*Daniel Bonilla Maldonado,* **Legal Barbarians Identity, Modern Comparative Law and the Global South**, Cambridge University Press 2021, 179 pages, EUR 89.5, ISBN: 978-1-108-83362-2.

Daniel Bonilla's *Legal Barbarians* offers a compelling critical account that shows how canonical periods are founded, and authors of modern comparative law operate, on a basic conceptual opposition: the "legal subject" versus the "legal barbarian".[1] In a nutshell, to paraphrase Bonilla, the legal barbarian is everything that the legal subject is not. The legal barbarian is not a subject worthy of study, not even capable of producing "true" law: "the only culture that is rich and complex enough to create true law is Western culture".[2] The legal barbarian has thus nothing to contribute to addressing or solving social problems; if anything, it should aim to mimic the legal subject. As a mere copy, it is condemned to live in the shadow of the real subject of law and to be assessed in term of its success or failure to reproduce the juridical structures of the "true" legal systems. The legal subject, perhaps unsurprisingly, is what we understand as the Global North today, and the legal barbarian is the (undistinguishable) rest of the world –or the Global South.[3] The legal subject/legal barbarian conceptual opposition, according to Bonilla, has permeated modern legal consciousness.

To show how modern comparative law has created the legal subject/legal barbarian conceptual opposition, in chapters 2-4, Bonilla analyzes three key moments and paradigmatic authors in the discipline: instrumental comparative law through the work of Charles Montesquieu (Chapter 2), comparative legislative studies through the work of Henry Maine (Chapter 3), and comparative law as an autonomous discipline through the work of René David and Hein Kötz (Chapter 4).[4] Each of these chapters is structured into three thematic axes: how in each of these moments the legal "self" and a legal "other" are created, the conceptual geographies they construct, and how legal history is conceived in each of these moments.[5] Chapter 5 examines the different intellectual movements that question the legal subject/legal barbarian narrative created by modern comparative law—namely, *Third World Approaches to International Law* (TWAIL), postcolonial studies of law, and critical comparative law. In particular, this chapter examines the subject that emerges from the counter-narrative created by these intellectual movements: the critical academic— "a subject defined by the professional space she occupies, her cultural hybridity, and her political position".[6]

1 Daniel Bonilla Maldonado, *Legal Barbarians: Identity, Modern Comparative Law and the Global South* (Cambridge University Press 2021) 11–12; 39–40.

2 *Ibid.* 171.

3 *Ibid.* 29–45.

4 *Ibid*. 12.

5 *Ibid*. 13.

6 *Ibid*. 27.

**A case for single case (or Small-N) studies?**

One of the central premises in Bonilla's account is that law is a central component of modern culture, not its consequence.[7] In his words, "modern law is not a consequence of modern culture; it is part of this culture, partially constitutes it".[8] As such, law is part of the conceptual framework through which both the legal subject and the legal barbarian construct their identity.[9] In Paul Khan's words, "[l]ike language, from the time we are born, law offers us a form of understanding ourselves, understanding the world, and giving meaning to the relationship between the world and us".[10] However, as noted above, modern comparative law has consistently disregarded the culture of the "other"/the legal barbarian as worthy of study or as a relevant factor to address social problems. In discussing the emergence of comparative law as an autonomous discipline, its commitment to the creation of objective knowledge, of functionalism,[11] and of the universalization/unification of law[12] Bonilla explains how legal taxonomies, in this case, the concept of *legal families* (as the collective subject in this phase of modern comparative law), eliminate social and cultural complexity.[13]

To a large extent, this can be explained by David and Zweigert-Kötz's understanding of the relationship between law and culture, and in the concept of law on which the previously mentioned taxonomies are constructed.[14] In contrast to Bonilla's view, for David and Zweigert-Kötz, law is a consequence of culture.[15] Legal families, in this context, "are a product of the cultures they operate in".[16] European culture, understood as the "Greco-Roman culture, its individualism, rationalism, and secularization",[17] created the civil and common law families.[18] It is the shared values of European culture that allow for the creation of "true law"/"true legal systems.[19] In this context, any other culture (e.g., African, Asian, and Latin American cultures) that does not belong to Western Europe produces religion or politics but not law.[20] This conception of law as culturally determined,

