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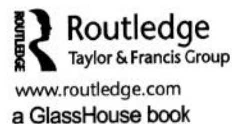
Decolonizing Law

Indigenous, Third World and Settler Perspectives

Edited by Sujith Xavier, Beverley Jacobs, Valarie Waboose, Jeffery G. Hewitt and Amar Bhatia



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A case study

*Amaya Álvez Marín, Tatsuhiko Inatani and Marta Infantino**

The debate over a civilizing mission in comparative and constitutional law

The origin of comparative legal studies has many common elements with the colonial constitutional history in Latin America. Comparative studies began at the Congress of Paris in 1900 and aimed at a convergence among different legal regimes towards the discovery of universal law produced by civilized nations.[1] Colonialism is conceptualized as a practice of domination, which involves the subjugation of one people to another.[2] In Latin America, it was mainly the Spanish Empire that imposed its laws and institutions from 1492 onwards. One of the ways in which this was justified was through a "civilizing mission" towards "barbaric" societies through dependence until they were developed or capable of imitating European governmental institutions, thereby becoming "enlightened". In Latin America, the emancipation process of the 19th century that created independent countries did not allow Indigenous Peoples to be represented at the constitutional level. On the contrary, constitutions made Indigenous legal, social, and cultural institutions invisible and voiced the necessity of adopting the only acceptable worldview: leaving behind their "savage" status.

* The ideas discussed in this chapter are part of a Collaborative Research Network between Professors Infantino, Inatani and Alvez started in 2014 at the Institute for Global Law and Policy (IGLP) at Harvard Law School. Data reported in the chapter was supported by the Chilean Research Funding Council CONICYT through a Fondecyt 11121371 "The Use of Comparative Law by the Chilean Constitutional Court (2006–2012): Theory and Practice", in which Amaya Álvez Marín was the main researcher.

1 Bénédicte Fauvarque-Cosson, "Development of Comparative Law in France" in Mathias Reimann & Reinhard Zimmermann, eds., *The Oxford Handbook of Comparative Law*, 2nd ed. (Oxford: Oxford University Press, 2019) at 29.

2 Margaret Kohn & Kavita Reddy, "Colonialism" in Edward N. Zalta, ed., *The Stanford Encyclopedia of Philosophy* (Fall 2017 Edition), accessed 22 August 2019, online: <https://plato.stanford.edu/archives/fall2017/entries/colonialism/>.

Comparative law, as a legal discipline denomination, is not univocal or unambiguous.[3] According to the mainstream view, comparative law is the "comparison of the world's present legal systems or particular elements thereof in pursuit of a variety of academic and practical objectives"[4] – a definition apparently too broad. Many comparatists, however, would adopt a more specific approach. For some, comparative law is mainly the study of legal transplants – that is, of the borrowing of ideas between legal cultures over time.[5] For others, comparative law is primarily about exploring the relationship between law and society,[6] focusing on the mentalities and perceptions of law in a given space and time,[7] observing how official rules live side by side with other (supranational or domestic) unofficial sources of law.[8] By contrast, others would define comparative law more generally as an intellectual adventure: "an opportunity for learning, for organizing and allowing us intimacy with the world".[9] Some authors perceive that the precise territory and stakes of engagement between socio-legal studies and comparative law have often seemed somewhat unsettled,[10] maybe as the result of outsider perspectives on law developed by the law and society project, on one hand, and the comparison of norms backed up by the coercive force of the state only, on the other.

This chapter proposes a parallel between criticism about the constitutional invisibility of Indigenous Peoples in Latin America and the struggles of comparative law as a legal discipline. The aim of Professors Saileilles and Lambert, about the very possibility of finding a universal civilized law, was limited to a marginal status throughout the 20th century. Therefore, we can rightly ask, what

3 Mauro Bussani & Ugo Mattei, "Diapositives versus Movies: The Inner Dynamics of the Law and Its Comparative Account" in Mauro Bussani & Ugo Mattei, eds., *Cambridge Companion to Comparative Law* (Cambridge: Cambridge University Press, 2012) at 3.

4 Mathias Reimann, "Comparative Law and Neighbouring Disciplines" in Bussani & Mattei, eds., *supra* note 3 at 34.

5 Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed. (Athens, GA: University of Georgia Press, 1993) at 6.

6 On law see, David S. Clark, ed., *Comparative Law and Society* (Cheltenham: Edward Elgar, 2012) at 1; Roger Cotterell, "Comparative Law and Legal Culture" in Reimann and Zimmermann, eds., *supra* note 1, 710; on history, see James Gordley, "Comparative Law and Legal History" in Reimann & Zimmermann, eds., *supra* note 1, 754; Reinhard Zimmerman, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (New York: Oxford University Press, 2012); Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983).

7 See for instance Jorge L. Esquirol, "The Impact of Transnational Comparativism on Law in Latin America" in Mauro Bussani & Lukas Heckendorn Urscheler, eds., *Comparisons in Legal Development: The Impact of Foreign and International Law on National Legal Systems* (Zurich: Schulthess, 2016) at 185–218.

