The Southern Turn in Comparative (Constitutional) Law. Review Essay: The Global South and Comparative Constitutional Law

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Abstract: Legal academia has historically been diligent in examining legal knowledge as a method of interacting with, controlling, or transforming the world. However, it has been only tangentially concerned with the discourses and practices that constitute the preconditions to produce legal knowledge, as well as those that regulate its value, distribution, and use. The Global South and Comparative Constitutional Law is a book that deviates from this general rule in legal academia. The book's main subject of enquiry is the political economy of legal knowledge. On the one hand, it questions the dominant models that control the production, exchange, and use of legal products. On the other hand, it offers an alternative model for creating, distributing, and operationalizing legal knowledge. To examine the aims of the book, as well as its materialization, I divide this essay into two parts. First, I describe and analyze the two dominant models in the political economy of legal knowledge: the liberal model and the colonial model. Secondly, I examine the arguments by means of which the book questions these models and analyze its normative proposal: the Southern turn in comparative (constitutional) law.

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Legal knowledge is a commodity. As a tradable good, legal knowledge is subject to a set of processes and rules that regulate its production, value, and exchange.[1] Legal products, therefore, are subject to a political economy of legal knowledge. This political economy specifies the processes through which legal knowledge can (and should) be created, who can be creators of legal knowledge, how the creators and consumers of legal knowledge should relate to each other, what role should be assumed by the different operators involved in the processes of creation of legal products, the direction that the exchange of this type of products should take, and what contexts are considered to be rich or poor for the creation

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1 *Daniel Bonilla*, La geopolítica del conocimiento jurídico: teoría y práctica, in: Daniel Bonilla (ed.), Geopolítica del conocimiento jurídico, Bogotá 2015, p. 13-42.

of original legal products.[2] Legal knowledge, of course, is more than just a commodity, for example, it can be understood as a good with intrinsic value as it allows us to describe, analyze or evaluate the world; an instrument that allows us to solve social problems, control individuals and communities, or distribute scarce resources; or a tool to resist power or to emancipate subordinate groups.[3]

Legal academia has historically been diligent in examining legal knowledge as a method of interacting with, controlling, or transforming the world.[4] However, it has been only tangentially concerned with the discourses and practices that constitute the preconditions to produce legal knowledge, as well as those that regulate its value, distribution, and use.[5] *The Global South and Comparative Constitutional Law* is a book that deviates from this general rule in legal academia. The book's main subject of enquiry is the political economy of legal knowledge. On the one hand, it questions the dominant models that control the production, exchange, and use of legal products. On the other hand, it offers an alternative model for creating, distributing, and operationalizing legal knowledge. To examine the aims of the book, as well as its materialization, I divide this essay into two parts. First, I describe and analyze the two dominant models in the political economy of legal knowledge: the liberal model and the colonial model. Secondly, I examine the arguments by means of which the book questions these models and analyze its normative proposal: the Southern turn in comparative (constitutional) law.

A. The Dominant Political Economy of Legal Knowledge

The dominant political economy of legal knowledge is constituted by two models that coexist in cognitive dissonance in modern legal imagination: the liberal model of legal knowledge production and the colonial model of legal knowledge production.[6] The two are normative models that compete to control modern legal conscience and thus to regulate the behaviors of individuals with respect to the production, exchange, and use of legal knowledge. The liberal model is the one that typically appears, in a not fully articulated

2 *Daniel Bonilla*, The Political Economy of Legal Knowledge, in: Colin Crawford and Daniel Bonilla (eds.), Constitutionalism in the Americas, Cheltenham 2018, p. 29-78.

3 *James Boyd White*, Legal Knowledge, Harvard Law Review 115 (2002), p 1396-1402.

4 *Duncan Kennedy*, Two Globalizations of Law & Legal Thought: 1850-1968, Suffolk University Law Review 631 (2003), p. 36; *Fernanda Pirie*, Legal Thought: Meaning and Power, in: Fernanda Pirie (ed.), The Anthropology of Law, Oxford 2013, p 52-72.

5 For some interesting exceptions see, for example, *Deval Desai/M. Schomerus*, 'There Was A Third Man…': Tales from a Global Policy Consultation on Indicators for the Sustainable Development Goals, Development and Change, The Hague 2018, p. 49; *Deval Desai,* In Search of 'Hire' Knowledge: Donor Hiring Practices and the Organization of the Rule of Law Reform Field, in David Marshall (ed.), The International Rule of Law Movement – A Crisis of Legitimacy and the Way Forward, Harvard 2014; *Deval Desai/Rebecca Tapscott, Tomayto Tomahto*, The Research Supply Chain and the Ethics of Knowledge Production, Humanity Journal (2015).

6 *Bonilla*, note 2, p. 31.

or implicit manner, when modern legal actors discuss issues related to, for example, the value of a particular legal product, the weaknesses of the Global South with regard to legal knowledge production, or the reasons why legal transplants generally originate in the Global North and migrate towards the Global South.[7] The model is openly discussed when it is required to substantiate the descriptions, analyses, and evaluations that an interlocutor makes with regard to the creation, exchange, or use of a particular legal product or the general processes that make them possible. The colonial model, in contrast, does not appear or appears much more veiled in these types of conversations.[8] Even though it also guides the behaviors of modern legal consciences, it is not openly discussed insofar as it conflicts with some of the values of enlightened modernity such as equality or autonomy. Both models are ideal types that simplify a heterogeneous and complex reality in order to describe and understand it. Describing these models thus implies making decisions about which elements are central to these discourses and practices, which are peripheral, and which are elements that do not form part of these ideal types.

B. Abstract Subject, Global Space, and Linear History

The liberal model has three elements to its core: subject, space, and time. The world is always perceived by a localized and historicized individual consciousness. The liberal model of legal knowledge production intersects with liberal political philosophy. In this model, politics and epistemology intersect. Some of the central premises of political liberalism are used to describe, analyze, and evaluate the subjects of knowledge, as well as their products, the processes by which they can be created, and the ways in which they can be interchanged.[9]

The first component of the model characterizes the subject of knowledge as autonomous and rational. [10] Consequently, it considers that any individual can create original legal knowledge; any member of the species has the capacity to create valuable legal products. The creation and its quality are a consequence of the talent, discipline, and work of individuals. [11] It is also a consequence of the appropriation and rigorous use of the theoretical frameworks and methodologies that are accepted within the discipline. The model, therefore, is profoundly egalitarian. The particular identity of the subject of knowledge is irrelevant. The liberal subject of knowledge is an abstract individual, characterized solely by the capacities that enable it to create legal products. Neither its race, nor its gender nor the culture to which it belongs matters. Clearly, the subjects of knowledge do not create knowledge in a vacuum. For them to fulfil their task, they need certain material conditions,

7 *Bonilla*, note 2, p. 30-31.
8 *Bonilla*, note 2, p. 31-34.
9 *Bonilla*, note 2, p. 41-42.
10 *Bonilla*, note 2, p. 36-38.
11 *Bonilla*, note 2, p. 36.

for example, robust universities, governments that financially and politically support the creation of knowledge, long-term public policies related to research and development, and a large and well-trained faculty.[12] These preconditions, however, are understood as a consequence of a series of decisions taken autonomously by the political communities to which the subjects of knowledge belong. The autonomy, talent, discipline, rigor, and solidity of individuals and their collectivities intertwine to enable the production of legal knowledge. The quality of legal products, their value, is conditioned by their capacity to describe, analyze, or evaluate the world with precision or by the possibilities they have for solving social problems.[13] The success of a legal product in the market of legal ideas will then be a consequence of its veracity or usefulness.

