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# Methodologies of Comparative Constitutional Law: Universalist Approach

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# A. Introduction

## 1. General Outline

**1** Like → *universalism*, the methodological attitude referred to as universalist approach denotes the idea of 'extending over' and 'including' the whole of something. Associated with practices of generalization, it indicates both a concept common to the whole humankind and the process whereby an idea is, or is intended to be, used everywhere.

**2** Generalizations are *methodological* or *substantive*. Whereas the latter points to the condition being universal in scope and character, the former considers the dissemination of allegedly universal concepts. In both cases, concepts are shared by all individuals, irrespective of their social, cultural, and legal backgrounds.

**3** This approach may be traced back to the issue of how to obtain the universal cognition of singularities. In the Middle Ages, it was known as the 'problem of universals'. The emphasis was placed not on concepts, but on how to demonstrate their universal validity. *Realists* focused on the existence of real universals, while *conceptualists* dealt with generalizations of concepts existing in the human mind (Klima).

**4** Comparative law faces a similar distinction. *Universalists* emphasize common features among systems, while *particularists* underline their uniqueness (Hirschl (2014) 15). Evidently, the adherence to universalism or particularism, which we will consider in due course, also depends on how comparatists' factual and cultural background and perspective may inform their choice of a universal or contextual methodology. If more theoretical, not to say philosophical, approaches to comparative law seem to favour universalism (see Valcke 2018), by contrast, social-scientific studies seem more likely to be contextual, although it may depend on the type of social science concerned (Reimann).

**5** The mediaeval dispute comprised a further category: the *nominalists*, who acknowledged the existence of universal words (Klima 3). Again, the English language is *the* universal language, whose grammar conveys the universals of legal globalization, and promotes development through law (Husa (2018) 147).

## 2. Definition and Subtexts

**6** The universal approach has different connotations. Firstly, it denotes the process whereby comparative law is unfettered from the 'chauvinist isolation' of national legislation (Yntema 495). Secondly, it upholds the idea of the separateness of the law. Detached from its context, it becomes universal, and its study 'the only form of scientific study of the law' (Husa (2015) 66). Its third variant, termed comparative constitutional *studies*, encourages a holistic approach to the study of constitutions (Hirschl (2014) 15). Fourthly, it designates the normative ambitions of legal systems and religious laws, which consider themselves the sole depositaries of universal truths. Despite this, none of the religious laws has been able to expunge other religious claims from the realm of the law (Whitman; Glenn (2012) 22).

**7** The approach provides a methodological justification to claims which advocate for their own generalization. Their validity is rooted in the idea of their having a superior *legitimacy* as regards other claims. These generalizations are often associated with ethnocentrism. As inferior systems do not have anything to teach superior systems, the latter are entitled to impose their truths on the former, even with force.

**8** In global comparative law, → *freedom of trade and commerce* advocates new universals in order to facilitate harmonization of laws and stimulate economic development. In so doing, the → *World Trade Organization (WTO), the* → *International Monetary Fund (IMF),* and the → *World Bank Group* display a universalistic character comparable to that of Western law (Husa (2018) 163).

## 3. Legal Universalism and Imperialism

**9** A distinction must be drawn between the universal approach and legal universalism. Whereas the former focuses on the conditions governing the generalization of rules and concepts, *legal universalism* denotes the outputs of generalizations. These disseminate legal ideas and/or devices; make legal systems converge towards common/universal standards; and transplant legal (constitutional) solutions. In so doing, legal universalism replaces former local legislation with new legal devices that possess universal substance because of their conveying universally accepted moral values.

**10** A variety of legal universalism, *legal imperialism* is aimed at protecting sectional interests; among others, the so-called 'neo-imperialist' agenda 'lurking behind the façade of universalist values' (Khilnani 11). When turned into *the* organizing theme of the community, sectional interests count as the interests of the whole. Legal imperialism entails a 'one-sided exportation of legal rules and concepts' (Mattei 6) and establishes 'legal' and cultural control over less-developed, ie inferior, countries. Within the law-and-development movement, less-developed countries had to accept both conditionalities appended to international treaties and the hegemony of Western legal ideology (Davis 545; Baxi 46; Husa (2015) 236).

