analyzed or referred to in mainstream comparative constitutional law. However, by that "southness by underrepresentation" definition it is not clear why Finland or Norway are not commonly taken to be members of the constitutional

[54] John Esposito et al., *Religions of Asia Today* (Oxford University Press, 2011).

south, for there seem to be many more accounts of Indian or South African constitutional law in comparative perspective than of Finnish or Norwegian law. Similarly, it might seem appealing to define the constitutional south in terms of the socioeconomic distinction between the global "haves" and "have-nots," but this too is problematic. Latvia is a member of the EU which, according to the Human Development Report 2013, belongs to the group of very high human development countries. Does it truly belong to the global constitutional north? Can countries traverse these divides over time? Argentina, for instance, may have appeared more closely aligned with the north in the early 20th century than at the dawn of 21st century. Is the deeply divided Belgium, a Western country at the heart of Europe, nevertheless closer in some respects to countries struggling with similar existential dilemmas in the global constitutional south? Furthermore, if by "global south" we mean countries characterized by lesser economic development, countries such as Brazil, India, Indonesia, and South Africa—all members of the G20—are hardly authentic representatives of the global south. Perhaps "south" is meant in a linguistic sense; that is, perhaps it refers to places where English—the *lingua franca* of the global constitutional conversation—is not the language in which constitutional matters are conducted, or where constitutional matters are not conducted in *any* of the world's major languages. But does this mean that Israel or Sweden are members of the global south? Another interpretation is that the south consists of countries that were subject to colonialism and imperialism in a way that has significantly affected their constitutional domain and practice. On this account, however, it is not clear why Canada (which gained its independence from Britain in 1867 but did not cut its formal constitutional ties with the British parliament until 1982) and New Zealand (which remained a British Dominion for many years, has no single date of official independence, and abolished appeals to the Privy Council only in 2004) are not considered members of the global constitutional south, whereas Brazil (which gained its independence from Portugal in 1822, i.e. 45 years prior to Canada's independence) is. In short, when taken on its own, none of these understandings of what is actually meant by the "global south" yields a consistently sensible selection of constitutional settings.

A third difficulty with the generic global south critique is its tendency to rely on a group of supposedly "alternative" constitutional settings—most notably India and South Africa—that are anything but underrepresented in the literature. Can anyone make a serious claim

that the Constitutional Court of South Africa has been understudied compared to, say, the constitutional court of Austria or Greece? Likewise, it has not been established, nor do I think it will be, that the methods of interpretation used by the South African Constitutional Court or the jurisprudential outcomes it commonly produces are substantively different than those of apex courts elsewhere, nor has it been shown that any substantive difference that does exist is attributable to South Africa's constitutional "south-ness." It may well be the case that the truest representatives of the constitutional global south are not its most studied members, but rather its silent majority, namely Guatemala, Fiji, Vietnam, Angola, and other countries that are seldom referred to in comparative constitutional studies, whose prominent jurists rarely go on lecture tours in the world's top law schools, and whose jurisprudence is almost never referenced by courts overseas or listed in syllabi for courses on comparative constitutionalism.

A common and intuitively plausible claim is that because the socioeconomic gaps in the global south are often considerably wider than those in the north, and because state capacity is, by and large, lower in the south, constitutional courts in these countries will be more inclined to intervene on behalf of the poor, or to support the constitutional recognition and progressive realization of social and economic rights. Anecdotal evidence on this matter seems to cut both ways. As we have seen in Chapter 1, a comparison that supports this proposition is a comparison between the generous interpretation of Article 21 of the Indian Constitution with respect to social and economic rights, and the restrictive interpretation of the nearly identical section 7 of the Canadian Charter of Rights and Freedoms with respect to such rights. It is plausible that the visible socioeconomic gaps in India, and the inability of the country's political sphere to close them, have something to do with the Supreme Court of India's willingness to extend relatively generous protection to socioeconomic rights. However, let us then compare Mexico and Colombia. The socioeconomic gaps in these two countries are roughly similar, and both of them would be considered as belonging to the global south—yet, there has been nearly no jurisprudence on socioeconomic rights in Mexico, and an explosion of progressive jurisprudence on such rights in Colombia. In other words, it appears that factors that are not directly related to the common characterization of these countries as members of the constitutional south account for the considerable differences in their socioeconomic rights