The second element is that of space, the conceptual geography inhabited by the abstract, autonomous, and rational subject of knowledge. The liberal subject of knowledge can originate from or be located anywhere in the world[14], it is not territorialized. The production of legal knowledge is not determined by the place where the subject is born or where it develops its research. The space imagined by the liberal model is the globe. The cosmopolitan subject of knowledge, its capacity to create legal knowledge, is not necessarily linked to a particular place on the globe. Of course, the globe is not a material space that can be inhabited; the subject of knowledge is always located in particular territories. However, the specific place from which the subject constructs knowledge is irrelevant for evaluating its capacities to do so or the quality of its products. The knowledge created by the subjects of legal knowledge, therefore, can potentially travel from any place to any other place in the world. There are no a priori privileged spaces for creating legal knowledge. The space in which legal knowledge can be created is multidirectional and has no limits other than the limits of our planet. It is the market of legal ideas that determines the directions taken by the exchange of legal knowledge.

Finally, the liberal subject of knowledge that potentially inhabits any part of the globe experiences history in a linear way.[15] The creation of knowledge is a process of slow but gradual progress toward truth or toward the effective solution of social problems. Subjects of knowledge rely on the legal products created in the past to shape the new products of the present. The success of past legal knowledge, its truth or usefulness, or its failure, its falsity or ineffectiveness, are the bases on which they rely to create new legal knowledge. The creation of legal knowledge is a collective process guided by trial and error. However, within modern political communities committed to liberal political values, this linearity of the history of knowledge is also the product of the continuous intertwining of reason and will.[16] Authoritative legal products are those constructed by reason and that the sovereign

12 *Bonilla*, note 2, p. 41.

13 *Bonilla*, note 2, p. 42.

14 *Bonilla*, note 2, p. 40-41.

15 *Bonilla*, note 2, p. 38-40.

16 *Paul Kahn*, The Cultural Study of Law, Chicago 1999, p. 7-30.

will accepts as its own. However, reason fails, or the sovereign changes its mind. The legal product may have been imprecisely or improperly conceived or the society for which it was created is no longer the society in which it is applied. Likewise, the sovereign, which has the capacity to create law, is not static; it changes its views on the value or usefulness of the legal products it accepted in the past. The creation of true, useful, and legitimate legal knowledge is therefore infinite, even if there is always the hope that the new product will be better than the product of the past.[17]

The processes by which legal knowledge are created within the model may vary widely: from extractive processes, to forms of chain production, to horizontal collaborative processes.[18] In the first, certain spaces are a source of empirical information that allows the creation of legal products, for example, Latin America is many times understood a source of information on the relationship between law and social change. In these cases, a scholar from the Global North does fieldwork to collect empirical information on her object of study or hires an academic from the Global South to collect the empirical information she needs to confirm or deny her hypotheses. As a consequence of this empirical work, the Northern scholar publishes an article in a journal in her country. In the second, there is a set of legal operators who play a different role in the process of collecting information, transforming it into a valuable legal product, and then distributing it. The first operator could be, for example, a local academic (the informant), the second an academic from the Global North who creates an article (the interpreter-creator) and the third, the editors of a legal journal from the Global North who are responsible for publishing, promoting, and disseminating the article (distributors). Finally, in the third process we find an agreement between two subjects of knowledge who understand themselves as peers in the process of collecting and interpreting the information needed to create a legal product, as well as in shaping this new product of legal knowledge.[19] Although the processes and operators that create legal knowledge are very different, they all have in common that they are autonomous subjects who voluntarily agree to play a particular role in the process of creating legal knowledge. These processes, moreover, can take place anywhere in the world and collectively contribute to the advancement towards "truth" or towards the effective solution of the problems faced by modern political communities.

C. The Colony and The Metropolis in Legal Knowledge

The colonial model of legal knowledge production revolves around the following three components. On the one hand, a dual subject: the colonial subject and the metropolitan

17 *Paul Kahn*, El análisis cultural del derecho, (translated by Daniel Bonilla), Bogotá 2014, p. 101-102.

18 *Deval Desai and Rebecca Tapscott, Tomayto Tomahto*, note 5.

19 *Daniel Bonilla/Colin Crawford*, The Political Economy of Legal Knowledge in Action: Collaborative Projects in the Americas, in: Gustavo Gregorutti/Nanette Svenson (eds.), North-South University Research Partnerships in Latin America and the Caribbean, Cham 2018, p. 115-140.

subject.[20] The colonial subject is a territorialized and racialized subject.[21] The model imagines the subject of colonial knowledge as a subject determined by the space from which it originates; its identity is a consequence of the conceptual geography from which it emerges and which it occupies: the Global South, Asia, the colony, the barbarian territories.[22] Likewise, it is imagined as a racialized subject. The color of its skin, black, brown, yellow, is intertwined with its capabilities to create legal knowledge. The colonial subject is understood within the model as a mimetic subject of knowledge; it only has the capacity to reproduce, disseminate, or apply locally the original knowledge created in the metropolis. The metropolitan subject, in contrast, is a subject of knowledge that has the capacity to construct original legal knowledge; it is a poietic subject. The metropolitan subject, however, is also a territorialized and racialized subject; its capacities to create knowledge are intertwined with the place from which it originates: the Global North, Europe, the metropolis, the civilized territories. The metropolitan subject is also imagined as a white subject. The color of its skin, moreover, is linked to the place it comes from. The subject of poietic knowledge is white and is so because it is European, it comes from the metropolis, from the Global North. In the colonial model, territory and race are intertwined. In the colonial model, territory and race provide the identity of the subject of knowledge.

In the colonial model, territory and race, which are constitutive for the colonial and the metropolitan subject, intersect with culture.[23] The mimetic or poietic capacities of the subjects are a consequence of the web of meanings identified with their territories. The culture of the colony is an impoverished culture that does not have the capacity to create true law, only religious or secular moral normative systems.[24] In contrast, the culture of the metropolis is a rich culture with the capacity to create true law: an autonomous normative system distinct from religion or secular morality. Culture, race, and geography intertwine to create the subject of colonial knowledge and the subject of the metropolis.[25]

Finally, the colonial model imagines legal history in a linear manner.[26] The history of law is a set of points which have a determined origin and end. The end of history is already occupied by the metropolis; its law is the paradigmatic product that all cultures and subjects want to attain. The structures and contents of the law of the metropolis materialize the ideals of what a legal system should be like. By contrast, the colonies occupy different points before the end of legal history. The line of legal history is constituted by a series of stages that all cultures must experience, and leave behind, in order to advance on the unique

20 *Bonilla*, note 2, p. 50.

21 *Bonilla*, note 2, p. 50-51.

22 *Daniel Bonilla*, Legal Barbarians: Identity, Modern Comparative Law and the Global South, Cambridge 2021, p. 1-29.

23 *Bonilla*, note 2, p. 51.

24 *Bonilla*, note 2, p. 65-66.

25 *Bonilla*, note 2, p. 67.