## 4. Dissemination of Constitutional Ideas

**11** In comparative constitutional law, the universalist approach usually falls under the umbrella of → *borrowing and migration of constitutions*. This assumption, however, might be considered too naïve and simplistic. As we shall see, colonialism, quantification, and constitutional convergence are examples of migration of constitutional ideas instrumental to the universalistic approach. But there also are forms of migration that are not done with a universalistic bent, but rather with a more functional or contextual one, such as the 'dialogical' and 'genealogical' forms of constitutional interpretation (Choudhry (1999); (2006)). Human rights provide us with a vivid example. Derivatives of the English, American, and French Revolutions, they are now universally disseminated (Arnold 12–13) and considered unamendable constitutional features (Roznai 26). Several regional organizations have aligned themselves along their universal standards (eg, → *African Charter on Human and Peoples' Rights (1981)* (Banjul Charter); → *American Convention on Human Rights (1969)* (Pact of San José); → *Arab Charter on Human Rights (2004)*). Western legal conceptions, such as the → *rule of law*, → *judicial review*, and → *separation of powers*, are universals 'whose dissemination is … constructed as a Kantian civilization good' (Baxi 50).

**12** Constitutional pollination usually takes place in times of democratic transition. Not only does the universal approach favour borrowing solutions, but it also facilitates the propagation of Western → *constitutionalism*. In the early 1990s, the dismantlement of previous communist regimes in Eastern Europe (→ *communism;* → *socialism*) was accompanied by the → *drafting of constitutions*, which mimicked it. In the same period, the winds of democratic change blew over Africa and stimulated the transition of several states

from authoritarian rule to a democratic regime. This favoured the adoption of new constitutions in many emerging African democracies.

**13** In Eastern Europe, such transitions also entailed their moving towards capitalism and markets; legal reforms were introduced in the ambit of public and private law (Ajani (1995) ). The dissemination of constitutional ideas also took place when China joined the WTO. The 1999 constitutional amendments incorporated the rule of law into the constitution; and the 2004 amendments protected human rights and private property rights (Arts 5 and 33 Constitution Law of the People's Republic of China: 4 December 1982 (as Amended to 11 March 2018) (China); see Zhang).

## B. Historical Evolution

### 1. Origins

**14** In recent years, comparative legal studies have veered toward a more contextual approach to constitutional law (→ *Methodologies of Comparative Constitutional Law: Contextual Approach*). This, evidently, contrasts with traditional comparative law, whose universalist approach represented its most distinctive 'cultural habit' since the establishment of comparative law as an autonomous discipline (Husa (2015) 100). The roots of such traditional cultural habit are traceable to the ancient world. Plato, Aristotle, and the Stoics opposed the Sophists' particularism and endorsed a universal law. Roman *ius gentium* represented a pragmatic response to the particularism of *ius civile*. The problem of universals also had consequences on the study of the law. Legal particularism was considered 'an evil'. The universalist approach to Roman law caused the substantive generalization of the *Corpus iuris*, which became the *ius commune* of the Western continental tradition (Mousourakis (2007) 149).

**15** The same holds true for other European processes of generalization. The English common law generalized the *usus et consuetudo regni* as practised at Westminster. The → *lex mercatoria* became the universal law for transnational trade. A universalist attitude shaped the universal ambitions—both religious and politico-legal—of the Catholic Church (Glenn (2013) 21). The Empire and the Church incorporated 'a common universal system of justice, rationally ascertained and defined' (Yntema 494).