jurisprudence.[55] The experience in South Africa also supports this idea. South Africa's constitutional jurisprudence on social and economic rights was very modest prior to the country's transition to a new constitutional order in 1995. Drawing on a new constitutional framework, the newly established South Africa Constitutional Court turned itself, in the first decade of its existence, into one of the most innovative and progressive tribunals in the world with respect to the adjudication of social and economic rights. In recent years, the Court's progressiveness on this front has declined considerably. Through all of these transformations, South Africa's "southness" remained virtually unchanged. In short, the net independent explanatory contribution of the global south factor is unclear, and at any rate may vary from one comparative setting or period to another.

As a normative and critical set of arguments that calls for greater inclusion of those once excluded settings and demands consistency in the invocation of "difference in similarity" or "similarity in difference" principles, values, and voices, the global south critique is powerful. From a methodological perspective, the invocation of the experience of the "constitutional south" is substantively useful to our understanding of a certain area of constitutionalism mainly where there is substantive difference, such that a focus on the "south" factor qualitatively expands the variance of observations on a given constitutional phenomenon, or where observations on the constitutional front (dependent variable) are similar to those witnessed in "canonical" settings despite considerable differences in key background factors (independent variables). When invoked in one of these contexts, the idea of the global south has a "black swan" effect in the sense that it debunks or at least raises doubts about the validity of an "all swans are white" generalization (no pun intended), and is useful to that extent. Where such substantive difference does not exist, however, and what is being looked at is yet another white swan just like all the others (although located elsewhere), the invocation of a "southern" example—fascinating as it may seem—adds little to theory-building as such. If we approach the global south with this in mind—which would be arguably a more analytically robust and methodologically

[55] For further elaboration on variance in economic and social rights constitutional provisions worldwide, see Courtney Jung, Ran Hirschl, and Evan Rosevear, "Economic and Social Rights in National Constitutions," *American Journal of Comparative Law* 62 (forthcoming in 2014).

astute approach to the idea—a given constitutional setting may belong to the global south in one context or comparative dimension but not in another, or may be relevant for some studies but not others. As we shall see in the following chapter, a similar set of considerations applies to any astute deployment of case-selection and research-design principles, whether drawing on "north" or "south" constitutional settings.

An intuitive solution to the fluidity of categories such as "the global constitutional south" is the use of problem-driven, inference-oriented controlled comparisons, whether of the small-N or large-N breed. Here, the constitutional experience of a particular country, or indeed of the global constitutional south category in itself, could be treated as relevant or irrelevant to any concrete question a given comparative study purports to address. This sort of approach would ensure that there is a rational, analytically robust connection between the research questions being asked and the observations about the global constitutional south being used to address them. Somewhat ironically (as we have seen, some global south critics argue in favor of context and qualitative analysis, and against a fallaciously unified narrative in comparative constitutionalism), a large-N research design that is often indifferent to the context and particularities of concrete cases rests on a fundamentally "egalitarian" vision that treats the constitutions of the Gambia and of the United States as two data observations of equal weight.

It may well be the only research design that systematically overcomes the north/south division in comparative constitutional studies. Paradoxically, it can do this by its tendency to ignore context, overlook many pertinent differences among countries, and by applying a unidimensional yet universal "sameness" principle to comparative constitutional analysis. If one's concern is the overrepresentation of a handful of countries at the expense of the rest of the constitutional universe, or the stratification of the world's constitutions through the construction of "platinum club" constitutional orders that are considered "important" and "serious" while other constitutional orders are taken to have considerably less (or even no) moral and theoretical value, then a large-N research design, with its "no constitution is left behind" approach, offers a potential remedy. This, then, brings us to problems of case selection and research design in comparative constitutional studies. I take a closer look at these matters in the next chapter.