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Legal Heterodoxy in the Global South

Adapting Private Laws to Local Contexts

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1.1 INTRODUCTION

How do legal institutions of the Global South differ from those of the Global North?[1] This question has attracted surprisingly little attention. Comparative law as a discipline has long focused on "legal families" as its central taxonomic division – a framework that views legal systems in the Global South as derivative of, and subordinate to, the "real" legal systems of a handful of wealthy western jurisdictions.[2] A classic comparative law textbook explicitly urges comparativists to "ignore" affiliate legal systems and focus on the "parent" systems.[3] This advice no longer passes unchallenged, but legal systems in the Global South are still often ignored, studied in isolation, or simply measured against benchmarks conceived based on legal institutions from the Global North.[4]

To the extent that scholars have confronted the specificities of legal systems in the Global South, a common perception, which we label the "traditional view," is that

[1] We use the term Global South as a synonym for developing countries. Our approach does not imply a stark dichotomy nor any judgment of superiority or inferiority, but instead suggests a continuum of social, economic, and legal challenges across countries belonging to this traditional classification.

[2] D. B. Maldonado (ed.), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge: Cambridge University Press, 2013). See also M. Pargendler, The Rise and Decline of Legal Families (2012) 60 *The American Journal of Comparative Law* 1043–74 (describing a different conception of legal families by Latin American scholars in the nineteenth century, who viewed their systems as belonging to a legal tradition of its own).

[3] K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd ed. (Oxford: Oxford University Press, 1998).

[4] See, for example, M. Siems, The Power of Comparative Law: What Types of Units Can Comparative Law Compare? (2019) 67 *The American Journal of Comparative Law* 861–88, 865 ("countries may be included within the conventional units of comparative law as far as those countries have adopted a legal system modeled after Western state-based law"). See Section 1.2 for discussion of comparative law scholars who have criticized the discipline's neglect of the Global South.

the legal systems of developing countries are mostly outdated, failed transplants, or plagued by enforcement challenges. This volume offers a different perspective. Rather than viewing the legal systems of developing countries as "failed law" or as a reality of interest only to sociologists or anthropologists,[5] we take them seriously as relevant legal experiences. Rather than measuring them against yardsticks based on the legal systems of the Global North, as in so many academic works and policy indicators,[6] we focus on legal adaptations and innovations in the Global South. We find (i) numerous manifestations of legal doctrines and solutions that deviate from approaches that currently hold the status of orthodoxy in the Global North by (ii) (a) incorporating distinct public policy objectives or (b) reflecting different values and worldviews. We call this phenomenon "legal heterodoxy," and this volume is dedicated to exploring its contours.

This introductory chapter provides the conceptual and theoretical framework for the chapters that follow. Section 1.2 explains the significance of the project. Section 1.3 sets out the traditional view that developing countries will be attracted to legal orthodoxy. Section 1.4 offers countervailing reasons why the appeal of orthodoxy may be limited. In Section 1.5 we define the concept of legal heterodoxy. Section 1.6 summarizes the examples of legal heterodoxy discussed in greater detail in the following chapters. Section 1.7 lays out an agenda for future research and explains how a focus on legal heterodoxy in the Global South leads to new insights about the contours of private law and its future prospects in the Global South and Global North alike. Section 1.8 discusses the relationship between that research agenda and existing literature.

1.2 SIGNIFICANCE OF THE PROJECT

This project marks a departure from the existing literature in terms of its scope, theoretical grounding, and findings. First, we focus on private law institutions in the Global South that have previously received little scholarly attention. Second, we theorize about the forces that drive those institutions to diverge from as well as converge with legal institutions in the Global North. Third, we uncover institutions that diverge in unexpected ways from their counterparts in the Global North.

1.2.1 *Focus on Private Law in the Global South*

This volume examines core areas of *private* law in the Global South: contracts, property, torts, corporations, and the attribution of legal

[5] For a critique of these approaches, see J. L. Esquirol, *The Fictions of Latin American Law and Their Strategic Uses: Legitimacy and Failure in Latin American Legal Systems* (Cambridge: Cambridge University Press, 2019); D. B. Maldonado, *Legal Barbarians: Identity, Modern Comparative Law and the Global South* (Cambridge, Cambridge University Press, 2021).