26 *Bonilla*, note 2, p. 54, 57-59.

path leading to legal progress. Consequently, the history of the law of the metropolis is a history that deserves to be told; it is a history that must be told in order to understand the evolution of law and its paradigmatic materialization.[27] In contrast, the legal history of the colony is a marginal history that can be lost in time. It is a history that does not deserve to be told; it is a history of reproduction and diffusion of the law of the metropolis. The legal history of the colony begins only when it encounters the law of the metropolis. The past before this encounter with the metropolis is not known, can be ignored, or has no value.[28]

The colonial model has a dual source: imperialist practices and discourses that intersect with modernity.[29] Imperial relations between Europe on the one hand and Asia, Africa, and America on the other, were consolidated in the 16th century and are characterized by a political domination based on violence and founded on the supposed European racial and cultural superiority. This domination materializes in different forms of colonial rule: direct, indirect or settlement.[30] Colonial rule implies, therefore, a total or partial rupture with native cultural forms. Local cultures are evaluated negatively, they are barbaric cultures, and are destroyed or sent to the margins of colonial life. The culture of the metropolis is imposed as the standard which colonial subjects must internalize and put into practice in both the public and private spheres. The law of the colony, therefore, is the law imported from the metropolis or the traditional law that is modified, influenced by the law of the metropolis. Local law is eliminated from the colonial polity, hybridized or tolerated as the system that regulates the private life of colonial subjects.[31] The imperial relations that intersect with modernity are also characterized by an extractive economic relationship in which the colony is a source of resources for the metropolis obtained through the exploitation of local labor. Local resources become the property of the empire; they are sent to the metropolis, enriching it. The natural resources that are extracted do not generate major consequences for the material welfare of the colonies. The various lines of local political, cultural, and economic development are, consequently, partially or totally truncated by the violence of the processes of conquest and colonization suffered by non-European territories.

The discourses that underpin the colonial model of legal knowledge production vary widely in their sources and authors. The works of the jurists and theologians of the school of Salamanca such as Francisco de Vitoria, Tomás de Mercado, and Domingo de Soto who articulate the arguments that justify imperialism from international law are a good example.[32] Another notable example is the work of paradigmatic authors of the French Enlightenment such as Condorcet and D'Alambert who articulate and promote the idea of

27 *Bonilla*, note 2, p. 51-52.

28 *Bonilla*, note 2, p. 51-52.

29 *Daniel Bonilla/Michael Riegner,* Decolonization, in: Rainer Grote/Frauke Lachemann/Rüdiger Wolfrum (eds.), Max Planck Encyclopedia of Comparative Constitutional Law, 2020.

30 *Bonilla/Riegner*, note 29.

31 *Bonilla/Riegner*, note 29.

32 *Francisco de Vitoria*, Relecciones sobre los Indios y el derecho de guerra, Madrid 1975; *André A. Alves/José M. Moreira*, Virtue and Commerce in Domingo de Soto's Thought: Commercial

the European "civilizing mission".[33] The narrative that modern comparative law constructs about the "self" and the "other" of modern law, however, is particularly important for the emergence and grounding of the colonial model of legal knowledge production.[34] This narrative constructs the identities of the "self" and the "other" that constitute the basis of modern law. Modern law, which is entwined with imperialism and colonialism, is constituted equally by what "is" and what "is not." Modern law is constituted by what is imagined outside of it. Absence is constitutive of modern law, even if this absence has been constructed by the law itself. The dominant subjectivities in modernity are, in part, juridical subjectivities. Modern law is a part of the network of meanings that the modern subject inhabits and at the same time constructs.[35]

The narrative that constructs comparative law is articulated in three central moments in the history of the discipline: instrumental comparative studies, comparative legislative studies, and comparative law as an autonomous discipline.[36] This genealogy of modern comparative law has continuities and discontinuities. The conceptual opposition between the legal barbarian and the subject of rights runs through both the moment of emergence (instrumental comparative studies) and the moments of transformation of the narrative (comparative legislative studies and comparative law as an autonomous discipline). At the same time, however, at each moment, this conceptual structure is filled with content and grounded in dissimilar ways.

Instrumental comparative studies, paradigmatically represented by Montesquieu, construct their narrative in three steps.[37] In each of them, Montesquieu makes use of the comparative method to justify his theses. "Comparative law" is a tool to justify his philosophical and sociological theses. The first step of the argumentation links natural law and positive law.[38] Montesquieu is committed to natural law theory; he believes that there are universal moral principles that can be discovered through reason. However, for Montesquieu, these principles have a high degree of abstraction. To guide effectively the conduct of individuals, therefore, these principles must be developed through positive law.[39] The development of these principles, however, must consider the characteristics of each political community. Positive law as an elaboration of natural law must consider context; there is not, nor should there be, a universal positive law. The second step in

Practices, Character, and the Common Good, Journal of Business Ethics 113 (2011); *Tomás de Mercado/Restituto Sierra Bravo*, Suma de tratos y contratos, Madrid 1975.

33 *Patrick Petitjean*, Science and the “Civilizing Mission”: France and the Colonial Enterprise, in: Benedikt Stuchtey (ed), Science Across the European Empires - 1800-1950, Oxford 2005, p. 107-128.

34 *Bonilla*, note 22, p. 1-29.

35 *Bonilla*, note 22, p. 29-45.

36 *Bonilla*, note 22, p. 12-25.

37 *Bonilla*, note 22, p. 46-69.

38 *Charles de Montesquieu*, The Spirit of Laws, Ontario 2001,p. 20-23.

39 *Montesquieu*, note 38, p. 21-23.

the argument develops the links between positive law and context.[40] For Montesquieu, geography has a causal relationship with law and politics.[41] In some passages of his work, Montesquieu argues that geography determines legal and political systems.[42] In others, it seems that the link between these categories can be broken by human will.[43]

In the third step in this line of argumentation, Montesquieu applies the two previous theses to social reality. Montesquieu identifies warm climate and large expanses of land with Asia, the "other" of European law and politics.[44] Hot climate affects the biology and psychology of Asians.[45] Heat makes their bodies weak, and structure their personalities around characteristics such as cowardice, laziness, effeminacy, lack of foresight, and lack of commitment to freedom. Asians submit without major qualms to their political leaders. The vast plains, moreover, compel the population to scatter and make controlling the territory and its inhabitants very difficult.[46] Asia, therefore, has no option but despotism to ensure peace and order in the political community.[47] Asia, like Africa, and America, has no law, only the capricious will of the despot as an instrument of social control. In contrast, European climate and topography causally link the continent to constitutional monarchy or democracy.[48] Seasons make the bodies of Europeans strong and resilient. Likewise, they make the character of Europeans courageous, enterprising, manly, and willing to fight for their freedom. Europeans do not submit to any illegitimate authority.[49] Small territories, bounded by large topographical features, moreover, make populations easily controllable by the authorities of the political community.[50] Europe therefore has a causal link with non-authoritarian forms of government. In Europe, law limits individuals as much as their rulers. Europe has real law, not just religion, secular morality, or the whim of political authorities to regulate itself.[51] According to Montesquieu, Asia and Europe (conceptual geography), the Asian and the European (dual subject), and a static and potentially dynamic history (conception of history) give content to the conceptual opposition legal barbarian/subject of rights that runs through the genealogy of modern comparative law.

Comparative legislative studies, paradigmatically represented by Henry Sumner Maine, constitute the first moment of mutation of the narrative constructed by modern comparative

40 *Montesquieu*, note 38, p. 23.
41 *Montesquieu*, note 38, p. 248-250.
42 *Montesquieu*, note 38, p. 248-250.
43 *Montesquieu*, note 38, p. 327.
44 *Montesquieu*, note 38, p. 296.
45 *Montesquieu*, note 38, p. 246.
46 *Montesquieu*, note 38, p. 296.
47 *Charles de Montesquieu*, Persian Letters, Letter 125, Oxford 2008.
48 *Montesquieu*, note 38, p. 296.
49 *Montesquieu*, note 38, p. 293-294.
50 *Montesquieu*, note 38, p. 296.
51 *Montesquieu*, note 38, p. 296.