**16** This approach also characterized the natural law theories and constitutionalism that had been flourishing from the 16th century onwards (Mousourakis (2019) 59; → *natural law theories and constitutionalism*). In the aftermath of codification, the resurgence of the universalist approach reflected the need to restore the 'lost unity of natural law' (Peters; see also Gordley 31). This entailed detecting universal principles among national systems. Nineteenth century comparative law focused on Western jurisdictions, functionalism, and universalism. Traces of this approach still percolate through the 'Common core project' (Siems (2018) 37–39).

**17** The universalist approach favoured the unification of national laws through generalization. Distilled from the law of the European, civilized nations, these unified systems of laws would stimulate trade and facilitate commercial transactions. During the 1900 Paris Congress, Raymond Saleilles and Édouard Lambert paved the way for an ambitious project, which would entrust comparative law with the discovery of universal principles common to the 'civilized' systems (Peters).

**18** Forged within the comparative private law studies, the approach was subsequently applied to constitutional law, stimulating the search for commonalities among constitutional contexts (Kommers). Twentieth century comparative law examined several national constitutions in 'search for a political ideal of ordered liberty' (Rosenfeld and Sajó 11; Khilnani et al 11).

### 2. Constitutional Achievements

**19** In the aftermath of the Second World War, comparative constitutional law experienced a widespread application of the universalistic approach, which saturated the field of human rights. The Preamble to the → *Universal Declaration of Human Rights (1948)* promoted their 'universal respect' and 'observance' because of their being 'a common standard of achievement for all peoples and all nations' (Bingham). Consequently, the modern normative system and institutions of human rights became a powerful source of universalism; this accounts, among other things, for the impact of international law on the shape of domestic constitutional texts over time (Tushnet (1999) 91; Ginsburg, Chernykh, and Elkins; Masterman; Gearty).

**20** The dismantlement of colonialism in the 1960s (→ *decolonization*) and the end of the Cold War favoured new waves of universalism; and 'the basic principles of constitutional law' were deemed to be 'the same around the world' (Beatty 10). Recipient countries adopted the Western legal paradigm as their benchmark, against which to assess 'whether governance comports with universal human rights norms' (Udagama 148; Davies 542).

**21** This attitude accounts for the 'World Series' syndrome in comparative constitutional studies (Hirschl (2014) 192–93). Only a small set of constitutional contexts, usually located in the Global North, have traditionally set the benchmark in relation to which all systems must be measured. Besides traditional constitutional contexts (United Kingdom, United States ('US'), and France), scholars also consider China and India (Masterman and Schütze ). This, however, discloses a methodological flaw. Comparative law still considers that universals may be carved out of a limited group of countries. This pattern of dissemination is mainly grounded in the politico-economic global dominance of a limited selection of state constitutions. As it shares the epistemological underpinnings of comparative law, the 'World Series' syndrome is unable to grasp the plurality of constitutional solutions which characterize the Global South.

## C. Comparative Description

### 1. Variety of Approaches

**22** Comparative constitutional law discloses a variety of approaches. Firstly, they project the generalization of legal knowledge beyond domestic jurisdictions. Secondly, they aim to detect commonalities among discrete legal environments. The pendulum swings between universalism and particularism (or relativism, or contextualism).

**23** Thirdly, comparative law reconciles universalism with constitutional variations. When the dissemination of Western constitutional ideas meets non-Western conceptions of the law, 'transfers of knowledge are needed … between different legal systems' (Mattei 8). In practical terms, universalism has to do with constitutional borrowing, and with substantive and methodological processes of generalization. This unavoidably triggers the 'objectivization' of constitutional devices (Arnold 7) and, at the same time, denies the relevance of local variations. In so doing, the universalist approach usually ignores the

contexts within which the law is applied and superimposes Western (global) standards on → *developing countries*.