[6] R. La Porta, F. Lopez-de-Silanes, and A. Shleifer, The Economic Consequences of Legal Origins (2008) 46 *Journal of Economic Literature* 285–332; K. Davis and M. B. Kruse, Taking the Measure of Law: The Case of the Doing Business Project (2007) 32 *Law & Social Inquiry* 1095–119.

personality.[7] This focus reflects two moves: (i) focusing on differences in *legal norms* (including legal rules, principles, doctrines, and caselaw), as opposed to concentrating on enforcement-related issues such as the speed, efficiency or integrity of courts and prosecutors, or the impact of extralegal institutions[8] and (ii) expanding the comparative legal analysis in the Global South beyond public law. While the last decades have seen the emergence of an influential, if still insufficient, body of literature on constitutional law in the Global South,[9] there has been no comparable effort to study distinctive features of private law in the developing world. Emerging scholarship on "critical comparative law"[10] and "decolonial comparative law"[11] is framed in broad terms but applications to specific private law institutions from a comparative perspective remain rare. This is unfortunate, given the key role of private law in providing the legal foundations of global capitalism and in shaping wealth creation and distribution.[12]

By Global South jurisdictions we mean developing countries, that is, countries with low or medium per capita income.[13] We are aware that other works define the

[7] For the time being, our focus is limited to domestic laws of countries in the Global South. Although transnational and international norms play an important role in private law, they feature in this volume mainly as points of comparison for domestic laws in the Global South. We leave to future work the task of exploring how countries in the Global South influence transnational and international law.

[8] As an example of works arguing that formal laws are not relevant in developing countries, see U. Mattei, Three Patterns of Law: Taxonomy and Change in the World's Legal Systems (1997) 45 *The American Journal of Comparative Law* 5–44 (arguing that "in developing and transition economies of Africa, Latin America, and Eastern Europe … there is no such thing as formal law binding government"); R. Kraakman et al., *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 2nd ed. (Oxford: Oxford University Press, 2009) ("We focus on developed, rather than developing, economies, because where foundational legal institutions, such as functioning courts and the protection of property rights, are absent or compromised, then the way in which corporate law responds to specific problems is less likely to make a difference to the real economy").

[9] See, e.g., O. V. Vieira, U. Baxi, and F. Viljoen (eds.), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria: Pretoria University Law Press, 2013) (examining how the highest courts in Brazil, Colombia, and South Africa give effect to social rights recognized in their constitutions); Maldonado (ed.), Constitutionalism of the Global South; P. Dann, M. Riegner, and M. Bönnemann, The Southern Turn in Comparative Constitutional Law: An Introduction, in P. Dann, M. Riegner, and M. Bönnemann (eds.), *The Global South and Comparative Constitutional Law* (Oxford: Oxford University Press, 2020), pp. 1–36.

[10] See, e.g., G. Frankenberg, Critical Comparisons: Re-thinking Comparative Law (1985) 26 *Harvard International Law Journal* 411–56; P. Legrand, The Impossibility of "Legal Transplants" (1997) 4 *Maastricht Journal of European and Comparative Law* 111–24; G. Frankenberg, *Comparative Law as Critique* (Northampton: Edward Elgar, 2016); R. M. Acuña, Comparación Jurídica desde el Sur Global: Genealogía de un Proyecto Crítico (2018) 73 *Themis Revista de Derecho* 131–45.

[11] L. Salaymeh and R. Michaels, Decolonial Comparative Law: A Conceptual Beginning (2022) 86 *Rabel Journal of Comparative and International Private Law* 166–88.

[12] K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton: Princeton University Press, 2019).

[13] The most common definition of the term "Global South" equates it with nation-states in Africa, Asia, and Latin America that are economically underdeveloped. Defined in this way, the term appears to be a successor to and nearly synonymous with the terms "Third World" and "developing countries." The value of this conception of the Global South has been challenged

Global South as "not only, even primarily, a place," but a "specific epistemic, methodological, and institutional sensibility."[14] This broader usage may encompass the "South within the North,"[15] as well as wealthy former colonies that are more peripheral to mainstream comparative law, such as Australia.[16] It also has the advantage of not "othering" the Global South by reifying difference and opposition. While there is much to be said for this broader perspective, this volume concentrates on the laws of developing countries as such because they have been understudied from a comparative standpoint. Our goal is to put them on the map for the comparative study of private law.