law.[52] This second lapse in the genealogy of the discipline is characterized by the use of the comparative method to produce knowledge that is useful for imperial governments and international commerce.[53] Knowing statute law, the most common object of comparison for nineteenth-century comparatists, facilitates the governance of colonies and the global flow of goods; it makes it possible to anticipate conflicts or suggest ways to resolve those that do arise between jurisdictions. Maine was an imperial official in India and one of the most influential authors in Great Britain's decision to replace direct rule of its colonies with indirect rule.[54] Maine's work, however, is much more ambitious. It offers broader theses on history and progress, as well as on the role different political communities occupy in these two ways of thinking about the time of human species. In doing so, it relies on comparative and historical methods.[55] If conceptual geography is at the center of Montesquieu's argumentation, in Maine's it is the concept of history. Maine understands history linearly; the history of mankind is the history of the progressive advance of different cultures along this line that has an identifiable origin and an identifiable end.[56] To substantiate his thesis, Maine examines the history of two Indo-European cultures: India and Great Britain. To Maine, these two cultures have common roots.[57] However, the former is the paradigmatic example of a primitive culture while the latter is the paradigmatic example of a civilized culture. The differences between India and Great Britain, for Maine, are synthesized in the identification of the former with status and the latter with contract.[58] The end of history Great Britain occupies is a consequence of its commitment to liberal politics and law.[59] Autonomy, reason, equality, individualism, and the separation of law and morality, among other values, characterize the British legal and political order. It is also characterized by being in direct line with Greek culture and Roman law, which are the source of liberalism. Indian barbarism is explained by its commitment to traditional values that revolve around religion and a hierarchical and estate-based society.[60]

The history of legal and political progress that intersects with cultural progress is, according to Maine, composed of four processes that are closely intertwined. In the first, we proceed from law as revelation to law as custom, to arrive then at codified law.[61] In

52 *Bonilla*, note 22, p 70-99.

53 *Veronica Corcodel*, The Governance Implications of Comparative Legal Thinking: On Henry Maine's Jurisprudence and British Imperialism, in: Horatia Muir Watt/Diego P. Fernández (eds.), Private International Law and Global Governance, Oxford 2014, p. 33.

54 *Karuna Mantena*, Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism, Princeton 2010, p. 148-178.

55 *Henry Sumner Maine*, Village-Communities in The East and West, London 1876, p. 6.

56 *Sumner Maine*, note 55, p. 6-7, 16.

57 *Sumner Maine*, note 55, p. 208-210.

58 *Henry Sumner Maine*, Ancient Law, London 1861, p. 70.

59 *Corcodel*, note 53, p. 6-7.

60 *Sumner Maine*, note 55, p. 215.

61 *Sumner Maine*, note 58, p. 2-9.

the second, the relationship between law and social change is explained by increasingly precise and sophisticated tools: legal fictions, equity, and legislation.[62] In the third, societies move from the patriarchal family to the individual as the basic unit of society[63]; and in the fourth there is a shift from blood to territory as the criterion for identifying members of the polity.[64] Great Britain is structured around the autonomous individual (and the contracts it generates), statute law as an instrument to adapt law to society, statutes or written judicial opinions, and territory as a criterion to identify the subjects of the constitutional monarchy; India with the undeveloped stages of each of these processes (custom, legal fictions and equity, patriarchal family, and filiation).

History as a central category in Maine's narrative is experienced by a dual subject inhabiting a dichotomous conceptual space.[65] The colonial subject, the Indian, and the metropolis subject, the European, embody the concept of the individual that Maine constructs in his narrative. The developed West, paradigmatically represented by Great Britain, and the rest of the primitive world, paradigmatically represented by India, constitute the conceptual geography of the narrative.[66]

The third moment in the genealogy of modern comparative law that underlies the colonial model of legal knowledge, comparative law as an autonomous discipline, has as its paradigmatic representatives René David, Konrad Zweigert, and Heinz Kötz.[67] The narrative that these authors construct revolves around the subject they imagine, not the notion of time, as in Maine, nor space, as in Montesquieu. This narrative has as its mythical origin the first international congress of comparative law organized in Paris in 1900.[68] This seminar set the central aims of the discipline: the unification and harmonization of law and the creation of legal taxonomies as a way of understanding the immense heterogeneity of the global legal world.[69] The legal family is the collective subject that creates the narrative constructed by David and Zweigert-Kötz. This collective subject is a materialization of the taxonomic objective set by the discipline. Legal families will make it possible to organize and understand the legal world, just as the taxonomies created by biologists make it possible to understand fauna and flora.[70]

62 *Sumner Maine*, note 58, p. 9-13.

63 *Sumner Maine*, note 58, p. 50-69.

64 *Sumner Maine*, note 58, p. 50, 60-64.

65 *Bonilla*, note 22, p. 93-94.

66 *Bonilla*, note 22, p. 93-94.

67 *Bonilla*, note 22, p. 100-132.

68 *Konrad Zweigert/Hein Kötz*, Introduction to Comparative Law, Amsterdam 1977, p. 2.

69 *René David*, Edouard Lambert, Bull. Soc. Lég. Comp. Roum. 70 (1947), p. 296, 299; *Zweigert/Kötz*, note 68, p. 3.

70 *Zweigert/Kötz*, note 68, p. 10-11.

The collective subject created by the narrative has two divisions, one internal and one external.[71] The internal one divides each legal family into mother legal systems and child legal systems.[72] The former are the source of the discourses and practices that characterize each family. In the case of the civil family, France and Germany; in the case of the common law family, Great Britain and the United States. The other systems simply reproduce their structures more or less precisely. Knowing the child legal systems is therefore irrelevant. It is not necessary to know the iterations, only the original; the child systems are not subjects of inquiry worth describing and analyzing.[73] The external one divides between the Western legal families, the Romano-Germanic and Anglo-Saxon, and the legal families of the rest of the world, Islamic and Hindu, among others.[74] The strength of Western legal families, for this narrative, lies mainly in the fact that they managed to separate law and morality.[75] Law is an autonomous or semi-autonomous normative system. In contrast, in non-Western legal families, law has not been able to disassociate itself from religion. Islam and Hinduism are intertwined with law; it is not possible to distinguish between them. Likewise, Western legal families are the consequence of a robust culture that allows the creation of a solid law.[76] Law is understood as an epiphenomenon of culture. Again, as with Maine, Greek and Roman cultures are understood as the source of modern European culture from which the liberal legal systems belonging to Western families emerge.[77] The cultures that create the non-Western families, in contrast, are weak cultures that cannot generate strong autonomous, liberal law. Western legal families will eventually absorb, displace or marginalize non-Western families. The strength of these legal traditions makes this an inevitable process.[78]

The collective subjects created by David and Zweigert-Kötz inhabit an imagined dual conceptual geography: the metropolis and the colony, the West and the rest of the world, the civilized territories and the barbarian territories, the Global North and the Global South.[79] In the former, real law is created; in the latter only morality and religion. In the former, original legal products are created; in the latter, products created in Western legal families are reproduced, disseminated, and applied locally. Collective subjects, in this narrative, therefore, experience history linearly. Progress is mediated by law, and the law that enables progress is Western liberal law. History has an origin and an end, as well as a series of

71 *Bonilla*, note 22, p. 104.

72 *Zweigert/Kötz*, note 68, p. 41.

73 *Zweigert/Kötz*, note 68, p. 36.

74 *Bonilla*, note 22, 105-106.

75 *René David/John E.C. Brierly*, Major Legal Systems in The World Today, London 1985, p. 17-19, 39.

76 *Bonilla*, note 22, p. 113-114.

77 *David/Brierly*, note 75, p. 14-15; *Zweigert/Kötz*, note 68, p. 68-71.

78 *David/Brierly*, note 75, p. 27.

79 *Bonilla*, note 22, p. 130-132.

stages that must be surpassed in order to transit from the first to the last phase. The legal barbarians struggle to overcome the stages that are necessary for them to occupy the place inhabited by the subjects of rights.[80]

The three moments that constitute the genealogy of comparative law, in sum, substantiate the colonial model of the creation of legal knowledge. All three provide a set of reasons that justify the conceptual opposition legal barbarian/legal subject underlying the model. Each, however, at the same time offers a different set of specific reasons to give meaning to this opposition and to support it.

