Southern Lessons for Constitutional Law

Edited by
UWE KISCHEL

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Proceedings of the 39th Congress of the Society of Comparative Law in Berlin, September 12 to 14, 2024

Edited by

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Preface

The general topic of the 39th congress of the Society of Comparative Law "Global North – Global South" has until now received scant attention in German constitutional law and in other European constitutional systems. Against this backdrop, the session of the Section of Comparative Public Law tried to identify the specific *legal* implications of this topic by examining the practical influence of perspectives from the Global South on constitutional law.

Traditional comparative constitutional scholarship has focused primarily on legal ideas, concepts and institutions originating in countries such as the United States, England, Germany, France – i.e. in the Global North –, analyzing, for example, how these legal elements function and how they might be modified in different Northern, but also Southern jurisdictions. To increase the focus on the Global South, this perspective needs to be shifted and supplemented by asking which contributions the Global South made to the international discussion on constitutional law, and by viewing these contributions not only from a Northern, but also from a Southern point of view.

The Section of Comparative Public Law addressed this question of "Southern Lessons for Constitutional Law", in a first part, by examining specific regional and country perspectives as well as the way they interact in the sense of "regards croisés". A second part then explored, in the form of case studies, concrete legal fields in which direct contributions by the Global South to the international discourse on constitutional law seemed particularly evident.

This volume compiles all public law contributions to the 39th Congress, and reflects the dual structure of the session itself. In a first group, the authors take regards croisés on the question of Southern lessons for constitutional law: Philipp Dann with a view from Germany, Konrad Lachmayer with a view from Austria, Pablo Riberi with a view from South America, and Surya Deva with a view from Asia. The second group contains two case studies of Southern influences: Selin Esen explores implications for the rule of law, while David Bilchitz examines socio-economic rights across the North-South divide. Collectively, these papers critically engage the transformative potential of Southern constitutional thought.

As editor of this volume, I would like to express my sincere gratitude to the authors for their remarkable contributions, and for the timely submission of their manuscripts. I particularly thank the Secretary of the Section of Comparative Public Law, Prof. Dr. Sebastian Graf von Kielmansegg, for his indispensable support in organizing the session. His calm and constant work in the background made our session the smooth experience that it was. I would also like to thank my assistants Carla Blecke, Christine Hecker, Clemens Sonntag, and William Kop-

plow, as well as my students Luca Boddenberg, Lea Freitag, Michaela Hentze, Moritz Kellotat, Josephin Lange, Jens Noske, Konstantin Oppeneiger, Liam Piwodda, Lara Rathsack, and Tim Sack for their invaluable assistance.

Greifswald, June 2025 Uwe Kischel

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Southern Lessons for Constitutional Law – A view from Germany

Philipp Dann

The topic of 'Learning from the Global South' constitutes a very timely choice for this conference of the German Society of Comparative Law. In my understanding, it represents one of the three major challenges of our age – alongside digitalization and climate change – that cut across many fields and therefore not merely can, but should be adopted from various disciplinary perspectives and positionalities.

Against this backdrop, the structure of my presentation reflects on four central questions: the first two questions examine preliminary considerations, yet they are followed by two questions that go to the heart of the conference's subject as articulated by the organisers. First, I will inquire the implication of the 'Global South' and the possible meaning of this notion. Second, I will consider whether it is appropriate to resort to the standard toolbox of comparative law to analyse constitutional law in the Global South or whether there is something distinct about this law. I will then turn to the main questions as posed by the organisers: What are the constitutional experiences of the Global South and hence the lessons we can draw from those experiences? Finally, I will reflect on the distinct perspective from Germany: What does it mean to engage with this discourse from a German standpoint? Which contributions can German scholars as well as German law make to this discussion?

A. What is the Global South?

This presentation commences with a crucial question: What is the Global South? There are, of course, many positions and inputs on this certainly difficult and contested notion.[1] It is important to appreciate, first and foremost, that the notion is a designation that is not regional. It does not refer exclusively to Africa, Asia, or Latin America, but cuts across and transcends those regional categories. Likewise, it is also not an ideological designation. It does not denote, for instance,

[1] *Philipp Dann*, Southern Turn, Northern implications, Comparative Constitutional Studies 1 (2023), p. 57; *Siba Grogovui*, A Revolution Nevertheless, The Global South, Vol. 5 (2011), p. 175.

socialist or *liberal* constitutionalism. So apparently, the notion does cut into something else than a regional or an ideological category.