## 2. Colonialism

**24** Colonialism has multiple connotations. Firstly, it reflects the assumption that legal traditions in general, and the Western legal tradition in particular, claim to have a superior *legitimacy* as regards other traditions (Glenn (2014) 366). In politico-legal terms, colonialism is servient to such superiority; its universalistic approach becomes the channel whereby traditions implement their policy of domination. Colonialism counts as the dominant legality (Baxi 72).

**25** Secondly, colonialism is a species of the broader concept of domination, which asserts inequality between different groups, and in which one endeavours 'to impose its cultural order to the subordinate' ones (Merry 890). Such a predicament assumes that the Western conception of the law is a universal legal paradigm 'superior' to all other legal paradigms.

**26** In a narrow sense, colonialism refers to Europe's 19$^{th}$ century colonial enterprise (Nicolini (2019); → *colonization*). In order to bring about development, Europe's civilizing mission considered it beneficial to disseminate Western constitutional devices throughout the world. Non-Western societies might attain legal superiority provided that they evolve through various stages of development that lead to the same stage of superiority envisaged by European legal traditions. Europe's civilizing mission presupposed the pre-eminence of Western anthropological attitudes (Siems (2018) 387). The universalization of 'European Humanity' reflected the radiant future European powers promised to inferior, ie non-European, 'anthropological types' (Whitman 308).

**27** The thorough application of the Westminster model in former British colonies is a derivative of colonial generalization (→ *parliamentary systems*; Hatchard et al 108; Kumarasingham 4–5 and 11; O'Brien 32). The generalization of the Council of Europe's → *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)* provided the template for the → *bill of rights* of former British colonies (Parkinson). Despite this, these are still considered 'the illegitimate children of the Anglo-American legal/political tradition' (Coomaraswamy 1). Politico-economic influence is apparent when the European Union encourages the spread of Western values. Its international action is guided by the principles which have inspired its own creation (democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, and so on; Art. 21 Treaty on European Union).

## 3. Functionalism

**28** As a constitutive feature of mainstream comparative law (Zweigert and Kötz; Michaels 345; Graziadei 109; Siems (2018) 25; Mousourakis (2019) 115) functionalism is instrumental to the universalistic approach (see also → *methodologies of comparative constitutional law: functional approach*). Functionalism is eminently empirical: legal devices are 'comparable if they are functionally equivalent, if they fulfil similar functions in different legal systems' (Michaels 348).

**29** The 'translation of diverse legal rules into one language' (Mousourakis (2019) 19) is obtained by considering the function that different principles, legal institutions, and machineries perform under different constitutional frameworks. Accepting that even discrete institutions may fulfil equivalent functions, functionalism assumes that the law is naturally universal (Husa (2015) 119; Hirschl (2019) 25). This does not mean equating functionalism and universalism. Even if servient to universalism, functionalism is just as often used to create a contextual response, for example by pointing out how institutional arrangements are different in different countries, even if they are tackling a superficially

similar problem. To this extent, search for commonalities may help in the process of highlighting mutual borrowings, the historical evolution of law in different constitutional contexts, as well as transplants (for a critical attitude to functionalism in constitutional comparative law see Tushnet (1999)).

**30** The principles of separation and correspondence, ie, the main principles upon which financial arrangements are built (Nicolini (2018)), provide us with an example. A survey of several constitutions discloses a great variety in their arrangement: Article 104 Basic Law for the Federal Republic of Germany: 23 May 1949 (as Amended to 13 July 2017) (Ger); Article 13 Financial Constitution Act: 21 January 1948 (as Amended to 5 June 2012) (Austria); Article 2 Federal Constitution of the Swiss Confederation: 18 April 1999 (as Amended to 2018) (Switz); s 92 Constitution of Canada (Canadian Constitution Acts, 1867 to 1982): 1 January 1982 (as Amended to 2011) (Can); Schedule VII Constitution of India: 26 January 1950 (as Amended to 16 September 2016) (India); Article 119 Constitution of the Republic of Italy: 27 December 1947 (as Amended to 2012) (It); Article 156 Constitution of Spain: 27 December 1978 (as Amended to 2011) (Spain); Act No 108, ss 214–15 Constitution of the Republic of South Africa: 18 December 1996 (as Amended to 2012) (S Afr). Therefore, we may argue that both principles vary from state to state and take different forms in different contexts.