8 H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 4th ed. (Oxford: Oxford University Press, 2014).

9 Günter Frankenberg, "Critical Comparisons: Re-Thinking Comparative Law" (1985) 26 *Harvard International Law Journal* 411 at 412.

10 Annelise Riles, "Comparative Law and Socio-Legal Studies" in Reimann & Zimmermann, eds., *supra* note 1 at 772–804.

is comparative law ultimately about? Is comparative law a method or an academic discipline, or is it perhaps a field of knowledge in its own right?[11]

If we were to analyze internal colonialism understood as a legal framework to dominate Indigenous Peoples and their territories without their consent, even against centuries of resistance, comparative law might provide some tools. For example, for some authors, comparative law serves to advance knowledge of legal diversity or to construct and sustain domestic visions of others' "otherness". Maybe comparative law is aimed primarily to deliver arguments for legitimating policy decisions, legal harmonization, and import and export of the law.[12] Comparatists have debated these fundamentals for many decades within the boundaries of their own field without a satisfactory agreed-upon answer.

Since its birth and growth as a self-standing field, comparative law has been surrounded by a combination of enthusiasm and doubt. Critiques have been raised in many quarters against the very idea and practice of comparative law, or certain ways of idealizing and practicing it. Some have claimed that comparative law – whether made in a structuralist or in a functionalist fashion – is too legocentric, state-centric and Western-centric, and comparative lawyers are seldom willing to discuss the purity of their motives, the objectivity of their methods and the correctness of their results.[13] Others claim that too often comparative lawyers deal with "ideas and notions that cannot be put to practical use"[14] and devote too scant attention to the compelling questions underlying their own work (e.g. what is the "law" and the "legal system" we care about when we compare?).[15] Still others have criticized the alleged neutrality of comparative law vis-à-vis its object of study, noting that comparative lawyers tend to downplay the political aspects of law, have a project of comprehension rather than governance, and depict themselves as "the last honest m[e]n, whose goal is merely that of understanding or contributing to a broadly humanist understanding of a universal phenomenon called law".[16] Some have gone so far as to conclude that comparative law is a struggle with the impossibility of understanding others from the outside[17] or to

11 Mathias Reimann, "The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century" (2002) 50 *American Journal of Comparative Law* 671 at 684–685.

12 For a summary of the possible purposes of comparative law, see Sebastian McEvoy, "Descriptive and Purposive Categories of Comparative Law" in Pier Giuseppe Monateri, ed., *Methods of Comparative Law* (Cheltenham: Edward Elgar, 2012) at 151–162; H. Patrick Glenn, "Comparative Legal Families and Comparative Legal Traditions" in Reimann & Zimmermann, eds., *supra* note 1 at 423–441.

13 See for instance Mauro Bussani, "Comparative Law Beyond the Trap of Western Positivism" in Tong-Io Cheng & Salvatore Mancuso, eds., *New Frontiers of Comparative Law* (Hong Kong: Lexis Nexis, 2013) at 1–9; Frankenberg, *supra* note 9 at 416–426.

14 Basil Markesinis, *Comparative Law in the Courtroom and Classroom* (Oxford: Hart, 2003) at 61.

15 Frankenberg, *supra* note 9 at 416–417.

16 Upendra Baxi, "The Colonialist Heritage" in Pierre Legrand & Roderick Munday, eds., *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003) at 59.

17 Pierre Legrand, "On the Singularity of Law" (2006) 47 *Harvard International Law Journal* 517.

proclaim that the 21st century is seeing the decline, or maybe even the end, of comparative legal studies.[18]

These debates could dialogue with the ways in which internal colonialism tried to extinguish Indigenous Peoples' rights over their territories limiting their self-government. The strategies have been explained by Tully as threefold: the doctrine of discovery, ***terra nullius***, which in the Spanish case was accompanied by religious mandate to convert and conquer was made by the Pope Alexander VI through the ***Inter Caetera*** bulls (1493); the disappearance of Indigenous Peoples through unilateral measures like conquest or uniform laws and voluntarily through the signature of treaties; and the incorporation of Indigenous Peoples to the dominant society in order to force them to lose their identity through assimilation and light accommodation.[19] There is substantial agreement that comparative lawyers' considerations about the theories and methods underlying their studies have so far largely missed the point, but we would like to expand this claim to mainstream constitutional scholars in Latin America. One set of reviewers is focused on the widespread lack of self-reflection and self-criticism displayed by many comparative and constitutional lawyers. Critics also underline the naïveté with which they tend to conceive themselves as residents of a "non-ethnocentric neutral territory",[20] and their task as that of merely collecting items and telling the "true story of similarities and dissimilarities between legal cultures, traditions, systems, families, styles, origins, solutions and ideas".[21] In the constitutional realm, this has been noticeable through neutral analysis of the assimilation laws and the light accommodation of Indigenous Peoples by downplaying political aspects of constitutional laws that aimed to perpetuate their invisibility.