The immediate purpose of our project is to test conventional views of the relationship between private law institutions in the North and South, but the value of this exercise goes beyond North–South comparison. To begin, these kinds of studies also facilitate South–South comparisons. The general practice of studying the legal systems of developing countries in isolation – with Global North standards as the sole reference point – is likely to produce an "odd duck syndrome," by which the legal institutions of a given Global South jurisdiction are described as exceptional when in fact they are not. For example, Pargendler's contribution in Chapter 10 reveals surprising commonalities among corporate laws in Global South jurisdictions. Scholars have described India's approach to enterprise liability for environmental harm as "unique" and "revolutionary" from a comparative perspective, while comparable rules exist in Brazil. Similarly, Brazilian commentators often attribute the rise of a welfarist (or social-justice infused) conception of contract law in the country to certain domestic scholarly trends, as well as to new statutory and constitutional provisions, without realizing that similar developments have occurred in other parts of the Global South, as described by Davis and Pargendler in Chapter 2.

Obtaining better information on how legal institutions in the Global South relate to other legal systems, in both the North and South, also makes it possible to re-examine the schemes that scholars and practitioners use to classify legal systems. As noted, the dominant scheme distinguishes legal families defined by relationships to European legal systems and, at a more general level, between common law and civil law systems. That approach, which dates back more than a century, may

on the grounds that it (i) oversimplifies reality by ignoring heterogeneity within both the Global South and the Global North and (ii) reifies domination of the Global South. N. Schneider, Between Promise and Skepticism: The Global South and Our Role as Engaged Intellectuals (2017) 11 *The Global South* 18–38.

[14] Dann, Riegner, and Bönnemann, The Southern Turn in Comparative Constitutional Law, p. 3 and 7.

[15] C. Levander and W. Mignolo, Introduction: The Global South and World Dis/Order (2011) 5 *The Global South* 1–11, 4.

[16] See, e.g., F. Morosini and M. R. S. Badin (eds.), *Reconceptualizing International Investment Law from the Global South* (Cambridge: Cambridge University Press, 2017), including Australia.

warrant reconsideration. Finally, although the analyses in this volume are primarily descriptive, they provide a necessary foundation for research aimed at explaining and evaluating legal institutions in both the North and South.

Having said all that, we should add an important caveat about the scope of this volume: The studies in the following chapters cover a wide range of jurisdictions – Argentina, Bolivia, Brazil, China, Colombia, Ecuador, India, Indonesia, and South Africa – but do not purport to offer a representative sample of Global South experiences. The legal institutions examined include examples from the largest economies in the Global South, which are precisely the places in which we predict that legal innovation and experimentation is more likely due to economies of scale and relative immunity to foreign influence. We do not expect legal heterodoxy to be the norm in Global South jurisdictions more generally and actually would expect it to be less prevalent in countries that are smaller, less affluent, or more dependent on the Global North than the countries covered in this volume. Even in the countries that we do cover, the studies in the chapters that follow are invariably limited to specific areas of law. Accordingly, we do not claim that legal heterodoxy is the norm with respect to all, or most, dimensions of private law in the jurisdictions covered. These limitations reflect the fact that, in preparing this volume, we were constrained by existing literature, our own academic networks, and the range of expertise of our team of contributors. Therefore, the aim is not to offer a definitive account of private law adaptations and innovations in the Global South but to promote a research agenda that encompasses a wider array of jurisdictions, legal issues, and perspectives.

1.2.2 *Theoretical Account of Orthodoxy and Heterodoxy*

In this introductory chapter we offer a theory of the forces that might drive countries in the Global South toward either orthodoxy or heterodoxy. The traditional view that private law in the Global South consists mainly of pale imitations of laws that have achieved the status of orthodoxy in the Global North is widely held, but its theoretical underpinnings are not always fully articulated. Moreover, to the extent that scholars seek to explain divergent private law norms in the Global South, they typically rely on differences in values or worldviews, especially in the Islamic world.[17] We contend that the drivers of legal heterodoxy include but are not limited to differences in values or worldviews.