**31** However, functionalism allows scholars to get beneath the linguistic labels and grasp the commonalities among the forms the principles under scrutiny take. This approach goes beyond the financial and fiscal machineries that characterize a specific financial constitutional regime. Instead of focusing on variation, functionalism focuses on the task the principles of separation and correspondence tend to attain under different constitutional frameworks.

## 4. Universalists and Relativists

**32** Comparative law experiences an ongoing debate between *universalists* and *relativists* (Hirschl (2014) 194; Valcke (2018) 160–61). Universalists emphasize the processes of pollination among legal (constitutional) systems (Watson), whereas relativists stress the uniqueness of each system (Legrand). Among universalists, *idealistic* universalists are juxtaposed with *realistic* universalists, depending on whether they seek to discover the ‘ideal of law’ or the ‘sociological laws governing legal phenomena’ (Mousourakis (2007) 145).

**33** Universalism and relativism are both variants of the universalist approach. Universalism applies methodological generalization, thus favouring cross-fertilization among constitutional systems. Particularism is a form of substantive generalization, which considers constitutional law a culture-specific human artefact. Its variant is *parochialism*, which scholars trace back to Montesquieu: ‘laws must be appropriate to the people for whom they are made’ (Dodek 1). Parochialism admits generalizations provided that cross-fertilization takes place among contexts with ‘the same level of development’ (Mousourakis (2019) 34). This echoes the ethnocentric approach exhibited by 19$^{th}$ century comparative law, when only the limited set of civilized, ie ‘European’ systems were considered generalizable and exportable. It also mirrors generalizations processed under the ‘World Series’ syndrome.

**34** Parochialism is challenged by *cosmopolitanism*. Even when adopting relativist approaches, scholars admit that a certain degree of dissemination is undeniable (Hirschl (2019) 16). And some principles, such as the ‘right to democratic governance’ (Frank 50), are considered universally justified. *Cosmopolitanism* has the merit to accommodate

allegedly universal values with culture-specific conceptions of the law within constitutional contexts.

**35** Not all principles are generalizable; some of them are ‘relative’ and geographically limited to specific areas of the world. This reflects the ‘dialogical conception of constitutionalism’, which considers that ‘comparative constitutional law is an important tool for understanding one’s *own* legal system, by serving as a stimulus to constitutional self-reflection’ (Choudry (2013)).

### 5. Quantification: Good Governance

**36** Together with the modern normative system and institutions of human rights and colonialism, ‘the mathematical turn in law’ (Restrepo Amariles 14) and the debate about quantification in comparative law (Siems (2018) 180) have clear-cut consequences on generalizations. Quantitative measurement delivers a ‘plan of … change based upon an imitation of laws, transplants and borrowings’ (AjaniÂ (2017)). The growing use of quantification in law in the form of indicators allows scholars to assess the ‘quality’ of legal systems and rank them, say, on how they actually implement the rule of law and protect foreign financial investors.

**37** The pre-eminence of economic universals entails the superiority of finance and banking legal instruments on constitutional systems. In Latin America, for example, several constitutions, such as the Brazilian Constitution, have incorporated the so-called *neoliberal orthodoxy* (foreign investors protection, limitations to social policies and expenditures: Amendments to the Constitution of the Federative Republic of Brazil: 5 October 1988 (as Amended to 2017) (Braz); see Alviar García; Moreno González).