Boaventura de Sousa Santos proposes the idea of an "ecology of knowledge" affirming "there is no ignorance or knowledge in general; all ignorance is ignorant of a certain knowledge, and all knowledge is the triumph of a particular ignorance".[22] In this way, we try to expand the possibilities that follow of the coexistence of the different cultures that make up the world, in order to achieve a "more balanced distribution of scientific knowledge".[23] This idea recognizes the effect of what de Sousa Santos calls *abysmal thought*, which represents the indifference with which traditional Western thought has made the ancestral knowledge typical of Indigenous Peoples invisible.

The impact caused by colonialism, whether external through comparative law or internal through constitutional law, continues to this day in the form of

18 Mathias Siems, "The End of Comparative Law" (2007) 2 *Journal of Comparative Law* 133.

19 James Tully, "Las luchas de los pueblos indígenas por y de la libertad" in Roger Merino & Areli Valencia, eds., *Descolonizar el derecho. Pueblos indígenas, derechos humanos y Estado plurinacional* (Lima: Palestra Editores, 2018) at 49–96.

20 Frankenberg, *supra* note 9 at 425.

21 *Ibid.* at 426.

22 Boaventura de Sousa Santos, *Refundación del Estado en América Latina* (Lima: Instituto Internacional de Derecho y Sociedad, 2010) at 44.

23 *Ibid.* at 45.

coloniality, since traditional Western thought "has sought to universalize and naturalize the conception of the world from the cognitive, evaluative and normative framework of a particular cultural tradition".[24] Making people believe that there is only one possible way of knowing the world from a given rationality, language, and culture – this could be referred as epistemology of ignorance. For Santos, comparative studies require to work properly between Indigenous Peoples and the rest of the population of a certain country an intercultural translation. One intellectual exercise that questions the very pillars on which the modern liberal state was built, such as separation of powers, representativeness, or human rights, in light of the knowledge and practices of Indigenous Peoples. The main notion is to force a consideration of Indigenous knowledge as legitimate and equal, with respect to Western or "Eurocentric" dominant formulations. The purpose is to find a common ground through a "translation work" with respect to knowledge and practices (institutions), a process that assumes the form of a ***diatopical hermeneutics***, that is, "a work of interpretation between two or more cultures with the aim of identifying isomorphic concerns between them, and the different responses they provide".[25]

There are concrete studies of epistemologies of ignorance in the legal education sphere in Latin America, particularly on public international law. Laura Betancur-Restrepo and Enrique Prieto-Ríos, as part of the REDIAL project,[26] conducted an empirical study analyzing 24 syllabi of public international law courses from 10 universities in Bogotá, Colombia. The paper argues that how international law is taught in Bogotá creates epistemological blind spots, which limits the perception and problematization of international lawyers, mainly with its relationship with colonial and imperial projects and its relationship with the local context.[27]

Much comparative analysis has been confined to loose references or to a simplistic cut-and-paste exercise lacking adequate theoretical grounding. The problem with the way in which actors are exercising the power of comparative inquiry is not that they choose to refer to a particular foreign law but rather the lack of explanations or reasoning behind the actor's choices.

The thin methodology upon which much comparative legal research is based, it has been claimed, partially accounts for the marginalization of comparative law from the curricula of Western legal education and the (self-)estrangement of the comparative lawyer amidst legal sciences in the Western legal academia. Whatever

24 Pedro Garzón, "Pueblos indígenas y decolonialidad, sobre la colonización epistemológica occidental" (2013) 10:22 *Andamios* at 307.

25 De Sousa Santos, *supra* note 22 at 46.

26 REDIAL stands for 'Repensar la Educación del Derecho Internacional en América Latina' (Rethinking International Legal Education in Latin America).

27 Laura Betancur-Restrepo & Enrique Prieto-Ríos, "Educación del derecho internacional en Bogotá: un primer diagnóstico a partir del análisis de los programas de clase y su relación con las epistemologías de no conocimiento" (2017) 39 (Julio–Diciembre) *Derecho del Estado Universidad Externado de Colombia* 53 at 54.

the reasons, what is undeniable is that comparative lawyers often fail to get their voices heard outside the inner circle of their fellow colleagues.