To some extent, it is perhaps easier to grasp what it does *not* mean; what is *not* the Global South. It is not a geographic description; that much is already clear by the adjective *global*. Some countries typically considered as North or 'First World' are located in the Southern hemisphere, such as Australia; at the same time, the Global South can also be found in Europe – if not even within Germany. Moreover, the term should not be conflated with the 'Third World', the originally very proudly used but since the 1980s increasingly deranged and hierarchical notion that was popular up until the 1990s.[2] It is also not the designation or the label that is mostly used in the United Nations, where it is 'developing countries' and neither is it synonymous with 'low-income countries' as categorized by the World Bank.[3]

The Global South then, admittedly, is a somewhat difficult and elusive concept. But being a German lawyer, I am inclined to provide a 'working definition' in order to better grasp and delimitate the core of present discussions. I propose that the label Global South designates those countries and societies that are part of a periphery created by European colonialism and that remain in this periphery due to the continuing legacies and effects of said colonialism.

My central argument and defining aspect then is that we can only understand and use the notion of Global South once we begin to understand, or at least try to understand the nature of European colonialism – what it constituted and how it continues to produce effects in the present. The notion of the Global South is one that is deeply informed by history, informed by political economy and one that signals a certain sensibility for understanding the margins, for understanding the centre and periphery relation.[4] Thus, while the Global South cannot be reduced to a mere geographic notion, it is also not simply an economic concept. Rather it has a much broader, more politically charged meaning.

Nonetheless, it is a notion that has been criticised and in the context of said criticism I would like to engage with three frequently raised objections: One is that the term is simplifying exceedingly. How can one neatly divide the world into merely two spheres? Hence, critics suggest these labels of 'South' and 'North' expressing an unreasonable broad concept. Latin America, China, and India are diverse to a point where they seem like different worlds, so how can one put them together? It is my contention, that this critique fails to get to the core of the

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[2] *Ulrich Menzel*, Das Ende der Dritten Welt und das Scheitern der großen Theorien, 1992; *Vijay Prashad*, The Darker Nations: A People's History of the Third World, 2007, p. 6; *Sundhya Pahuja*, Decolonizing International Law, 2014, p. 9.

[3] *Philipp Dann*, The Law of Development Cooperation, 2013, p. 202.

[4] *Jean Comaroff*, John Comaroff, Theory from the South, or How Euro-America is evolving towards Africa, 2011; *Florian Hoffmann*, Facing South: On the Significance of An/Other Modernity in Comparative Constitutional Law, in: Philipp Dann, Michael Riegner, Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, 2020, p. 41.

notion. The main idea behind using the notion of the Global South is rather to reassert the ongoing relevance of the centre-periphery divide. And all of these regions share the common experience of having been profoundly shaped by colonialism – albeit in surely very different and multifaceted ways.

The second major criticism is that the notion itself might ultimately be reifying problematic categories; that by using South and North again we just continue to solidify a distinction between two halves of the world, which we actually aspire to overcome. This is an undeniably valid and thoughtful argument addressing a serious problem. Yet again, such concerns, while they rightfully are important, should not lead to abandoning the concept altogether. The world, after all, is not a level playing field. The recognition of existing distinctions, which we must have to learn with, is thus of fundamental importance. These distinctions should be openly addressed rather than to obscure them.

The final point of criticism is that the term 'Global South' is, in fact, a notion of the North about the South. As was pointed out frequently, it is not a notion that is very popular in the South, for example in India or in Latin America. Tellingly, a Chilean student of mine remarked never having used the notion of the Global South in Chile or in other Latin American countries. So interestingly, it is a label that enjoys popularity in Europe and in North America, but appears to be mostly absent in the contexts it seeks to designate.