To be more specific, we maintain that differences in private law rules in the Global South are likely to be explained by one of two broad categories of factors.

[17] On the debate over the influence of religious values on law in the Islamic world, see C. Mallat, Comparative Law and the Islamic (Middle Eastern) Legal Culture, in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law*, 2nd ed (Oxford: Oxford University Press, 2019).

First, lawmakers or adjudicators may wish to endorse different values or worldviews. We argue that this may explain heterodoxy in private law even outside of the Islamic world. Second, distinctive social, economic, or political features of the local contexts may lead lawmakers or adjudicators in the Global South to make different choices from their counterparts in the Global North.[18] In Section 1.4 we argue that distinctive characteristics of developing countries that are conventionally presumed to attract countries to orthodoxy – namely, a legacy of colonialism, limited fiscal capacity, macro-economic instability, and economic dependence on richer countries – may sometimes encourage heterodoxy.

1.2.3 *Mapping Legal Heterodoxy*

In focusing on legal heterodoxy, we seek to unearth and analyze private law approaches in the Global South that have received insufficient attention. The examples of heterodoxy we document include a greater concern with inequality in contract law adjudication in Brazil, Colombia, and South Africa; a dedicated regime for "hyper vulnerable" consumers in Argentina; pioneering regimes of mandatory corporate social responsibility in India and beyond; the imposition of tort liability in China, irrespective of causation; the erosion of limited liability for the benefit of stakeholders in Brazil and India; the overturning of Brazil's patent extension rule as an unconstitutional violation of the social function of intellectual property and the right to health; legal incentives for Black economic empowerment through greater participation in corporate ownership and governance in South Africa; and the attribution of legal personhood to nature, among others.

Many of the studies in this volume highlight heterodox private law institutions that embrace diverse policy objectives to a greater extent than corresponding institutions in the Global North. In other words, these examples of private law innovations in the Global South offer relatively robust challenges to the "modularity approach" that has dominated law-and-economics thinking and neoliberal policies since the 1970s.[19] The modularity approach posits that each field of law should pursue one narrow efficiency-related objective (e.g., reduction of agency costs in corporate law, reduction of transaction costs in contract law, consumer welfare in antitrust law, and maximization of firm value for the benefit of creditors in insolvency law, to name just a few).[20] Under this modular view, distributive objectives should remain strictly confined to the field of taxation and social transfers.[21]

[18] For a defense of such context-specific lawmaking see K. Davis, Legal Universalism: Persistent Objections (2010) 60 *University of Toronto Law Journal* 537–53.

[19] M. Pargendler, Controlling Shareholders in the 21st Century: Complicating Corporate Governance beyond Agency Costs (2020) 45 *Journal of Corporation Law* 953–75.

[20] Ibid.

[21] L. Kaplow and S. Shavell, Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income (1994) 23 *Journal of Legal Studies* 667–81 (arguing that promoting

To be sure, legal institutions in the Global North often do not conform to such a modular approach, which is prescriptive and ideological rather than primarily descriptive.[22] Karl Polanyi's classic work documented how self-regulating markets invariably triggered resistance; in a similar fashion, efforts to implement purely modular regulation have often prompted countervailing reactions.[23] We specifically examine how these social and regulatory reactions take place in the Global South and through private law. In particular, we explore how inequality and crises have led Global South jurisdictions to embrace "antimodularity" in private law in a distinct way from, or to a greater extent than, is currently the norm in the Global North – a possibility that contrasts sharply with the traditional view.[24]

1.3 THE TRADITIONAL VIEW

The traditional view is that the characteristic features of developing countries lead them to adopt simplified versions of legal doctrines designed by either developed countries or international organizations dominated by those countries – "orthodox" doctrines for short. The corollary is that developing countries will not deviate from orthodoxy by adopting "heterodox" or "innovative" laws. We begin by setting out the empirical and theoretical foundations of the traditional view and then summarize its supporting evidence.