D. The Southern Turn: Politics, Theory, and Methodology

The Global South and Comparative Constitutional Law persuasively challenges the dominant political economy of legal knowledge. Phillip Dann, Michael Riegner, and Maxim Bönnemann, the editors of this book, acknowledge that comparative constitutional law has globalized geographically, diversified methodologically, and pluralized epistemologically.[81] However, they also argue that there is still a profound vertical relationship between the law and legal scholarship of the Global North and the Global South.[82] Constitutional law from the Global South is underrepresented in publications, teaching materials, seminars and international research networks. This vertical relationship, moreover, is not simply the consequence of the triumph of the legal products of the Global North in the marketplace of legal ideas. It is not simply the triumph of the talent, discipline and good decisions made by the legal scholars of the Global North, as the liberal model of legal knowledge production would explain it. This vertical relationship is a consequence of the imbalance of political, economic, and cultural power that exists between the Global North and the Global South. This imbalance is, in part, the effect of imperial and colonial relations between these two conceptual geographies.[83]

The Global South, Dann, Riegner and Bönnemann argue, is composed of a set of highly diverse countries characterized by profoundly heterogeneous microdynamics.[84] However, these countries also have common macro-dynamics, macro-dynamics that cut across their history.[85] These macro-dynamics are the ones that justify their inclusion in the same category: Global South. Two macro-dynamics are of particular importance to Dann, Riegner, and Bönnemann's argument: the colonial and postcolonial experience of the countries of the South and their peripheral character in the modern global order.[86] These macro-dynamics

80 *Bonilla*, note 22, p. 126.
81 *Dann/Riegner/Bönnemann*, note 81, p. 30-38.
82 *Dann/Riegner/Bönnemann*, note 81, p. 1, 3-14.
83 *Dann/Riegner/Bönnemann*, note 81, p. 15.
84 *Dann/Riegner/Bönnemann*, note 81, p. 14.
85 *Dann/Riegner/Bönnemann*, note 81, p. 14.
86 *Dann/Riegner/Bönnemann*, note 81, p. 15-18.

have important epistemological consequences: the marginalization, indifference, and devaluation of the legal products of the Global South, as well as the insufficient theorization of their legal discourses and practices. The liberal model of legal knowledge production, consequently, does not have the capacity to describe, evaluate, or transform these power dynamics. Its emphasis on supposedly autonomous and equal subjects of knowledge, who generate legal knowledge as a consequence of their talent, discipline, and labor, obscures the power relations that permeate the processes of production, exchange and use of legal knowledge.

The liberal model obscures the epistemic injustices generated by the vertical relationship between the legal communities of the global North and South.[87] These injustices must be made explicit, criticized, and confronted. Therefore, the colonial model of legal knowledge production must be challenged and replaced. The global triumph of the legal ideas of the Global North has not always been a consequence of their veracity or their usefulness in solving social problems. It has also been a consequence of the violence of colonial modernity that implied the replacement or marginalization of the legal traditions of the Global South, as well as their forced integration into a hierarchical global order, the political domination of the colonies based on discourses of the racial and cultural superiority of the Global North, the interruption of native development processes, and the compression, after independence from the metropolis, of the economic and political processes implemented over very long cycles in the Global North.[88] For Dann, Riegner and Bönnemann, the conceptual opposition legal barbarian/subject of rights that runs through the colonial model of legal knowledge production ignores the negative effects of the epistemic injustices it generates. The editors of the book do not develop this argument. Nevertheless, I believe it opens a promising avenue of research: the relationship between testimonial injustice and hermeneutic injustice on the one hand, and the liberal and colonial models on the other.[89]

The Global South and Comparative Constitutional Law, however, does not only offer analytical and critical tools to question the dominant political economy of legal knowledge. It also offers a solid and suggestive normative project: the Southern turn in comparative (constitutional) law.[90] In my interpretation, this normative project is composed of three intersecting elements: one political, one theoretical, and one more methodological.

E. A Political Manifesto

The Global South and Comparative Constitutional Law is a political manifesto. Dann, Riegner, and Bönneman argue that the Southern turn implies not doing comparative law

87 *Dann/Riegner/Bönnemann*, note 81, p. 31-32.

88 *Dann/Riegner/Bönnemann*, note 81, p. 15-17.

89 *Miranda Fricker*, Epistemic injustice, Oxford 2009.

90 *Dann/Riegner/Bönnemann*, note 81, p. 11-14.

for the Global South and not only doing comparative law *with* the Global South.[91] They propose, in contrast, doing comparative law *from* the South.[92] The first two alternatives are part of the dominant political economy of legal knowledge. The first option calls for creating legal products in the Global North to shape or transform the Global South. Likewise, it conceives the South as a space for the diffusion of legal knowledge built in other latitudes. Immersed in the colonial model, this perspective assumes that the South is a deficient context for the creation of legal knowledge. The South is only an object of law in a double sense: a space for legal transplants (law is imposed on it from outside) and a geography to study the weaknesses or failure of law as a normative system.

The second alternative, comparative law with the South, is committed to broadening the empirical basis that constitutes the object of study of comparative (constitutional) law. The legal systems of the South must be included in the set of legal systems to be described, analyzed, and evaluated by comparative lawyers. The samples to be compared must be globalized. The versions more sensitive to the "other" of modern law within this second option also recognize the products created in the Global South and by scholars who are part of this conceptual geography. In this second option, the law of the Global South coexists with the law of the Global North. However, this perspective remains embedded within the dominant political economy of legal knowledge. The theoretical premises and practical patterns that constitute the discipline are neither questioned nor transformed. The "other" of modern law is recognized by the "self" of modern law. However, as in the liberal model, the power dynamics that gave rise to the theoretical and methodological premises, as well as the ways of doing comparative law, remain intact. Legal systems and scholars from the Global South and the Global North are understood as peers in the "abstract", as autonomous subjects and collectivities that interact freely and to be studied equally within the discipline. In practice, however, the conceptual opposition legal barbarian/legal subject that runs through the colonial model continues to construct part of the consciences of mainstream comparative law scholars and the forms of comparative law-making they put into operation.

Comparative law from the South, on the contrary, wants to use the historical experience of the South (colonialism, postcoloniality, and its peripheral character) and the particular issues that concern its constitutionalism (see next section in this text) to question the dominant epistemological framework of comparative (constitutional) law.[93] The South then becomes a conceptual space from which to critique the orthodoxy of comparative law and to dismantle the hierarchies that the colonial model of legal knowledge creation has constructed between the ideas, institutions, and scholars of the Global North and the Global South. Likewise, the Southern turn in comparative law requires dismantling the assumptions that a priori consider the products of the South as not valuable and those of

91 *Dann/Riegner/Bönnemann*, note 81, p. 11-14.

92 *Dann/Riegner/Bönnemann*, note 81, p. 13.