In conclusion, even this paradoxical observation might complement the overall picture: Global South remains a complicated notion raising a lot of questions, it nonetheless carries weight and fulfils an important function as it points to distinctions that continue to have relevance. Ultimately, it displays the gap of which side we as societies stood during the colonial period visible. Were we in the centre? Were we colonizers? Or were we the colonized? Those questions continue to have an effect on and to shape our present realities. The notion of the Global South helps us to see that. In conclusion, it may be imperfect, albeit valuable and even necessary to point to an important fault line, to a distinction that continues to be relevant.

B. Can we use the normal toolbox of comparative law?

Once a common understanding of the notion of the Global South is established and once one decides to work with it, the question remains how to proceed. What kind of methodology should be applied? Is it suitable to have recourse to the standard toolbox of comparative law? Is it sufficient to be aware of the concepts of functionalism, protectionism, critical comparison; that there are all these kinds of different approaches to be able to start working on 'Southern Lessons from Constitutional Law'?[5]

[5] For good overviews, see *Uwe Kischel*, Comparative Law, 2019; *Mathias Siems*, Comparative Law, 2022.

This question should be strongly disagreed with. On the contrast, one should not simply proceed with the existing methodology. I would argue that its approaches cannot be applied unconditionally unless and until we have started to consider the legacies of colonialism also in this regard. Moreover, I do believe that until this point, our comparative law methodologies, our understandings and critiques of functionalism and contextualism etc., do not take this dimension enough into account. This displays a significant problem and if we want to have a serious engagement, we need to fill this gap. I am sceptical of those who just add India, Columbia, or Tanzania to the gene pool of comparative (law) studies without taking into account the larger, more complex and more painful history. It is unlikely that progress will be achieved if we restrain from finally addressing this.[6]

Accordingly, what does this demand mean concretely for constitutional scholarship? How can we reflect the legacies of colonialism when we analyse constitutional orders? In this second section, I will raise three problems indicating what needs to be infused in our methodological thinking as we proceed. These are well-known problems to some extent, but I still consider it important to make them transparent.

The first one is an epistemic problem that concerns the asymmetry of knowledge recognition. It touches upon classic questions of who is heard and what we actually think to know. Daniel Bonilla Maldonado, a famous comparative law scholar from Colombia[7], once shared a telling story about his two email addresses with me. One email address is his usual Colombian email address. He works in Los Andes, which is one of the great universities in Latin America – but then he also studied and worked at Yale. Correspondingly, he had an email address from Yale as well. With these two addresses, he had a very disparate experience: When he used the Yale address, he got immediate responses, usually within a day. When he used the Colombian address, he did not receive an immediate answer – if he received one at all. This example illustrates a crucial epistemic point: It does make a considerable difference where people think you are from. It is perhaps not the name, but the origin. A Colombian origin may or may not arouse interest. However, being affiliated with Yale will most likely do: Yale is perceived as important. This leads to a rephrased version of Gayatri Spivak's pertinent question 'Can the Subaltern speak'?[8] Is there actually anything relevant to learn from the Subaltern, i.e., in our context the South? Do we as scholars from the Global North even want to listen and to consider Southern knowledge as relevant? By posing these ques-

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[6] *Ran Hirschl*, Comparative Matters: The Renaissance of Comparative Constitutional Law, 2014, p. 218.

[7] *Daniel Bonilla Maldonado*, Constitutionalism of the Global South, 2014; *Daniel Bonilla Maldonado*, Legal Barbarians: Identity, Modern Comparative Law and the Global South, 2022.

[8] *Gayatri Spivak*, Can the Subaltern Speak?, reprint 2010; *Gayatri Spivak*, Critique of Postcolonial Reason, 1999.

tions, we come to realize the extent to which we lack immediate direct knowledge, voices, and positions from the Global South. In our literature we still have an immense imbalance of recognized voices. We must commence by at least acknowledging this and investing more efforts in making us hear and comprehend voices and positions from the Global South. Simultaneously, we will not solve the problem by entering a library in order to about Southern jurisdictions. That is epistemically not sufficient. Instead, it is fundamental to put much more effort into direct and open-minded exchanges. Only then can it is possible to address this first problem and better understand what we actually do (not) know and start recognizing the asymmetries in the scholarly recognition of produced knowledge.