1.3.1 *Characteristic Features of Global South Jurisdictions*

It is well documented that developing countries have certain typical characteristics, despite significant heterogeneity in various dimensions. First, almost all developing countries were colonized by European nations in the eighteenth, nineteenth, or early twentieth centuries.[25] Moreover, most of those countries received relatively few European settlers during the colonial period.[26] This implies that the legal

distribution through the tax-and-transfer systems produces fewer behavioral distortions – and thereby increases the size of the pie to be distributed – compared to efforts to effectuate distribution through other areas of law).

[22] See, e.g., M. Pargendler, The Grip of Nationalism on Corporate Law (2020) 95 *Indiana Law Journal* 533–90; Pargendler, Controlling Shareholders in the 21st Century.

[23] K. Polanyi, *The Great Transformation: Economic and Political Origins of Our Time* (New York: Rinehart, 1944).

[24] Our argument also diverges from Polanyi's argument that links institutional diversification in less advanced countries to diversification in advanced countries. Specifically, Polanyi posited that the decline of the international market economy and the gold standard would help countries transcend "the pernicious nineteenth-century dogma of the necessary uniformity of domestic regimes within the orbit of the world economy." Ibid., p. 262.

[25] Exceptions include China, Ethiopia, North Korea, and developing countries located in Europe.

[26] Developing countries with relatively high proportions of Europeans in the population include Argentina, Costa Rica, the Dominican Republic, Dominica, and St. Lucia. See W. Easterly

institutions adopted during the colonial period were designed by Europeans to be applied principally to non-Europeans.

Second, the governments of many present-day developing countries have limited capacity to raise revenue from taxes. There is a strong correlation between the tax/GDP ratio and per capita GDP.[27] Social scientists often equate this lack of fiscal capacity with lack of state capacity, defined as the state's ability to accomplish its intended policy goals.[28]

Third, contemporary developing countries tend to experience greater macroeconomic volatility than countries with higher per capita incomes.[29] In the economics literature, macroeconomic volatility is typically defined as variation in the growth rate of GDP over time.[30] This typically implies volatility in wages and prices and often includes true crises.[31] Consequently, the fact that developing countries experience relatively high levels of economic volatility implies that inhabitants of those countries are systematically exposed to more economic risk than inhabitants of wealthier countries.[32] In addition, states with limited fiscal capacity may struggle to provide insurance that fills the gaps that inevitably will be left by private insurance markets.

Fourth, even after the end of formal colonization, many Global South jurisdictions tend to be dependent on wealthier countries with larger economies. This dependence stems from several factors. Many developing countries are relatively capital-poor. In addition, as noted, their economies tend to be prone to balance-of-payments crises. Their firms also tend to have less access to advanced technology. This means that developing countries generally depend on wealthier countries for access to export markets, advanced technology (which may be tied to foreign direct investment), emergency financing, and foreign aid.[33] These forms of economic dependence often translate into political and military vulnerability.

and R. Levine, The European Origins of Economic Development (2016) 21 *Journal of Economic Growth* 225–57.

[27] M. Dincecco, *State Capacity and Economic Development: Present and Past* (Cambridge: Cambridge University Press, 2017), section 1.1, figure 1.

[28] Ibid., section 1.1.

[29] N. V. Loayza et al., Macroeconomic Volatility and Welfare in Developing Countries: An Introduction (2007) 21 *The World Bank Economic Review* 343–57.

[30] Economic analyses use either the standard deviation of the GDP growth rate or the standard deviation divided by the absolute mean growth rate as indicators of economic volatility. See W. Easterly, R. Islam, and J. E. Stiglitz, Shaken and Stirred: Explaining Growth Volatility, in B. Pleskovic and N. Stern (eds.), *Annual World Bank Conference on Development Economics 2000* (Washington: The World Bank, 2001), pp. 191–211; D. Acemoglu et al., Institutional Causes, Macroeconomic Symptoms: Volatility, Crises and Growth (2003) 50 *Journal of Monetary Economics* 49–123.

[31] Easterly, Islam, and Stiglitz, Shaken and Stirred.

[32] Loayza, Macroeconomic Volatility and Welfare in Developing Countries.

[33] For a historical discussion see T. D. Santos, The Structure of Dependence (1970) 60 *American Economic Review* 231–36.