These failures – to draw thick foundations for comparative legal studies and to make them known and easy to grasp for inside and outside observers – have reinforced and widened the reach and gravity of the Cinderella syndrome. This metaphor, first used by Harold Gutteridge, considered comparative law as a sleeping Cinderella, waiting for a Blue Prince that would recognize her beauty and kiss her into life.[28] Günter Frankenberg adds a new twist to it, considering that comparatists could come across as the owners of truth and as the representatives of a higher professional ethic in a reverse version of the same syndrome.[29]

Chilean constitutional judges: the possibility of epistemologies of ignorance through an empirical study

The case study is part of a research project titled The Use of Comparative Law by the Chilean Constitutional Court (2006–2012): Theory and Practice from a Critical Perspective. The aim was to statistically examine all cases decided by the Constitutional Court in order to establish, with certainty, if comparative law was being used in court decisions. Once we knew the data, the next aim was to discover the ways in which comparative law has been used. This research is a response to the gap detected by Groppi and Ponthoreau. They stated: "few studies have tried to base their considerations upon effective empirical data, probably discouraged by the practical difficulty and width of this type of research".[30] The project sought to create a quantitative analysis of explicit references to the cases and the ways in which comparative law has been used so far. The project examined the period between 2006 (when the 2005 "democratic makeover" of the Constitutional Court was implemented) and 2012 (the year that the research fund was adjudicated).

Empirical constitutionalism is a new academic path still undeveloped in Chilean doctrine, with few exceptions. A scarce reference can be found in a book by a former judge of the Chilean Constitutional Court,[31] but only a few articles so far have been fully devoted to the topic. For example, Humberto Nogueira argues that there is a lack of method in which foreign materials are used, with little recognition of the relevance of the resources at hand, reliance upon the preference of the judge, and even the influence of the graduate studies pursued by the judge

28 Harold Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research*, 2nd ed. (Cambridge: Cambridge University Press, 1949) at 23.

29 Frankenberg, *supra* note 9 at 418–421.

30 Tania Groppi and Marie-Claire Ponthoreau, "Introduction: The Methodology of the Research: How to Assess the Reality of Transjudicial Communication?" in Tania Groppi & Marie-Claire Ponthoreau, eds., *The Use of Foreign Precedents by Constitutional Judges: Hart Studies in Comparative Public Law* (Oxford: Hart, 2013) 1 at 3.

31 Jorge Correa Sutil, *Inaplicabilidad por inconstitucionalidad en la jurisprudencia del Tribunal Constitucional* (Santiago: Abeledo Perrot–Legal, 2009) at 51.

defining the type and origin of the comparative sources.[32] Judith Schonsteiner offered an empirical study of the use of human rights treaties by the Constitutional Court and the different reflections to consider it a source of constitutional law. Her claims resonate with the ones developed throughout this study about a "cherry-picking" exercise and not the consideration of human rights law as a constitutional groundwork.[33] More recently, we proposed a study with categories of comparative references: references that aim to demarcate the legal resolution of the case, and other references that aim to confirm the decision already adopted or to show a different legal alternative. We answer the question regarding the relevant, strategic, or merely decorative role of comparative law in the jurisprudence of the Chilean Constitutional Court based on empirical legal data.[34]

Following Frankenberg's work, it is worthwhile to consider how ideas, ideals, and ideology travel from one jurisdiction to another.[35] Various new terms are being used for this process, including "legal transplants",[36] "the migration of constitutional ideas",[37] and the theory of "constitutional transfer",[38] with each term defining the openness of a court to engage with foreign materials, although with slightly different degrees and accents. The actual practice of courts in various countries has been inconsistent about the use of foreign law. On one end of the spectrum, the United States Supreme Court has rejected the use of foreign precedents and is, arguably, even unreceptive to foreign case law.[39] On the other end of the spectrum, the South African Constitutional Court, among others, is invited by its own constitutional text to interpret cases with assistance from foreign case law.[40]

Out of 721 final decisions adopted by the Chilean Constitutional Court, 246 judicial decisions contained some form of reference to foreign law, using comparative law as a legal discipline to solve the conflict brought before them (Figure 8.1). This represents approximately one-third of the cases decided before the Constitutional Court in Chile. Questions arise from this situation: How

32 Humberto Nogueira, "El Uso del Derecho Convencional Internacional de los Derechos Humanos en la Jurisprudencia del Tribunal Constitucional Chileno del Período 2006–2010" (2012) 39:1 *Revista Chilena de Derecho* 149.

33 Judith Schonsteiner, "El Derecho Internacional de los Derechos Humanos en el Tribunal Constitucional Chileno: el mínimo común denominador" (2016) 39:1 *Revista de Derecho Universidad Austral de Chile* 197.

34 Amaya Álvez Marín & Benjamín Vicente, "Estudio legal empírico sobre el uso del Derecho Comparado por parte del Tribunal Constitucional de Chile" (2018) 31:2 *Revista de derecho* (Valdivia) 155.

35 Günter Frankenberg, "Comparing Constitutions: Ideas, Ideals, and Ideology–toward a Layered Narrative" (2006) 4:3 *International Journal of Constitutional Law* 439 at 440.

36 Watson, *supra* note 5.

37 Sujit Choudhry, *The Migration of Constitutional Ideas* (Cambridge, UK: Cambridge University Press, 2006).

38 Günter Frankenberg, "Constitutional Transfer: The IKEA Theory Revisited" (2010) 8:3 *International Journal of Constitutional Law* 563.

39 *Lawrence v. Texas* (2003) 539 U.S. 588; *Roper v. Simmons* (2005) 543 U.S. 551.