**38** This shift from the legal to the economic sphere is even more apparent as far as the rule of law is concerned: as it promotes efficient institutional changes, the rule of law deals with *governance*, not with *government*. Furthermore, it has become the driver promoting good governance. But, the rule of law is neither the byproduct of global international law nor has it been supposed to act as a politico-economic driver. Before it became the shibboleth of global governance, it had a different legal meaning, because it traditionally set constraints on political power in order to protect the rights and freedoms of the individuals (Sajó; Preamble to the Constitution of Canada; Preamble to the Constitution of the Republic of Ghana: 8 May 1992 (as Amended to 1996) (Ghana)).

**39** Global convergence has twisted the rule of law into a measurable value-neutral legal concept that secures predictability on investment returns. The World Bank upholds that liberal democracy perfectly fits the new universals of global economic and financial dominance. Since they have built the current global system, only Western liberal democracies are ‘compatible with economic success and [the] rapidly integrating information-intensive world economy’ (Kurki 366; see also Ginsburg (2020)).

## D. Comparative Assessment

### 1. Convergence of Laws

**40** In order to generate productive generalizations, not only does the universalist approach resort to several methodological attitudes, but it also takes different forms for disseminating constitutional ideas. Scholars term these forms ‘convergence of law’. Over the past few decades we have been experiencing a considerable degree of ‘convergence of constitutional structures, institutions, texts, and interpretive methods’ (Hirschl (2014) 205).

**41** ‘Convergence of laws’ denotes the vast array of forms whereby the universalist approach is applied within the ‘global epistemic community’ of comparative (and constitutional) scholars (→ *critical legal studies and comparative constitutional law*). The descriptor encompasses several processes of legal convergence, such as harmonization, homogenization, transplants, unification of laws, which all, evidently, are inflected after constitutional taxonomies, such as constitutional ‘transplants’ (Halmai), ‘borrowing’ (Friedman and Saunders; Tebbe and Tsai), and ‘convergence’ (Dixon and Posner ).

**42** Western legal traditions count as the dominant legality; convergence means ‘Westernizing’ the globe (Whitman 306). What scholars style as good governance is ultimately the generalization of Western legal standards. The WTO’s principles of transparency and governmental accountability are, for example, generalizations of the Western ‘liberal tradition of political ideology’ (Potter 125). Like in the 19th century, global comparative law discloses a clear ideology, which aims to sidestep the ‘problems caused by the fragmentation of national laws’, and ‘to restore a measure of legal unity’ with a universal character (Mousourakis (2019) 7).

## 2. Private-Public Divide

**43** Comparative constitutional law inherited its universalist ambitions from 19th century comparative law. Concepts like ‘convergence’ or ‘unification’, although inflected in constitutional terms, are outputs forged by comparative private-law scholars. The spread of quantification has added fuel to the fire of universalism. The World Bank’s *Doing Business Reports*, for instance, encourage countries to arrange their constitutional framework around processes of legal generalization. ‘One size can fit all––in the manner of business regulation’ (World Bank ‘Doing Business in 2004’ xvi): the more homogeneous and efficient the system, the more likely the investment, and the higher the economic return.

**44** When considering the practical implications of the universal approach, the divide between constitutional and private law becomes blurred. New constitutionalism, for example, infuses constitutional environments with ‘mechanisms associated with neo-liberal restructuring of the global political economy’; it also allows ‘dominant economic forces to be increasingly insulated from democratic rule and popular accountability’ (Gill). This reflects the shift towards the creation of a global common regulation of international financial relations and markets. It also triggers a shift towards the efficiency rule. Its application requires that the national level is financially responsible *vis-à-vis* financial markets and international investors. Finally, global financial dominance causes a further shift from the political to the economic sphere. National governments now seem to rely on a new form of confidence between the political power and the sovereign financial market, where the ‘distressed sovereign debt can be sold on private equity markets and the debtor [is] subjected to the harsh economics of private law’ (Muir Watt 286; → *sovereign debt and state bankruptcy*).

