Introduction

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 make 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

1 See James Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity 62–79 (Cambridge University Press 1997).
2 See *id*. at 36.

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, 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

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

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.

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).

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.

6 See John Rawls, A Theory of Justice 15–24 (Harvard University Press 1999).
7 See *id*. at 387–88.
8 See generally Robert Nozick, Anarchy, State, and Utopia (Basic Books 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 1989) (inquiring into the nature of identity and humanity in the modern West).

In this hierarchy, the scholarship and legal products created by the Global South[10] 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

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, 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.

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, 222–24 (2nd ed.,Simon and Schuster 1978).

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. From this perspective, 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

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, 806–08 (2004).

17 See Brian Z. Tamanaha, "The Primacy of Society and the Failures of Law and Development," p. 6, St. John's University 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, and 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.

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.

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 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 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 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, 441–43; 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.

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, Laurence Tribe, and Cass Sunstein 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 or 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

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 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 1984) (Arg.).

American,[26] African,[27] Asian,[28] and Eastern Europe[29] 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 the concepts and mandates of law 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

26 See Merryman and Pérez-Perdomo, *supra* note 19, at 66.

27 See generally Martin Chanock, The Making of South African Legal Culture 1902–1936: Fear, Favour and Prejudice (Cambridge University Press 2001); 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 1993).

28 See generally Administrative Law and Governance in Asia (Tom Ginsburg and Albert H. Y. Chen eds., Routledge 2009); Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases 42 (Cambridge University Press 2003).

29 See, for example, Marcin Matczak, *Judicial Formalism and Judicial Reform: An Example of Central and Eastern Europe* (July 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, Ética y derechos humanos (Astrea 2003) (Arg.); Eugenio Bulygin, El positivismo jurídico (Fontamara 2006) (Mex.); Carlos Alchourrón and Eugenio Bulygin, Introducción a la metodología de las ciencias jurídicas y sociales (Astrea 1974) (Arg.); Boaventura de Sousa Santos, Toward a New Legal Common Sense: Law, Globalization, and Emancipation (Cambridge University Press 2002).

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 products[34] 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

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 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 hand, 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 introduction 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.