40 South African Constitution (1986) s 39.

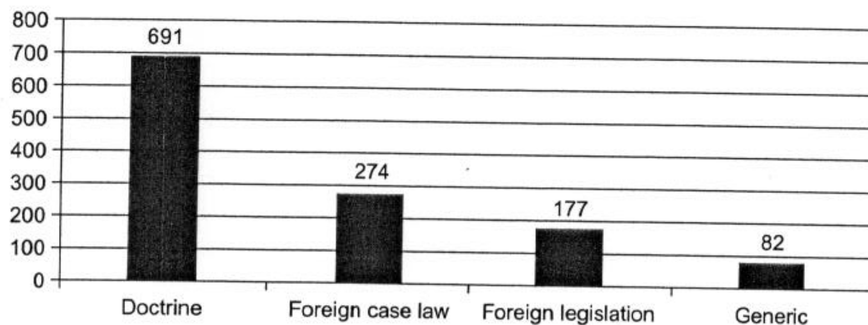

Figure 8.1 Categories of comparative law cited at the Constitutional Court in Chile (2006–2012)

Source: Own elaboration; $N = 721$ judicial decisions.

deep should our knowledge of legal systems go in order to allow us to draw sound comparative conclusions? Or to what extent should comparative law chip away at distinctions between the national and the international legal spheres, the private and the public legal domain, and substantive and procedural law?

The Chilean Constitutional Court, however, displays an uncomfortable double standard on the matter. The court does not explicitly accept the influence of foreign case law, nor has it established a method for its use (Figure 8.1). There is an implicit understanding that most of the arguments used in solving constitutional cases are based on, or have features in common with, foreign law. Chilean judges often refer to foreign law as part of a decision, particularly the jurisprudence of foreign tribunals; legislation of other national, international, or transnational entities; and doctrine of foreign authors. By far the most frequent reference is to Spanish doctrine and the judgments of its Constitutional Court as a natural parameter for Chile. We offer data obtained on the concrete use of comparative law, one scenario that gives meaning to the debate summarized in the first part over comparative law as a legal discipline.

We aim to reflect on a potential framework for the use of comparative law in Chile. One of the difficulties in this forum is the constant mixing of references to international law and foreign law, without a methodological approach of the legal discipline of comparative law. International law in Chile can be a mandatory reference due to the acceptance of international human rights treaties as part of the catalogue of fundamental rights. Doctrine and jurisprudence supports the recognition of major human rights treaties above legal rank but still considers them to be infra-constitutional as legal norms. A 1989 amendment of section 5 of the 1980 constitution incorporated international obligations on human rights at the domestic level. The text recognizes that human rights treaties ratified by Chile are a limitation on sovereignty, handing them a "constitutional status" and,

therefore, adding new obligations to the state in the field of fundamental rights.[41] As a result, we tried to exclude international law from the research database, except when the judge's reference is voluntary with Chile not being a part of the particular treaty. An example of this would be references to European Union treaties or case law of the European Court of Human Rights.

These distinctions, although basic, proved to be sometimes difficult. For example, doctrine revealed to be a difficult source because it is difficult to know whether a particular piece of doctrine was written for a specific jurisdiction or was simply written as a highly theoretical enterprise with no specific audience. Therefore, we decided to use the geographical origin of the work as criteria for doctrine. In terms of foreign precedents, we were careful not to consider a comparative exercise when an international court has some jurisdiction over the country under examination. In the Chilean case, the jurisprudence of the Inter-American Court of Human Rights is binding through the American Convention on Human Rights and, therefore, it is international and not comparative law. However, reference to the European Court of Human Rights in several Chilean cases is comparative law. Foreign legislation was easier to isolate as a category of comparative law, although the amount of context necessary to understand the reference was challenging. In most cases, the information provided was insufficient to determine whether the foreign legislation being cited was positive or negative borrowing. Finally, it was necessary to create a category where we could incorporate references that were so general or imprecise that it was impossible to reconstruct the source of foreign law cited.

The argument made here is that constitutional judges, by referring to foreign law in concrete constitutional cases, would need to use discretion to determine whether there are any social or political conditions or historical developments that will differentiate the local and foreign system to a degree that would render impractical any comparative inquiry. Therefore, what is proposed is a cautious inquiry of the rationale of comparative constitutionalism in every case. Some of the research questions are: How can comparative law go beyond the comparison between national legal systems (a notion often equated to that of States) and official rules? What difference does it make to expand the comparative analysis to unofficial or customary layers within legal systems? In addition, if we support a contextual analysis for comparative law, which methodological tools can be offered to relate culture, society, and politics to law?

The study of the judicially driven transplants from Europe and the United States into Latin American courts may unveil how law in postcolonial settings may have perpetuated the historical balance of power between the West and its former colonies. Along the same lines, exploring the Latin American constitutional moment may provide a litmus test for Frankenberg's layered narrative on "constitutions as law, as culture and as imaginations of community".[42] Think,

41 Humberto Nogueira, "Los derechos esenciales o humanos contenidos en los tratados internacionales y su ubicación en el ordenamiento jurídico nacional: doctrina y jurisprudencia" (2003) 9:1 *Revista Ius et Praxis* 403.