The second problem is one that touches upon the core of the factual working conditions in the Global South and is to some extent profane. However, the institutional problems underlying knowledge production must also be acknowledged. We must come to realize how difficult it is to produce books and writing and the like in the material circumstances described as the Global South.[9] To illustrate this point with yet another personal observation: Many universities in India are not like this conference building here at Humboldt University. They are not palaces; they do not have massive libraries and other such facilities. Instead, they are often highly instable institutions that are equally often exposed to political pressure, where teaching and grading obligations of colleagues are suffocating. Often, professors work in part time jobs, they do not certainly have the time and leisure to read, to write, to engage, or to rethink. While I am taking most of my insight from personal experiences with India, these conditions are probably comparable to many places in the Global South. The Indian law schools are just a different kind of world when we compare them with German universities. To be clear, I am neither talking about intelligence nor commitments of the scholars. Rather, I am talking about the institutional context, in which people can produce knowledge, can write, and find the time to reflect on writing. All this needs to be taken into account, next to the partly challenging circumstances of life in many parts of the Global South. We as scholars must seek ways to acknowledge that, even though it does not fit neatly into a methodological category. But it is a sensibility that we have to bring to the topic and that we have to bring to the conversation if we aspire to engage with scholarship and scholars of the Global South.

My third and last point is more theoretical and also more established. I think we should increase our awareness for the deceitful universality of our constitutional vocabulary. In our constitutional as well as our political theory, we assume that we all share the same vocabulary. When talking about states, rights, borders, about representative democracy, or similar concepts, we assume that we all mean

[9] *Dinesha Samararatne*, Comparative Constitutional Law from and within the Global South: challenges, prospects and hope, World Comparative Law (VRÜ-WCL) 57 (2024), p. 337.

the same thing. But this assumption alone is highly deceptive.[10] In my view, it is even a mistake, because these notions necessarily rest on local experiences and stories that are profoundly diverse. We need to understand and somehow integrate those crucial differences into a more differentiated and reflective vocabulary. This adds to the existing critiques that problematize functionalist approaches, because it once more lays bare the difficulty to even agree on the use of any kind of common vocabulary.

In summary, the illustrated three problems cause methodological challenges that we must factor in when looking for lessons from the Global South. I do not view these challenges as insurmountable; rather, we might eventually be able to overcome them if we accept to work on them. What I deem essential though, is that we approach these difficulties with intellectual honesty and rigour to find out how to overcome them together.

C. What are distinct Southern constitutional experiences – and hence lessons for law?

To move on and beyond these more preliminary considerations, I now come to the main question and that is first of all: what are the distinct Southern lessons? Allow me to amend this question a little by pointing out that any lessons follow from certain distinct experiences. Asking about constitutional experiences made in the South is, of course, a slightly broader topic but it builds the groundwork from which then concrete lessons follow. Let me therefore note three distinct Southern experiences of which special emphasis will rest on the third.[11]

The first are experiences that originate in the social and economic legacies of colonialism. Many countries that we consider part of the Global South are still in the periphery of global capitalism. There is widespread and deep poverty and we need to be aware of those imbalances and inequalities. Not least, because they also have an effect on constitutionalism, namely that the material promise of constitutionalism is much stronger in Southern constitutions.[12] Against this

[10] On this point famously *Dipesh Chakrabarty*, Provincializing Europe, 2004; *Upendra Baxi*, Constitutionalism as a Site of State Formative Practice, Cardozo Law Review 21 (2000), p. 1183; *Daniel Bonilla Maldonado*, Constitutionalism in the Global South, 2014, p. 18, Introduction.

[11] In more detail: *Philipp Dann*, Michael Riegner, Maxim Bönnemann, The Southern Turn in Comparative Constitutional Law: An Introduction, in: Ibid (eds.), The Global South and Comparative Constitutional Law, 2020, p. 23.