1.3.2 *Theoretical Underpinnings of the Traditional View*

The traditional view rests on a cluster of arguments about the economic and cultural attractions of legal orthodoxy in countries characterized by a colonial heritage, limited fiscal capacity, macro-economic instability, and international economic dependence. One of the most prominent economic arguments is premised on the assumption that developing countries have limited state capacity and, therefore, given the costs of drafting and assessing the effects of new laws, cannot afford to formulate new laws that are likely to improve on those developed in richer countries.[34] A second argument based on the same premise is that developing countries ought to adopt laws that take the form of relatively simple rules in order to conserve scarce local legislative and judicial resources.[35] A third argument is that developing countries should strive to attract foreign direct investment by adopting laws familiar to the greatest possible number of prospective investors, which historically have tended to be the laws of the United States and former European colonial powers.[36] If we assume that policymakers in developing countries are rational actors who try to maximize the net benefits of lawmaking, then all of these arguments support the conventional prediction.

Other arguments focus on the cultural rather than economic attractions of orthodoxy. A variety of actors, including lawmakers and the general public in developing countries, may assign prestige to economically successful countries, including former colonial powers, and associate status with the adoption of those countries' laws.[37] This dynamic might be sustained by disparities in wealth that allow academic institutions and other organizations based in rich countries to dominate the production of information and ideas about the world, including law. Similar dynamics might cause the elites who dominate international financial institutions or donor organizations to make the adoption of orthodoxy a condition for securing emergency or concessional financing. These cultural arguments also support the conventional prediction that developing countries will pursue orthodoxy, but they do not rest on the assumption that orthodoxy is normatively desirable.

Each of these economic and cultural arguments predicts that countries in the Global South will be attracted to laws that originate in the Global North, but not necessarily from the same Global North countries – in other words, they point to different definitions of orthodoxy. For instance, some of the arguments emphasize

[34] R. A. Posner, Creating a Legal Framework for Economic Development (1998) 13 *The World Bank Research Observer* 1–11.

[35] Ibid.; B. Black and R. Kraakman, A Self-Enforcing Model of Corporate Law (1996) 109 *Harvard Law Review* 1911–82.

[36] On the potential benefits of foreign direct investment see L. Alfaro and J. Chauvin, Foreign Direct Investment, Finance and Economic Development, in M. Spatareanu (ed.), *Encyclopedia of International Economics and Global Trade* (Singapore: World Scientific, 2020), vol. I, pp. 231–58.

[37] Esquirol, The Fictions of Latin American Law and Their Strategic Uses.

the attractions of laws of former colonial powers, while others emphasize the attractions of the legal systems of countries that have historically served as large sources of trade and investment and have dominated international organizations. The former set of arguments implicitly identify orthodoxy with the laws of England, France, the Netherlands, Portugal, and Spain, while the latter set point most directly to the United States and the European Union.

For the purposes of this volume, we will define legal orthodoxy to mean laws that are favored in either a former European colonial power, the United States, or the European Union. We define China as belonging to the Global South because, until relatively recently, there has been little doubt that it qualifies as a developing country.[38] We leave to future research the question of China's influence on legal systems in the Global South.

1.3.3 *Evidence Supporting the Traditional View*

There is no question that developing countries sometimes adopt orthodox laws. In many developing countries, important components of the legal system have persisted since colonial times. Many former British colonies still have English or colonial statutes on the books and cite English precedents.[39] In fact, until recently, a fair number of those jurisdictions relied on a predominantly British tribunal, the Privy Council, as their highest appellate court and several continue to employ British judges in their local courts.[40] Meanwhile, developing countries colonized by France, Spain, or Portugal continue to use legislative provisions copied from colonial powers and to cite those powers' decisions and commentaries.[41] There are many examples of developing countries adopting laws inspired by US law, such as Article 9 of the Uniform Commercial Code.[42] More recently, many jurisdictions have adopted data protection laws based on the European Union's General Data

[38] P. Benoit, China Is Developing and Developed at the Same Time, Foreign Policy, May 23, 2023.

[39] H. Spamann, Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law (2009) 2009 *Brigham Young University Law Review* 1813–77.

[40] A. S. King and P. K. Bookman, Traveling Judges (2022) 116 *American Journal of International Law* 477–533.