42 Frankenberg, *supra* note 35 at 451.

for instance, of how Latin American constitutional comparative lawyers tend to take the Spanish or the US experiences as the parameter for comparison, thus reinforcing a trend which is tantamount to a form of cultural subordination. Our reflections on constitutional law adjudication in Chile aimed also to explain the strategies already tackled to render Indigenous Peoples and their legal claims invisible – for example, through uniform laws, the signature of treaties and the incorporation of Indigenous Peoples to the dominant society in order to force them to lose their identity through assimilation and light accommodation. There is also a particularity in the Latin American constitutional realm. Where many countries like Colombia (1991), Ecuador (2008), Perú (1993) and Bolivia (2009) have moved toward a recognition of Indigenous Peoples, Chile isolated and therefore rejected the use of comparative law from Latin America.

As previously asserted, Constitutional Court judges frequently reference foreign law using Eurocentric references, primarily Spanish doctrine and judgments of the Spanish Constitutional Court as a sort of "natural parameters" for Chile (Figure 8.2). A challenge is whether the constant tendency to use Spain as a parameter is tantamount to a form of subordination or not. It is also interesting to interrogate if the epistemology of ignorance could be a systemic one, according to which knowing(s) and unknowing(s) serve to differentiate the powerful from the powerless in relation to a specific area following Alcoff's work.[43]

So far, there is no other empirical or doctrinal study in Chile (that we are aware of) about the way in which comparative studies applied by constitutional judges

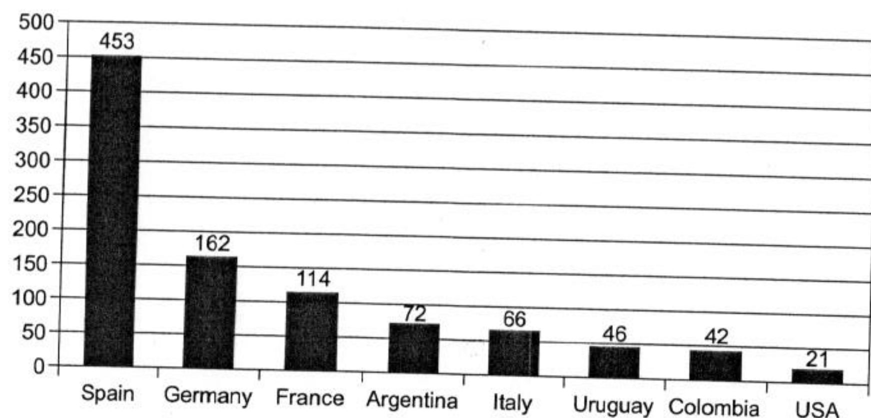

Figure 8.2 Origins of the principal foreign jurisdictions cited by the Chilean Constitutional Court (2006–2012)

Source: Own elaboration; $N = 976$ foreign references.

43 Linda Martin Alcoff, "Epistemologies of Ignorance: Three Types" in Shannon Sullivan & Nancy Tuana, eds., *Race and Epistemologies of Ignorance* (Albany: State University of New York Press, 2017) at 54.

ignore Indigenous Peoples' legal knowledge by deciding on foreign examples that reinforce the civilizing paradigm in place since the Spanish conquest five centuries ago. By describing the "cultural production of ignorance", Robert Proctor enumerates part of the reasons that could explain the phenomenon: "neglect, forgetfulness, myopia, extinction, secrecy, or suppression".[44] This reflective exercise is part of the task constitutional lawyers and judges could pursue in order to make the choice of remaining ignorant a conscious one.

The road forward: invitation to release comparative law's critical potential as a tool in constitutional adjudication

Praised at the beginning of the 20th century for its potential to explore the globe's legal diversity, comparative law is now struggling to maintain that role in a much more interconnected and globalized world where the need for, and the capacity of, comparative legal research to unravel legal phenomena seems to be waning. As David Kennedy once put it, "post-war comparatists seemed determined to establish a professional practice more earnest and boring that many of them could actually stand to pursue".[45]

In spite of the debates, doubts, and critiques just mentioned, there are reasons to think that comparative law still has an important role to play in dealing with legal rules, expectations, and practices at any level – be it national, international, transnational, or global. We are particularly interested in opening a space for constitutional judges to reflect on Indigenous legal cultures and comparative constitutional orders that consider them relevant in the Latin American space. This chapter would like to reflect a step further on the possibility that judges could be actively participating in the creation of a *lacuna* or silence. This has been named, by authors like Eduardo Mendieta, as epistemologies of ignorance.[46] This could also be a way in which the silence over the legal system of Indigenous Peoples in Chile could be unearthed, as well as the comparative studies used to adjudicate constitutional cases with examples of legal systems that already turned towards a plural legal system, or opened the sources of law, or worked towards ensuring cultural diversity in the legal system.