[12] *David Bilchitz*, Socio-Economic Rights and Expanding Access to Justice in South Africa: What can be done?, in: Philipp Dann, Michael Riegner, Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, 2020, p. 210; *Roberto Gagarella*, Inequality and the Constitution, in: Philipp Dann, Michael Riegner, Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, 2020, p. 235.

backdrop, it is certainly no coincidence that the notion of transformative constitutionalism emerged in South Africa and was soon picked up in India and in Latin America. It carries a certain kind of hope but also a certain urgency to react and to call upon the state to deal with social economic legacies.[13] That is one area of distinctly Southern experiences.

The other constitutional experience that emerges connects to the political legacies of colonialism. We cannot forget about those either. It starts with the emergence and genesis of statehood in Europe versus what we call the South.[14] European states emerged over centuries of competition in Europe, over centuries of competition between sacral and profane power. This was a very slow process of building up state capacities, of negotiating borders and after many centuries, as late as in the 19th century, it somehow gelled into what we know today as a state. The story in the South is, of course, decisively different and this mostly has to do with European intrusion, interference and colonialism. Boarders in the Global South are very often contingent and contingently drawn up by colonial powers. There was almost no time to build up state capacities – existing capacities were even destroyed. The consequences of this history are seen in many political constellations in the South today, in deeply divided societies and in contested borders. The question of how a state's constitution emerged under these circumstances and how it operates in these contexts points to an entirely different kind of inquiry than for their European counterparts.

This leads directly to the third point which is the contestation of constitutionalism. Once again, I begin in Germany and perhaps from what German scholars assume to be the normal case. In my opinion we should be well aware of the German – conscious or sub-conscious and somewhat Hegelian – assumption that the state is pursuing the common good.[15] I think this assumption is deeply engraved in almost all German lawyers. We just assume that the state overall is a somewhat benevolent and neutral force. Of course, there are different parties competing for power, but ultimately the state is good, with political pluralism perhaps even serving as a reason to prove that point. So, that reflects a foundational German understanding. We have a certain trust in that framework.

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[13] *Frans Viljoen, Oscar Vilhena, Upendra Baxi* (eds.), Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa, 2013; *Gautam Bhatia*, Transformative Constitution. A Radical Biography in Nine Acts, HarperCollins India, 2019; *Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flávia Piovesan, Ximena Soley* (eds.), Transformative constitutionalism in Latin America. The emergence of a new Ius Commune, 2017; *Philipp Dann*, Transformative Constitutionalism and the Indian Constitution, in: Aparna Chandra, Gautam Bhatia, Niraya Gopal (eds.), Cambridge Companion to the Indian Constitution, 2025 (forthcoming).

[14] For a very elegant version of this argument through the lens of Max Weber's influence on our vocabulary, see *Florian Hoffmann*, Facing South, in: Philipp Dann, Michael Riegner, Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, 2020, p. 41.

[15] *Michael Stolleis*, Geschichte des Öffentlichen Rechts, Vol. 2 (2017), p. 133.

But this is miles apart from the assumption about statehood and about constitutionalism in many countries, in many societies of the Global South. Frequently, the state there is not perceived as that neutral, common good pursuing kind of creature, but, on the contrary, as partisan, as aggressive, as overbearing, and as a problem.[16]

With the perception of the state being very different, that naturally also impacts the constitutional framework. We have that highly idealized Euro-American understanding of the founding moment, of a revolution, an assembly of the people coming together, writing the framework of the society – a well-known story.[17] But we must not assume that the same understanding of the story is correct in many countries of the Global South. Often constitution making was highly contested and is contested until today.[18] So, our falling back on a fairly trusting assumption of statehood and of the constitution as a neutral framework of a political discourse is not universal but rather particular. In extension, we need to see and understand that the expectations towards as well as the working of constitutions are different elsewhere.

To conclude this third section, it becomes evident that we have very contested legacies of modernity in constitutional law and so far, there is only little understanding of these contestations in Europe. But we must be acutely aware of these contestations when we operate in the Global South. I think it is imperative to be much more mindful and knowledgeable about the main stories of emerging nations, emerging statehoods, or emerging legal orders in the Global South before we even start to get closer to a meaningful engagement. In that sense, these are very important experiences and lessons from the South.