93 *Dann/Riegner/Bönnemann*, note 81, p. 13-15.

the North as valuable (useful, truthful, and effective). The Southern turn therefore requires an openness towards the "other" that opens the possibility of learning from the law of the "legal barbarian", from the products of the "other" of modern law. Making use of the tools offered by critical legal theory, the Southern turn also proposes that the North be rethought from the South; that comparativists should be open to the possibility that the experiences, theoretical, and practical tools that the South has created may be useful for analyzing and transforming the law of the Global North.[94]

The political manifesto proposed by Dann, Riegner and Bönnemann is not only a normative proposal to be applied collectively in the future. The book itself is an application of the Southern turn that the book's editors offer their readers. The book originates from a seminar at Humboldt University in Berlin organized by the book's editors.[95] At the seminar, as in the book, a group of legal scholars from the Global North and South came together to think jointly, critically, and collaboratively about comparative law from the Global South. The editors, except for the introduction shaping the project, do not contribute pieces to the book. The voices of other authors must be heard. The editors are facilitators of the exchange of ideas between authors from different regions on the possible meanings, strengths, and weaknesses of the Southern turn in comparative (constitutional) law. They also explicitly acknowledge and reflect on how their identities, three white men from the Global North, affect this collaborative construction of knowledge.[96] The book is thus an application of the principle of "institutional diversification" that is part of the political and academic project that constitutes the Southern turn.[97] The book makes use of the power asymmetries that exist between academics in a prestigious academic institution in the Global North and academics in the South and North participating in the project to attack these same asymmetries. In doing so, Dann, Riegner, and Bönnemann acknowledge the power dynamics that the liberal model of legal knowledge creation ignores and confront the power imbalances that the colonial model creates. The book is a dialogue among peers to reflect on problems of common interest that cut across the discipline. It is also a further step in the process of "slow comparison" that Dann, Riegner and Bönnemann propose. Comparative law must be a paced process that concerns itself with the same objects of study over long periods of time. The editors of the book have for years investigated the relations between the Global North and the Global South from the perspective of comparative law.[98]

94 *Dann/Riegner/Bönnemann*, note 81, p. 13, 32.

95 *Phillip Dann/Michael Riegner/Maxim Bönnemann,* Acknowledgements, in: Phillip Dann, Michael Riegner and Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020.

96 *Dann/Riegner/Bönnemann*, note 81, p. 37.

97 *Dann/Riegner/Bönnemann*, note 81, p. 35-36.

98 *Philipp Dann,* Federal Democracy in India and the European Union: Towards Transcontinental Comparison of Constitutional Law, Verfassung und Recht in Übersee/World Comparative Law 44 (2011), p. 160; *Philipp Dann/Felix Hanschmann*, Post-colonial Theories and Law, Verfassung und Recht in Übersee/World Comparative Law 45 (2012), p. 123; *Michael Riegner*, Access to Informa-

The conceptual and practical structures that have generated the models that constitute the political economy of legal knowledge can only be transformed through close, long-term alliances between scholars from the Global North and South.

F. A Critical Examination of The Concept of the Global South and Epistemic Self-reflexivity

The theoretical contributions of the book are constructed in the following two areas: the critical examination of the concept "Global South" and the analysis of the epistemic self-reflexivity required by the Southern turn. The premise from which the book starts is that the Global South is a concept that has descriptive, analytical, and critical traction. The category "Global South" brings together a set of countries that are heterogeneous in their micro-dynamics but share two historical macro-dynamics: the colonial and post-colonial experience and an interest in addressing three problems that are particularly notable, though not unique, in the Global South.[99] The first point, on common historical experience, I examined in the previous section. The second point revolves, first, around the emphasis in the Global South on the socio-economic dimensions of constitutions and constitutionalism.[100] In response to the problems of poverty, exclusion, and inequality faced by its constituent countries, constitutionalism in the Global South has explored much more than constitutionalism in the Global North the structure, contents, and institutional designs that social and economic rights require in order to be realized.[101] This concern with socio-economic rights is generally picked up in the discussion of transformative constitutionalism of the Global South, which differs from the preservationist constitutionalism, with its obsession with civil and political rights, the stability of an order that is seen as fundamentally just, and the commitment to the state as a "legislative project" that is characteristic of the Global North.[102]

Transformative constitutionalism, on the other hand, is interpreted as a constitutionalism committed to the idea that the State should intervene systematically and continuously in society to achieve the ends of material justice that shape it. It is also characterized by recognizing the State's positive obligations related to social justice, by recognizing

tion as a Human Right and Constitutional Guarantee. A Comparative Perspective, Verfassung und Recht in Übersee/World Comparative Law 50 (2017), p. 332; *Michael Riegner/Smarika Kumar*, Freedom of Expression in Diverse Democracies: Comparing Hate Speech Law in India and the EU, in: Philipp Dann/Arun Thiruvengadam (eds), Democratic Constitutionalism in Continental Polities: EU and India Compared, Celtenham 2020; *Maxim Bönnemann/Laura Jung*, Critical Legal Studies and Comparative Constitutional Law, in: Rainer Grote/Frauke Lachenmann/Rüdiger Wolfrum (eds), Max Planck Encyclopedia of Comparative Constitutional Law, Oxford 2017.

99 *Dann/Riegner/Bönnemann*, note 81, p. 2-3.

100 *Dann/Riegner/Bönnemann*, note 81, p. 3.

101 *Dann/Riegner/Bönnemann*, note 81, p. 18-23.

102 *Dann/Riegner/Bönnemann*, note 81, p. 20-22.

the importance of social and economic rights in guaranteeing such justice, by accepting that human and constitutional rights have horizontal effects, and by the importance of the judiciary in the materialization of the transformative agenda of constitutions in the Global South.[103]

The texts by Heinz Klug, Diego Werneck Arguelhes and Roberto Gargarella make a rich and complex contribution to the discussion on the socio-economic dimensions of transformative constitutionalism. Klug's text, on the one hand, examines the discursive and practical patterns of African constitutional orders, analyzes the different meanings given to transformative constitutionalism in South Africa, and questions the usefulness of implementing it in the rest of the African continent. On the other hand, Klug from a normative perspective proposes that the concept of "transformative constitutionalism" be used as a sociological evaluation criterion to determine whether and to what degree "transformative" constitutions are enforced, or whether they are aspirational texts that float vacuously over the societies of the Global South.[104] Werneck Arguelhes examines what he considers a "negative" case of transformative constitutionalism, the Brazilian one. Werneck Arguelhes argues that the transformative promises of the Brazilian constitution have not materialized at the levels that would be desirable. He also warns about the dangers of generalizing relatively successful cases of transformative constitutionalism, such as Colombia's, to the rest of the Global South and about the dangers of getting lost in the back alleys of the normative discourse of transformative constitutionalism. Arguelhes argues that what is important is the efficacy of the discourse; what is relevant is the impact that the constitution has on social reality, whether it is capable of reducing the injustices that pervade it. Arguelhes, finally, argues that transformative constitutionalism has focused excessively on the role of courts in the socioeconomic transformation of political communities. As the case of Brazil demonstrates, socioeconomic change is sometimes a consequence of the joint work of the three branches of government.[105]

Roberto Gargarella does not directly examine the concept of transformative constitutionalism. He does, however, analyze a topic that is directly related to this concept: the continuities and discontinuities of Latin American constitutionalism with respect to socioeconomic rights. More precisely, he examines how three central political perspectives in the region's political and legal history, republicanism, liberal-conservatism, and social con-

103 *Upendra Baxi*, Preliminary Notes on Transformative Constitutionalism, in: Oscar Vilhena Vieira, Upendra Baxi, and Frans Viljoen (eds), Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India, and South Africa, Pretoria 2013, p. 19; *Dann/Riegner/Bönnemann*, note 81, p. 21.

104 *Heinz Klug*, Transformative Constitutionalism as a Model for Africa?, in: Phillip Dann, Michael Riegner and Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, p. 141-164.