[41] M. Siems, *Comparative Law*, 3rd ed. (Cambridge: Cambridge University Press, 2022), pp. 246–252; Esquirol, The Fictions of Latin American Law and Their Strategic Uses, pp. 28–43. But see M. Pargendler, Politics in the Origins: The Making of Corporate Law in Nineteenth-Century Brazil (2012) 60 *The American Journal of Comparative Law* 805–50 (finding greater agency and diverse origins in nineteenth-century corporate lawmaking in Brazil).

[42] F. Fiorentini, Legal Transplants in the Law of Secured Transactions. Current Problems and Comparative Perspectives, in F. Fiorentini and M. Infantino (eds.), *Mentoring Comparative Lawyers: Methods, Times, and Places: Liber Discipulorum Mauro Bussani* (New York: Springer, 2020), pp. 3–23, pp. 10–11 (discussing adoption of OAS Inter-American Model Law on Secured Transactions).

Protection Regulation.[43] Finally, there are notable instances of developing countries that have adopted legal norms proposed by international bodies such as the International Monetary Fund (IMF) and the Organisation for Economic Cooperation and Development (OECD), including in core areas of corporate law.[44]

The fact that developing countries sometimes, or often, adopt orthodox laws does not mean that the traditional view is the only, or the primary, game in town. The key question is whether developing countries also deviate from orthodox solutions in key legal contexts and, if so, why and how.

1.4 LIMITATIONS OF THE TRADITIONAL VIEW

There are several reasons to question the appeal of legal orthodoxy in the Global South. To begin, the sweeping empirical generalizations that underpin the traditional view ignore the remarkable heterogeneity that characterizes the Global South. Moreover, the claims that orthodoxy is economically superior rest upon contestable assumptions about the costs and benefits of adopting laws modeled upon foreign laws. Finally, the arguments premised on the cultural attractions of legal orthodoxy and international pressure neglect the fact that orthodoxy is not necessarily compatible with either the material interests or ideological commitments of people who hold the balance of political power in developing countries.

1.4.1 *Empirical Objections*

Although a legacy of colonialism, limited fiscal capacity, macroeconomic volatility, and international subordination may be general characteristics of countries in the Global South, there is considerable variation both among and within those countries. European colonialism took many different forms in today's developing countries, even within colonial empires, and ended at different points in time. Countries with limited fiscal capacity can deploy scarce tax revenues in very different ways, with very different implications for state capacity. Perhaps most importantly, limited fiscal capacity, economic volatility, and international dependence are negatively correlated with wealth and economic size and so large Global South jurisdictions may exhibit relatively few of the "typical" characteristics of developing countries. For example, Brazil definitely qualifies as a developing country and has struggled to address inequality through fiscal policy and to curb environmental disasters through regulation. At the same time, Brazil's tax/GDP ratio is close to the OECD average and its state apparatus is known for its prowess in international economic matters.[45]

[43] G. Greenleaf, Global Data Privacy Laws 2021: Despite Covid Delays, 145 Laws Show GDPR Dominance (2021) 169 *Privacy Laws & Business International Report*.

[44] M. Pargendler, The Rise of International Corporate Law (2021) 98 *Washington University Law Review* 1765–1820.

[45] OECD, Revenue Statistics in Latin America and the Caribbean – Brazil, 2023; G. Shaffer, *Emerging Powers and the World Trading System: The Past and Future of International Economic Law* (Cambridge: Cambridge University Press, 2021).

There may also be legal variation within countries in the Global South, particularly in large federated states.

1.4.2 *Economic Objections*

To recap, the economic arguments for orthodoxy presume that the costs of using foreign laws as models are low relative to the cost of domestic innovation, and that the benefits, especially in terms of attracting foreign investment, will be significant. Each of these claims is questionable.

The economic implications of adopting foreign laws are complicated by the fact that this strategy will typically entail relying on foreign or foreign-trained legal advisors. On the one hand, harmonization with foreign laws will allow developing countries to tap additional and potentially superior sources of legal advice and legal education. Or, to put it in economic terms, adopting foreign models should increase the supply of legal services, which should, at least in theory, reduce cost and increase quality. On the other hand, the demand side of the market also has to be considered. Foreign law schools and foreign lawyers operate in an international market and the amounts they charge for their services will reflect international demand. The fees charged by local professionals with expertise in foreign law will also be affected by international demand to the extent they can offer their services across international borders, whether in person – which will involve migration – or remotely, as in the case of legal outsourcing. Our point here is that, while harmonization with laws from the Global North may have beneficial effects on the supply of legal services in the Global South, those benefits may be offset to some extent by the effects of increased demand for the legal services required in the South. To further complicate matters, in any given context the net economic effects of legal harmonization will depend not only on market forces but also on factors such as the presence of subsidies and restrictions on cross-border provision of legal services.