D. What is the view from Germany?

I finally come to the view from Germany. I will establish three ideas which follow from what has just been established. The first is a direct follow-up to the previous thought: there is a strong need to parochialize our own constitutional experience. We as Germans are often proud of our *Grundgesetz* and there are good reasons to

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[16] *Anuj Bhuwania*, Judicial Review and India's Statist Transformative Constitutionalism, in: Aparna Chandra, Guathm Bhatia, Niraja Gopal Jayal (eds.), Cambridge Companion to the Indian Constitution, 2025 (forthcoming).

[17] *Ernst Wolfgang Böckenförde*, The Constituent Power of the People, in: Ibid., Constitutional and Political Theory, 2017; for a critical perspective from a comparative perspective *Philipp Dann, Zaid Al-Ali* (eds.), The Internationalized Pouvoir Constituant: Constitution-Making under External Influence, Max Planck United Nations Yearbook 10 (2006), p. 423.

[18] *H W O Okoth-Ogendo*, Constitutions without Constitutionalism: Reflections on an African Paradox, in: Douglas Greenberg, Stanley Katz, Melanie Beth Oliviero, Steven Wheatley (eds.), Constitutionalism and Democracy: Transitions in the Contemporary World, 1993, p. 65; *Upendra Baxi*, Constitutionalism as a Site of State Formative Practice, Cardozo Law Review 21 (2000), p. 1183.

be. But we need to realize and to be much more aware that this is our particular story, not a universal one. We cannot expect similar kinds of beliefs, trust and experiences somewhere else. Ultimately, it is crucial to understand that universality in constitutional vocabulary and in constitutional processes must be distrusted to some extent. We must make more efforts to relativise our Hegelian trust and to become more mindful of others. That is, in my view, particularly important in the German context.

The second point might almost have become obvious by now. We need to live up to our colonial history. Colonialism is also part of our history. It has been overshadowed in much of our collective memory by the Nazi era and rightfully so. I am not discounting this in any way. But I think we are catching up on studying and understanding better the colonial past of Germany, too.[19] We might currently even be ahead of similar discussions in France, in the UK, in Italy or elsewhere and generally on a good way.[20] But there is still a lot to do. Very concretely, one could now talk about restitution of artefacts, one could talk about reparations and last, but not least, in my opinion, one of the tasks of our generation is to diversify the scholarly community. So far, we are a scholarly community of constitutional law in Germany that shares a certain homogenous background and I deem it necessary and expect to see that more racialized people are integrated into that community.

Finally, we also must reflect on the blind spots that follow from that story and that composition of our scholarly community.[21] One such blind spot has become visible with respect to the German academic and public discourse on the conflict in Gaza. There is, in general, a limited awareness in Germany about the history and political complexities of the Near East. In this context, learning from the Global South also means to look at the world not from the centre but from the periphery, to study and to approach it with much more empathy or openness for the solidarity for those who have fought from the margins and not from the centre. That is somehow part of the struggles we are facing here right now. But I am an optimist. I think we are on the right path. I think we are asking these questions, but these are hard questions and we have to address them.

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[19] *Sebastian Conrad*, German Colonialism, 2014; *Sebastian Conrad*, Rückkehr des Verdrängten? Erinnerungen an den Kolonialismus, Aus Politik und Zeitgeschichte (ApUZ) 69 (2019), p. 28.

[20] *Philipp Dann, Isabel Feichtner, Jochen von Bernstorff* (eds.), (Post)Koloniale Rechtswissenschaft, 2022; *Jakob Zollmann*, Koloniale Herrschaft und ihre Grenzen, 2010.

[21] *A Dirk Moses*, German Intellectuals and the Nazi Past, 2007.

E. Conclusion

In conclusion, I do not wish to give a mono-causal explanation for the complexities any meaningful exchange must face. In that sense, I am not arguing that colonialism is the sole explanatory factor. Rather, I think it is the other way around. We cannot get anywhere unless we also consider the colonial legacies. Especially as scholars of comparative law, we must undertake this effort as failing to do so will miss the core of the problem. Simultaneously, I do think that we are in an important and potentially very productive moment in comparative scholarship. The fact that the German Society of Comparative Law chose this topic today has meaning: we are getting better equipped to start collaborations, to learn, to engage in meaningful exchanges across the globe.