Many of these reasons relate to the critical potential of comparative law – that of probing legal cultures for sources of their change or resistance to change, for their implicit judgments and assumptions about the usual way of doing things, and for the ways in which people's identities and narratives are intertwined with their daily

44 Robert N. Proctor & Londa Schiebinger, eds., *Agnotology: The Making and Unmaking of Ignorance* (Palo Alto: Stanford University Press, 2008) at 312.

45 David Kennedy, "The Methods and the Politics" in Legrand & Munday, eds., *supra* note 16 at 351–352.

46 Eduardo Mendieta, "The Ethics of (not) Knowing: The Care of Ethics and Knowledge Will Come on Its Own Accord" in Adia Maria Isasi-Díaz & Eduardo Mendieta, eds., *Decolonizing Epistemologies: Latina/o Theology and Philosophy* (New York: Fordham University Press, 2011) at 252.

practices of law. In this respect, we rely on comparative law's potential to expand the horizons of legal research, a potential which is fully yet to be explored.

Comparative law has great potential to provide those who practice it with a mindset whose conditions are the same as those required for critical legal thinking. Moreover, the comparative critical lawyer does not expect law to be easy to grasp, displaying a relentless tendency to contest entrenched beliefs, established domains, self-fulfilling explanations, easy answers, and often the questions themselves. Like any critical thinker, the comparative lawyer has a sensitivity for the complexity and the ambiguity of the law and is aware of her relative ignorance about how law actually works and is dissatisfied with mainstream explanations about how and why law is the way it is.

From the data gathered, we know that Chilean Constitutional judges choose to use comparative law. We would like to offer at least five reasons why we believe that comparative law could potentially nurture critical (comparative) legal thinkers; this also includes the type of exercises that judges confront while comparing foreign doctrine, jurisprudence, legislation, and constitutions in order to decide a case before them. This is also a way in which the criticism against comparative studies as too logocentric, state-centric, and Western-centric could be answered, including the discussion about the purity of the judges' motives, the objectivity of their methods, and the correctness of their results.[47]

Getting beyond ourselves

It is generally held that comparative law is about knowing the Other. Yet, insofar as the Other is always defined in relation to the self, comparative law is mostly about knowing oneself. The lawyer or judge who moves only within the framework of her own discipline or formal legal system unconsciously tends to ask herself questions and look for answers which are consistent with the possible ways of viewing the world under that framework (only). But questions and answers that work in a given environment (besides origins coming from other frameworks) may have a different, or little, sense in other settings. By looking beyond the boundaries of her own frameworks, the comparative lawyer or judge tries to see herself through (what she thinks) are others, to resist the power of prejudice and ignorance, to appreciate the relativity of her own firmly held beliefs and well-settled knowledge, and to understand how her standpoint affects her own visions of life, perceptions of problems, and needs for solution.

Against overconfidence

As noted above, comparative law's focus is generally held to be that of knowing others – whatever the "others" may be. Yet knowing others is for the comparative

47 See for instance Bussani, *supra* note 13 at 1; Frankenberg, *supra* note 9 at 416–426.

lawyer more an aspiration than an achievement. Comparative law makes one aware of the many obstacles that, when dealing with a discipline, system, or culture new to, or different from, our own may hinder our capacity to understand what is different from us. We may, for instance, unknowingly embrace a given perspective or interpretation of what we are studying simply because that perspective or interpretation fits with our own mentality or pre-existing knowledge. This could be potentially the case of seeing Spain as the natural parameter. Hidden biases such as these may easily lead the researcher to project her own way of thinking onto the objects of her scholarly attention and to prioritize some questions, approaches, or solutions over other ones only because she knows and has internalized the former better than the latter. Comparative law is no cure for these problems. However, by developing and practicing a sharp sense for diversity and heterogeneity, comparative law warns the researcher against the risk of agnotology and about being overconfident in terms of our own knowledge on and ability of understanding others.

Emphasis on understanding

At whatever level it is exercised, no (serious) legal comparison is easy. It is (or should be) a tenet of comparative law that no legal system can be understood without considering the multiple layers that make up its structure,[48] the mixed origins of its components,[49] the gaps between law's narratives and practices,[50] and the

> set of deeply rooted, historically conditioned attitudes about the nature of law; about the role of law in the society and the polity; about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught.[51]

Comparative law's emphasis on the relevance (and the immensity) of investigating these aspects to study, criticize, or reform a legal system makes knowledge both an aim and a methodological guidance for the comparative lawyer, turning any comparative legal research into an endless quest for more and better understanding – of the self and of others.

48 Mauro Bussani, "A Pluralist Approach to Mixed Jurisdictions" (2011) 6:1 *Journal of Comparative Law* 161.

49 Esin Örücü, "Family Trees for Legal Systems: Towards a Contemporary Approach, Epistemology and Methodology of Comparative Law" in Mark van Hoecke, ed., *Epistemology and Methodology of Comparative Law* (Oxford: Hart, 2004) at 361.