**45** The public-private divide (→ *public law - private law divide*) is then blurred because of the universalizing legal code of financial assets. *Durability*, *priority*, and *convertibility* are assisted by *universality*, which extends the scope and applicability of financial instruments. Universality therefore undermines the relation between state and capital and, at the same time, upholds the superiority of privately, ie sectionally, coded assets (Pistor 21).

## 3. Universal Language

**46** The role displayed by the English language at the global level has favoured the resurgence of universalist methodologies in the field of comparative (constitutional) law. English common law has historically constituted the backbone of global law; the same US common law, which is supposed to be the hegemonic legal system, owes its features to English law. Transnational legal modules are the derivatives of processes of legal enculturation promoted by the dominant common law legal profession.

**47** English legal language performs a 'communifying function' within the global society (Berman 38). As the processes of capital coding turned out to be transnational and loosely tied to territories and communities, the English language also became de-territorialized. Its linguistic paradigm adapted to the process of generalization. The process of linguistic 'objectivization' also makes global English a channel whereby the universalist ideology hinted at by the process of global legalization is disseminated. If global concepts are universal, they must be conveyed by a language that it is applicable to all people and things at all times (Husa (2015) 182).

## 4. Comparative Constitutionalism(s)

**48** The intersections between constitutionalism, global law, and universalism have generated a constellation of a variety of approaches in comparative constitutional jurisprudence. Like the tiles of a roof, local, supranational, and global legalities mutually overlap. The debate between universalists and particularists now points to the use of foreign sources, the validity of allegedly universal principles, and the uniqueness of national constitutions.

**49** *Constitutional sovereigntists* challenge dominant global legalities that claim a superior *legitimacy* as regards constitutional orders (Hirschl (2014) 201). *Global constitutionalists* assume that the 'very idea of what a constitution is has migrated from the national to the supranational and international sphere' (Masterman and Schütze 3; Schwöbel; O'Donogue). This quasi-constitutional framework prevails on subordinate constitutional systems, upholding that this might trigger a general international community of justice (Yntema 496; Husa (2018)).

**50** The 'cosmopolitan account of global law' (Valcke (2018) 162) assumes the presence of multiple 'juridicities', which have a bearing on the constitutional legitimacy of several countries. *Pluralistic cosmopolitanism* and *constitutional pluralists* advocate a 'multi-focal constitutional order', while, according to *monistic cosmopolitanism*, each system shares one and the same kind of juridicity (Valcke (2018) 160). The features of global law also reflect the 'world legal community', which needs a transnational, borderless legal framework into which heterogeneous legal systems coalesce.

## 5. Global Dialogue and Critique

**51** Judicial dialogue has also favoured the dissemination of universalizing approaches in comparative constitutional law. In triggering constitutional universalism, however, judicial internationalization resonates with both parochialism and the 'World Series' syndrome. Indeed, judicial cross-fertilization usually takes place among jurisdictions, whose 'common judicial effort across the borders' (Mak 2–3; Husa (2018) 86) reflects a strong commitment towards the propagation of universal values.

**52** Jurisdictions join the 'cosmopolitan conversation' by quoting foreign precedents (Lyke). In so doing, judicial networking replicates the debate between universalists and particularists, because it applies both methodological and substantive generalizations. Courts resort to methodological generalization in order to corroborate the legitimacy of their own judgments. Foreign precedents provide justification to judicial strategies in the light of universal principles. The practice of judicial review in Botswana was justified in the light that 'Botswana is a member of a comity of civilized nations and the rights and freedoms of its citizens are entrenched in its Constitution' (*Petrus v The State* (1984) (Bots)). The transnational environment and its influences facilitated the judicial enforcement of human rights in Bermuda (*Minister of Home Affairs v Fisher* (1980) (PC)) and the establishment of judicial review in Israel (→ *Mizrahi Bank Case (Isr)* (1995)). The same argument proved to be valid when the South African Constitutional Court declared the → *death penalty* unconstitutional (*S v Makwanyane and Another Case (S Afr)* (1995)). This approach mimics the 'general principles of law recognized by civilized nations' clause laid down in Article 38 Statute of the International Court of Justice (→ *General Principles of Law*; → *Civilized Nations*).