105 *Diego Werneck Arguelhes*, Transformative Constitutionalism: A View from Brazil, in: Phillip Dann, Michael Riegner and Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, p. 165-189.

servatism, have confronted socioeconomic injustices in Latin America. Gargarella argues that these perspectives have concentrated excessively on the dogmatic part of constitutions and have given little importance to the organic part of political charters. Consequently, for Gargarella, there have been no notable changes in the ways in which power is distributed within Latin American state structures and the chances of effectively addressing socio-economic injustices in the region have been reduced.[106] Sujit Choudhry explores a different dimension of transformative constitutionalism. Choudhry does not examine the socioeconomic dimensions of this concept. Rather, he examines two ways of interpreting transformative constitutionalism: one cosmopolitan and one anticolonial. Similarly, he examines the relationship between these models and the process by which the rights of same-sex couples were recognized in India.[107]

The second issue which has been emphasized by the constitutionalism of the Global South is that of the political structures which should shape the states that comprise this conceptual geography.[108] Constitutionalism is understood in the Global South, in part, as a sphere of struggle over how the State should be designed. This struggle takes place in a context characterized by the following three variables: (i) the existence of societies profoundly heterogeneous and hierarchical; (ii) colonialism inhibited or hindered the creation of the preconditions required for the emergence of a robust democratic culture: strong political parties, solid civil societies and a vigorous public sphere; and (iii) the limits imposed by the omnipresence of the conceptual and practical matrix of the nation-state in the region. Dann, Riegner and Bönnemann argue that the political struggle over state structures in this context has largely revolved around conflicts between authoritarian and democratic tendencies in the countries of the Global South.[109] The articles by Weitseng Chen and Roberto Niembro Ortega explore this issue in detail.

Chen analyzes constitutional authoritarianism in Asia, Niembro Ortega Mexican constitutional authoritarianism. Chen examines what he describes as the hybrid character of Asian states: relatively stable, functional and economically sound on the one hand, and executive branches with few legal limits on the other. For Chen, Asian countries are characterized by a pragmatic and instrumental commitment to constitutionalism. This constitutionalism enables the coordination of ruling elites, controls the lower levels of state bureaucracies, incentivizes economic activities, and legitimizes the state politically. However, at the same

106 *Roberto Gargarella*, Inequality and the Constitution: From Equality to Social Rights, in: Phillip Dann, Michael Riegner and Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, p. 235-249.

107 *Sujit Choudhry*, Postcolonial Proportionality: Johar, Transformative Constitutionalism, and Same-Sex Rights in India, in: Phillip Dann, Michael Riegner and Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, p. 190-209.

108 *Dann/Riegner/Bönnemann*, note 81, p. 23-27.

109 *Dann/Riegner/Bönnemann*, note 81, p. 23.; *Luis Eslava*, The Developmental State: Independence, Dependency, and History of the South, in: Jochen von Bernstorff/Philipp Dann, The Battle for International Law: South–North Perspectives on the Decolonization Era, Oxford 2019, p. 71-100.

time, it encourages, or fails to control, the authoritarian tendencies of the political leaders of the countries of the region.[110] Niembro Ortega argues that Mexican constitutional authoritarianism, like that of other states in the Global North and South, is not determined by the contents of the constitution. Rather, he points out, it is a consequence of the mentality of those in power. Niembro Ortega, therefore, examines Mexico's political and legal history to make explicit and analyze the hybrid character of its constitutionalism: liberal in its contents, but authoritarian in the interpretation and application of these political values.[111]

The third issue that characterizes the constitutionalism of the Global South is access to justice.[112] Dann, Riegner and Bönnemann do not understand that concept from a narrow technical point of view. They consider that access to justice is central to determining the type and quality of the relationship between the citizen and the State. In their view, access to justice has to do with the strength and effectiveness of the State and the law in resolving social conflicts.[113] In the Global South, this issue is related to two types of contradictions that traverse States and their legal systems. The states of the Global South are strong States that organize and foster the economy, sustain heterogeneous societies united, and maintain public order, even if they use repressive methods inherited from colonialism, and at the same time, they are weak States that have dysfunctional institutions and elites, low levels of legitimacy, and few resources to achieve their objectives.[114] Likewise, the legal systems of the Global South are both instruments of emancipation and systems of oppression; systems that protect the rights of citizens and systems that do not allow for social change or do not allow for addressing the injustices that afflict the political community and that compete with other normative systems, for example, religious or social normative systems, or those created by illegal groups.[115] David Bilchitz's article explores access to justice from the perspective of human rights as capabilities. In particular, he argues that access to justice should be interpreted as a capability that has both internal dimensions (related to the capability of each individual to exercise this right) and external dimensions (related to the institutional strengths to implement it). Bilchitz also examines access to justice in South Africa using these conceptual lenses and proposes Indian public interest litigation and the

110 *Weitseng Chen*, Same Bed, Different Dreams: Constitutionalism and Legality in Asian Hybrid Regimes, in: Phillip Dann, Michael Riegner and Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, p. 250-269.

111 *Roberto Niembro Ortega*, The Challenge of Transforming Mexican Authoritarian Constitutionalism, in: Phillip Dann, Michael Riegner and Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, p. 270-288.

112 *Dann/Riegner/Bönnemann*, note 81, p. 27-30.

113 *Dann/Riegner/Bönnemann*, note 81, p. 27-30.

114 *Dann/Riegner/Bönnemann*, note 81, p.27.

115 *Dann/Riegner/Bönnemann*, note 81, p. 27; *Daniel Bonilla*, 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 2013, p. 1-38.

Colombian *tutela* as legal instruments that can help raise the levels of implementation of the right to access to justice in his country.[116]

The theoretical reflection on the concept of the Global South (as experience and thematic issues) by the editors of the book is extended in chapters by Florian Hoffmann, Christine Schwöbel-Patel, Zoran Oklopcic, and Jedidiah Kroncke. Hofmann argues that the concept "Global South" must cease to be solely an instrument to identify and question the marginalization of difference in the comparative law of the Global North or to criticize the hegemony of Western law. The Global South, for Hoffmann, must be understood as a constitutional space where modernity is paradigmatically materialized. The Global South is a conceptual and material geography characterized by imperialism, colonialism, and hybridity. Examining the Global South, therefore, would allow for a more accurate understanding of modernity. Accordingly, Hoffmann proposes the meridianization of comparative law through ethnographic studies that would make explicit, analyze, and critique the way law operates daily in the Global South. This meridianization of comparative law would also make it possible to question the reified Weberian ideal types that have been central to comparative law and that have obscured the complex and heterogeneous legal realities of the Global North and Global South.[117] Schwöbel-Patel agrees with Hoffman that scholars doing comparative law from the Global South must question the dominant geopolitics of knowledge. For Schwöbel-Patel the comparatists of the Southern turn must contribute to the decolonization of comparative law. Accordingly, they must analyze the constructs that stabilize and reproduce the vertical relationship between the legal communities of the Global North and South and historicize the violent processes by which Western law has been imposed on the Global South, as well as the relations between coloniality and colonialism. Schwöbel-Patel[118] contributes to the realization of this objective by examining the connections between neoliberal economists and lawyers committed to "global constitutionalism".

The articles by Hoffmann and Schwöbel-Patel focus on how to do comparative law from the South. Oklopcic and Kroncke focus on the who, on the subject who does comparative law from the South. Oklopcic argues that comparatists from the South have never really confronted three problems central to their approach to comparative law: the polemic nature of the names used to describe their location (the "South," the "colony," etc.), the complexity of what is confusedly lumped together in the term "perspective"

116 *David Bilchitz*, Socio-Economic Rights and Expanding Access to Justice in South Africa: What Can Be Done?, in: Phillip Dann, Michael Riegner and Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, p. 210-234.

117 *Florian Hoffmann*, Facing South: On the Significance of an/other Modernity in Comparative Constitutional Law, in: Phillip Dann, Michael Riegner and Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, p. 41-67.

118 *Christine Schwöbel-Patel*, (Global) Constitutionalism and the Geopolitics of Knowledge, in: Phillip Dann, Michael Riegner and Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, p. 68-85.