50 Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law" (1991) 39 *American Journal of Comparative Law* 343.

51 John H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 3rd ed. (Palo Alto: Stanford University Press, 2007) at 2.

Engaging with complexity

As stated above, comparative law is not afraid of the complexities of laws. The comparative lawyer or judge knows that law is not always what it claims to be. She is committed to staying close to how law lives in different settings. Although historically, comparative law has developed as a method to compare legal rules from different states (or, at best, legal systems), today's comparative lawyer takes for granted that states (and legal systems) are only one of the many sites where law lives. Rather, she acknowledges that law is produced by (and contributes to produce) many different actors and institutions playing different roles as rule-makers and rule-takers, and produced by many different identities, narratives, and interpretive patterns which shape people's ways of organizing social experience, giving it meaning and qualifying it as normal and just.[52] Under comparative law's perspective, law becomes a ubiquitous, pluralistic, and ambiguous phenomenon that can be traced everywhere: in texts, institutions, actions, ideas, expectations, and fantasies. This is the rather disquieting but also fascinating prospect for the comparative law scholar.[53]

A quest for interdisciplinarity

Despite its limited capacity for dialogue with lawyers who are not comparatists, comparative law has always been a field open to interactions and exchanges with other disciplines. This is partly because comparative law, like many non-legal disciplines, offers a chance to look beyond law's institutional and positivistic framework, to delve into those hidden and much more pervasive legal rules that frame minds, kindle fantasies, structure social visions, and influence actions.[54]

Much of the comparative law's toolbox is indeed borrowed or developed in close consonance with that of other disciplines, such as history, sociology, anthropology, and linguistics. Some exchanges with other disciplines have given rise to new methodological approaches, such as the case of "comparative law and economics".[55]

Many other potentially fruitful directions are to be further explored: comparative international law;[56] comparative human rights law (which in a paradoxical way, despite the subject being taught in many universities, very few studies have attempted to investigate how human rights law could be examined in comparative legal terms); comparative law and development;[57] and critical comparative law.[58]

52 George P. Fletcher, "Comparative Law as a Subversive Discipline" (1998) 46 *American Journal of Comparative Law* 683.

53 Frankenberg, *supra* note 9 at 454.

54 *Ibid.* at 447.

55 Nuno Garoupa & Tom Ginsburg, "Economic Analysis and Comparative Law" in Bussani & Mattei, eds., *supra* note 3 at 57.

56 On the possible relationships between comparative law and public international law, compare Anthea Roberts, *Is International Law International?* (Oxford: Oxford University Press, 2017); Boris Mamlyuk and Ugo Mattei, "Comparative International Law" (2011) 36:2 *Brooklyn Journal of International Law* 385; Martti Koskenniemi, "The Case for Comparative International Law" (2011) 20 *Finnish Yearbook of International Law* 1 at 1–8.

Conclusions

At the origin, comparative legal studies aimed at a convergence among different legal regimes of civilized nations. It was praised at the beginning of the 20th century for its potential to explore the globe's legal diversity; nonetheless, right now comparative law is struggling to maintain that role. Since 1900, there have been many questions surrounding what comparative law's aims are and the ways in which constructions of "others" are presented. This chapter focused on the potential of comparative law as a legal discipline; therefore, we criticized the lack of self-reflection and self-criticism displayed by many comparative lawyers.

This is also the case of Chile, a country situated at the periphery of the so-called civilized nations. For a long period of time, the comparative exercise has been limited to legal transplants from a Western perspective mainly anchored in European examples. The empirical research shows how central Europe is a parameter, a sort of mandatory role model. Constitutional judges refer very often to foreign doctrine, legislation, and judicial cases, but in most cases they downplay the political aspects of those laws. We particularly focused on the epistemology of ignorance created through the silence over the legal framework of Indigenous Peoples in constitutional adjudication by the Chilean Constitutional Court. As showed empirically, much comparative analysis has been confined to loose references or to a simplistic cut-and-paste exercise lacking adequate theoretical grounding and perpetuating the civilizing paradigm of comparative law.

We think that part of the marginalization of comparative law is due to the thin methodology upon which much comparative legal research is based. Nevertheless, we reflect that there are reasons to think that comparative law still has an important role to play in dealing with legal rules, expectations, and practices at any level – be it national, international, transnational, or global.

Comparative law has much to learn and might have something to give – from its great sensibility for the "self" and the "other" to its challenge to cultural prejudice, its tolerance for ambiguity, its refusal to oversimplify (or deny) complexity, its openness to "other" approaches to law, and its potential for empowering and liberating our taken-for-granted perspectives on what the law is and how we would like it to be.

57 Jedidiah Kroncke, "Law and Development as Anti-Comparative Law" (2012) 45 *Vanderbilt Journal of Transnational Law* 477.

58 Frankenberg, *supra* note 9 at 411.