**53** The consequences of judicial substantive generalizations are twofold. Firstly, when the US Supreme Court justices disagree about whether 'foreign law' is 'a valid point of reference for interpreting the US Constitution', they are generalizing their own constitutional regime. They need not find commonalities (Hirschl (2014) 197), because the US constitutional law reflects the universal tenets of constitutionalism: 'the US have adopted the best … version of some specific principles of justice, and hold it on to the rest of the world as something to emulate' (Tushnet (2000) 1339).

**54** Secondly, courts resort to judicial dialogue to demonstrate the uniqueness of their cultural-legal environment. This type of parochialism is patent in *Stanford v Kentucky* (1989) (US), where death sentencing for juvenile offences was upheld in the light of the 'American conceptions of decency'. The silence of the 'American constitutional tradition', jurisprudence, and the lack of US Supreme Court's precedents were used to deny a petition for certiorari regarding the death penalty, as well as to challenge the panoply of foreign judgments quoted by the appellant's counsel in *Knight v Florida* (1999) (US).

**55** Parochialism reveals the ethnocentric attitude in comparative constitutional studies which marginalizes the Global South (Hirschl (2014) 207). This has triggered the 'Global South critique': several tenets of the universalist approach to the law challenge the resistance of reflective judiciaries. Anti-sodomy laws, for example, are deemed to embed societal consensus against same-sex sexual intercourse. Courts in Malawi (*R v Soko* (2010) (Malawi)), Kenya (*EG v Attorney General* (2019) (Kenya)), and Singapore (*Lim Meng Suang v Attorney-General* (2013) (Sing)) upheld the anti-sodomy laws because of the specificity of their legal culture. Conversely, Courts in India (*Navtej Singh Johar v Union of India* (2018) (India)), Botswana (*Letsweletse Motshidiemang v Attorney General* (2019) (Bots)), and Belize (*Attorney General v Orozco* (2019) (Belize)) departed from this culture-related approach and struck them down.

**56** The Caribbean and the South Pacific also employ parochial generalizations in order to protect the 'global south version' of human rights (Hirschl (2014) 207). In the Caribbean, the creation of the → *Caribbean Court of Justice (CCJ)* followed the negationist approach of the Judicial Committee of the Privy Council in *Pratt v Attorney General of Jamaica* (1994) (PC). The CCJ should have endorsed a retentionist distinctively regional jurisprudence as regards the death penalty. Quite ironically, the same CCJ struck down the *mandatory death penalty* in *Nervais v The Queen* (2018) (CCJ). The same holds true for the Solomon Islands, where the judiciary inflected the universalist character of human rights in order to protect

the Island's legal particularism and customary laws (*Tanavalu v Tanavalu* (1998) (Solom Is); *Pusi v Leni* (1997) (Solom Is)).

## E. Conclusions

**57** The universalistic approach in comparative constitutional law still shares the ethnocentric attitudes of the dominant Western legal culture. In terms of validity, this approach is also the prevailing one in global comparative law.

**58** However, it also challenges legal pluralism. Its approach and output, ie legal universalism, require homogeneous politico-legal features throughout the world, and manage legal complexity by simplifying it. In some cases, the universalist approach confronts the culture-related resistance of reflective judiciaries in the Global South. Such a critical attitude toward the universalizing trend also percolates through comparative constitutional-law scholarship, which resists processes of homogenization-unification. This attitude may be traced back to the fact that, in comparative law, '[p]lurality is essential' (Hirschl (2014) 206). By contrast, the reductionist approach disregards 'unity and plurality' (Valcke (2004); Hirschl (2019) 28), as well as the 'sustainable diversity in law' (Glenn (2014)) which are at the heart of comparative legal studies.

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