(locating, situating, and orienting), and the Eurocentric nature of modern constitutions and constitutionalism. Oklopcic demands of the comparatists-from-the-South a greater degree of self-reflection that enables them to move away from the dominant style of comparative constitutional inquiry which he describes as naively botanical, polemically quietist, and rhetorically timid.[119] Kroncke argues that the comparatists-from-the-South must become critical adaptors/translators committed to sophisticated functionalism if they are to advance a cosmopolitan global dialogue on law. For Kroncke, this type of comparatist must focus on the national, not the transnational, dimensions of the creation, exchange, and use of legal knowledge and must understand that innovative legal products are a public good available to all individuals. Similarly, Kroncke's ideal comparatist must play an active role in subverting the colonial model within academia, for example, by transforming traditional forms of comparative law teaching, expanding the legal materials used in the classroom, and actively seeking academic partners in the Global South.[120]

This set of chapters, as well as the conceptual framework in which the editors situate them, questions and confronts the political economy of legal knowledge in a variety of ways. It directly questions and confronts the indifference of the liberal model to the inequality that has historically characterized the relationship between the academia and the legal communities of the Global North and South. Likewise, it questions and confronts the way in which the colonial model has contributed to create these inequalities. The book emphasizes and questions the vertical character of North-South legal relations, as well as the marginality that legal products and operators from the South have had in the global market of legal ideas. It also takes the law of the Global South seriously, the experiences and issues that characterize it. The chapters that make up the book, including the introduction, theorize on the law of the Global South (examining its post-colonial character and its geopolitical marginality) and critically examine its contents, for example, constitutional authoritarianism in Mexico and Asia, the low levels of enforcement of socio-economic rights in Latin America, or the South African indifference to the domestic dimensions of the right to access to justice.

Likewise, the chapters that make up the book controvert the conceptual opposition "legal barbarian/legal subject" which constitutes the core of the colonial model. The book shows that the Global South can be a rich context for the production of legal knowledge and how some of its legal products can be useful for thinking about, critiquing, and transforming the law of the Global North. The book shows, for example, how the concept of constitutional authoritarianism can be useful to describe and analyze the experience of countries such as Hungary, Poland, and Donald Trump's United States. In the same way,

119 *Zoran Oklopcic*, Comparing as (Re-)Imagining: Southern Perspective and the World of Constitutions, in: Phillip Dann, Michael Riegner and Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, p. 86-109.

120 *Jedidiah J Kroncke,* Legal Innovation as a Global Public Good: Remaking Comparative Law as Indigenization, in: Phillip Dann, Michael Riegner and Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, p. 110-137.

continuing with the examples, it shows how the flexibility of standing rules, the simplicity of processes, and the low costs of instruments such as the Colombian tutela or the Indian public interest litigation can serve to make the right to access to justice more effective in Europe or North America. Finally, it offers a series of conceptual tools (ethnographies, historicization of coloniality, critical self-reflection, and the comparatist as critical translator, among others) to give analytical, critical, and normative traction to the Southern turn and, therefore, to offer some instruments that would contribute to creating a model of political economy of legal knowledge as an alternative to the liberal and colonial one – one that takes power into account, but is not simply an inversion of the vertical relationship between the Global North and the Global South.

The second theoretical contribution made by the book is based on the various facets that make up the concept of "epistemic reflexivity".[121] This category directly confronts some of the central components of the colonial model of legal knowledge creation. On the one hand, it questions the epistemic hierarchy on which the model is based. Epistemic reflexivity promotes an explicit and critical evaluation of the premises on which the discipline is based, among others, the unidirectional relationship between culture and law, the idea that there are only some cultures (those belonging to the Greco-Roman matrix) that have the possibility of creating "true" law, and uniformity as one of the central purposes of comparative law. The concept of epistemic reflexivity encourages comparatists to be aware of the perspectival character of the categories they use to advance their work and to be open to the possibility of recognizing and using different conceptual lenses, particularly those that emerge from the experiences and issues that characterize the Global South.[122] Such questioning of the hierarchies dominating the relationship between the subjects of knowledge of the Global North and the Global South, moreover, is understood as a matter of epistemic justice; these are inequalities that delegitimize the subject of knowledge of the Global South and thus diminish the credibility of its discourses and practices and make it difficult to construct the categories necessary to name the kinds of injustices that afflict it. The comparativist of the Southern turn therefore should recognize that non-Western legal discourses and practices have been, and can continue to be, valuable in understanding or solving social problems around the globe.

On the other hand, epistemic reflexivity questions the idea central to the colonial model, that there is a privileged point of view for comparison, the one of the comparatist of the Global North.[123] The Northern comparatist does not have a priori privileged categories for knowing the world or superior abilities to understand or transform it. The comparatist committed to the Southern turn therefore must contribute to provincializing the dominant theoretical approaches in comparative (constitutional) law, must learn from the legal and political histories of subaltern groups, and must engage with "distancing" and "difference,"

121 *Dann/Riegner/Bönnemann*, note 81, p. 31-33.

122 *Dann/Riegner/Bönnemann*, note 81, p. 31-33.

123 *Dann/Riegner/Bönnemann*, note 81, p. 32.

categories that allow for critical self-reflection, the recognition of the perspectival character of one's own identity, and the dangers of universalizing the web of meanings in which one is immersed. The comparatist of the Southern turn, in short, must recognize and value the multiperspectival character of the discipline. Finally, epistemic reflexivity disputes the idea that there are pure legal cultures, as promoted by the colonial model. Neither the civil nor the common law are traditions that are not "contaminated" by other cultures. Epistemic reflexivity promotes the recognition of the hybrid character of legal cultures around the world. There is no culture that has been able to exist in absolute isolation. Interactions between different legal cultures have been the historical rule, not the exception.[124]

G. Anti-formalism, legal realism and enlightened functionalism

The Southern turn criticizes the traditional methods that have been dominant in comparative law as a consequence of their cognitively dissonant engagement with liberal and colonial models of legal knowledge production. The Southern turn does not believe that formalism and traditional legal dogmatics are approaches that can account for the complexity and heterogeneity of law.[125] The study of law on the books, as well as its systematization, only allow us to describe, analyze, and evaluate a marginal part of the discourses and practices that make up legal cultures. The obsession with the formal sources of law in the abstract and the use of the machinery available in the heaven of legal concepts to hierarchize and classify them are not appropriate mechanisms for understanding how legal systems around the globe are effectively structured and how they operate. The Southern turn implies that we take the law of Asia, Africa, and Latin America seriously. The South is and has been a creative source of original and valuable legal products. However, the examination of the law in the books of these regions of the world must be complemented by an examination of their law in action.[126] Normatively, the Southern turn engages with tools proposed by US legal realism and developed and productively applied by some contemporary intellectual schools of thought, such as critical legal studies, legal feminism, and critical race studies, which are influenced by ideas like attention to the context in which law is created and applied, interdisciplinarity, and sensitivity to the intersections between law and politics.[127]

The Southern turn proposed by *The Global South and Comparative Constitutional Law* is, in conclusion, an important contribution to understanding and doing comparative law in ways different from those promoted by the liberal and colonial models of legal knowledge production. The Southern turn is a politically conscious, theoretically informed, and

124 *Dann/Riegner/Bönnemann*, note 81, p. 33; *Judith Schacherreiter,* Postcolonial Theory and Comparative Law: On the Methodological and Epistemological Benefits to Comparative Law through Postcolonial Theory, Verfassung und Recht in Übersee/World Comparative Law 49 (2016), p. 291.

125 *Dann/Riegner/Bönnemann*, note 81, p. 33.

126 *Dann/Riegner/Bönnemann*, note 81, p. 28.

127 *Dann/Riegner/Bönnemann*, note 81, p. 1-36.

methodologically complex proposal that opens alternative paths for North-South dialogue – paths that are worth pursuing with the editors and authors who promote and materialize it in this book.