7 *Ibid*. 35.
8 *Ibid*.
9 *Ibid*.
10 *Ibid*. 2.
11 *Ibid*. 101.
12 *Ibid*. 111.
13 *Ibid*. 110.
14 *Ibid*. 114.
15 *Ibid*. 112.
16 *Ibid*. 113.
17 *Ibid*.
18 *Ibid*.
19 *Ibid*. 114.
20 *Ibid*.

according to Bonilla, does not classify but ranks the legal systems of the world.[21] The practical implications of such an understanding are striking. The description of the process of adoption of Ethiopia's civil code,[22] drafted by René David, is particularly illustrative of how easily cultural complexities were disregarded: the working premise was that there was no law in Ethiopia,[23] and even the local language was understood as an obstacle to creating "true" law.[24]

Building on the previously described approach, *Legal Barbarians* challenges -and questions the utility of- comparative law approaches that are not in dialogue with (and do not take seriously) the legal reality and, more specifically, the culture, of the jurisdictions under study. On this point, Bonilla notes:

> *The role that law has in the construction of individual identities of course varies among cultural communities. The modern, enlightened subject does not imagine itself in the same way as a subject that belongs to a traditional Latin American indigenous community like the Nukak Maku does so…. How law is conceived varies between one community and another. Consequently, the way in which the legal constructs the identity of the subjects it governs is also distinct.*[25]

In this way, Bonilla seems to make an implicit call for Small-N studies. Studies, that above all, are able to offer the nuance that modern comparative law, in Bonilla's account, lacks. Such an approach requires comparativists to directly engage with the complexities of law as culture. From my perspective as a comparative constitutional scholar, it seems clear that the engagement with culture is crucial to understanding constitutional systems, yet it is an endeavor still in its early days. This is so despite a number of recent works that take seriously the relationship between culture and constitutional law, and that are acutely aware of the importance of the local.[26] A key concept that offers an important, if imperfect, tool to move in that direction is that of constitutional culture. Consider, for example, David Kenny's work developing a methodological approach to reveal and map constitutional

21 *Ibid*. 115.

22 *Ibid*. 117–126.

23 *Ibid*. 118.

24 *Ibid*. 121–122.

25 *Ibid*. 3.

26 See e.g. Daniel Bonilla Maldonado, 'Introduction: Toward a Constitutionalism of the Global South' in Daniel Bonilla Maldonado (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press 2013); David Kenny, 'Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland' [2018] 66 The American Journal of Comparative Law 537; Diego Eduardo López Medina, *Teoría impura del derecho: la transformación de la cultura jurídica latinoamericana* (Legis 2004).

culture – what he terms *comparative localism*[27] – and suggesting that a difference- and divergence-oriented approach is needed in comparative constitutional law (what he calls *differential comparative constitutional law*);[28] or that exploring cultural norms that have helped preserve executive dominance in a minority government context in Ireland (with Conor Casey);[29] as well as that exploring the relationship between directive principles and constitutional culture (with Lauryn Musgrove McCann).[30]

In my own work, I have attempted to understand the operation of amendment rules by going beyond the text and examine the ways in which different non-legal factors (which can be understood as falling within the notion of constitutional culture), affect the rigidity or flexibility of constitutions.[31] Despite this increased attention to culture, comparative constitutional lawyers still tend to focus on certain countries of the Global North (or what Ran Hirschl would call the *usual suspects*)[32], which reflects in a dramatic way the dichotomy between subjects and barbarians and the supposed unworthiness of the latter for comparative analysis. The idea behind the latter, as Bonilla explains in his discussion of functionalism (Chapter 4), is that in finding solutions to social problems, the comparative lawyer should:

> *focus on the mother legal systems, not on the child legal systems. Comparative law's object of study should therefore not be anything other than a few European countries (France, Germany, and the United Kingdom, primarily) and the United States. Understanding legal families does not involve describing, analyzing, and evaluating the legal systems of the Global South; these are mere reproductions of the mother legal systems. It is, therefore, not a coincidence that the teaching of comparative law in the twentieth century revolves around the few countries mentioned above… European law is thus presented in this narrative as universal or universalizable while non-European law is presented as non-universalizable, contextual law.*[33]

27 Kenny (n 26); David Kenny, 'Examining Constitutional Culture: Assisted Suicide in Ireland and Canada' [2022] 17 Journal of Comparative Law 85.

28 Kenny (n 27).

29 Conor Casey and David Kenny, 'The Gatekeepers: Executive Lawyers and the Executive Power in Comparative Constitutional Law' [2022] International Journal of Constitutional Law 1.

30 David Kenny and Lauryn Musgrove McCann, 'Directive Principles, Political Constitutionalism, and Constitutional Culture: The Case of Ireland's Failed Directive Principles of Social Policy' [2022] European Constitutional Law Review 1.

31 Mariana Velasco-Rivera, 'Constitutional Rigidity: The Mexican Experiment' [2021] International Journal of Constitutional Law 1042; Mariana Velasco-Rivera, 'Why Mexico Keeps Amending Its Constitution: Secrets of a Cartel Democracy' [2019] JSD Dissertation.

32 Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014).

33 Bonilla Maldonado (n 1) 105, 117.

This also means that innovations that may appear in "child legal systems" are to be seen as deviations rather than as alternatives to the dominant legal structures. In comparative constitutional law, there is also some progress in this area. In light of Chapter 5, *The Critical Academic of Law,* the development of works by scholars who are from the Global South is crucial to creating a counter-narrative that resists and challenges the legal subject/legal barbarian conceptual opposition. A recent example is Berihun Gebeye's *A Theory of African Constitutionalism*[34] where he challenges the schools of thought (legal centralism and legal pluralism) that respectively see African constitutionalism as very disappointing at best and as a tragic failure of the liberal constitutional project at worst and that conceives it separately from constitutionalism in the West.[35] In my view, one of the many contributions of Gebeye's work is not only that it sheds light on jurisdictions that are normally overlooked in comparative constitutional studies but also that it unapologetically breaks with legal subject/legal barbarian hierarchical conceptual opposition that Bonilla points out. Gebeye offers a theoretical framework (legal syncretism) to understand and assess African Constitutionalism not as a deviation from the liberal constitutional project, but in its own terms—taking into account international law, colonial laws, African indigenous laws, and liberal constitutional norms and practices. In so doing, Gebeye situates himself, in Bonilla's terms, as the critical academic from the Global South that constructs a counter-narrative that challenges the conceptual opposition subject of law/legal barbarian that cuts across comparative studies and places African constitutionalism on equal footing as constitutionalism of the West. In this context, "legal difference does not (…) imply inferiority or subordination (…)",[36] it is simply a different constitutional experience equally able to offer solutions to social problems than any other jurisdiction in the West.

In the last instance, the *Legal Barbarians* can be understood as a warning call for comparativists – to recognize and accept the limitations of the discipline, an invitation to nuance and the acceptance that perhaps the understanding of legal systems in a comparative way will always be imperfect. "The heterogeneity of the world of law" as Bonilla writes, "must be made explicit within the discipline."[37] This means that "[t]he legal 'other' should…be taken seriously, should be described in a precise manner, and should be evaluated rigorously as the discipline has described and evaluated the legal "self."[38]

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34 Berihun Adugna Gebeye, *A Theory of African Constitutionalism* (Oxford University Press 2021).

35 *Ibid*. 1.

36 Bonilla Maldonado (n 1) 171.

37 *Ibid*. 172.

38 *Ibid.*