The idea that orthodox laws are required to attract foreign direct investment also rests on questionable assumptions. To begin, the evidence is mixed on whether foreign direct investment stimulates economic growth. This calls into question the merits of making attractiveness to foreign investors a central objective of legal reform.[46]

The traditional view also rests on the potentially faulty assumption that developing countries interested in attracting foreign direct investment ought to focus on catering to investors from Western Europe and the United States. This view neglects the growing importance of investment flows from countries outside the Global North, and in particular China. For instance, since 2013, the value of Chinese foreign direct investment flows to Africa has exceeded that of flows from the United States.[47]

[46] Alfaro and Chauvin, Foreign Direct Investment, Finance and Economic Development.

[47] China Africa Research Initiative, Chinese Investment in Africa, Johns Hopkins School of Advanced International Studies, 2022.

It remains true that adhering to orthodoxy allows developing countries to reap whatever benefits flow from catering to foreign investors from the United States and Western Europe. In many instances, though, it is possible to capture these benefits by permitting foreign actors' affairs to be governed by foreign laws while other actors' transactions are governed by a distinct body of local law. There are many ways to accomplish this kind of "regulatory differentiation."[48] Common techniques include creating separate bodies of "offshore" corporate law and trust law, signing bilateral investment treaties, creating export processing zones, or enforcing arbitration, choice of law, and choice of venue clauses. Admittedly, though, it can be difficult to prevent bodies of law ostensibly designed for foreigners from affecting local actors.

Finally, orthodoxy forgoes the benefits of legal adaptation and innovation. Legal rules that are functional in the Global North may be dysfunctional in other settings – they may be inefficient given realities in the Global South, or even operate to distribute wealth from the Global South to the Global North. The magnitude of the benefits of innovation and adaptation will be context-specific and depends on the extent to which the legal challenges facing the developing country in question are materially different from those of countries whose laws might serve as models. However, there are good reasons to believe that developing countries do face materially different challenges. For instance, the need to conserve scarce judicial resources may prompt innovations that involve more than merely simplifying foreign doctrines.

1.4.3 *Political Drawbacks*

Even if orthodox laws are economically optimal, in the sense that they maximize social welfare within the relevant jurisdiction, there is no guarantee that they will be politically viable in any given Global South jurisdiction.[49] Orthodox laws may not provide material benefits to the groups who hold the balance of political power in the relevant developing country, whether those groups are urban elites or impoverished rural majorities. In the absence of effective progressive tax policy, deviations from orthodoxy may be required to satisfy the economic demands of these influential constituencies.[50] In addition, in many political systems in the Global North and

[48] For a definition of different dual or multiple regulatory strategies, including regulatory competition, regulatory differentiation, and regulatory dualism, see R. J. Gilson, H. Hansmann, and M. Pargendler, Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union (2011) 63 *Stanford Law Review* 475–537.

[49] M. J. Roe, Backlash (1998) 98 *Columbia Law Review* 217–41; A. L. Chua, The Paradox of Free Market Democracy: Rethinking Development Policy (2000) 41 *Harvard International Law Journal* 287–380.

[50] For example, Chua, The Paradox of Free Market Democracy: Rethinking Development Policy, suggests that, in developing countries that lack effective tax-and-transfer systems, deviations from orthodox policies that favor both free markets and democracy may be required to alleviate tensions resulting from the presence of economically dominant ethnic minorities.

South alike, lawmakers have a bias toward adopting laws that favor the economic interests of nationals ("nationalistic laws") because foreigners operate at a political deficit.[51] This weighs against the conventional prediction that developing countries will adopt private law institutions that cater to foreign actors.

Legal orthodoxy might also lack ideological appeal. In many countries in the Global South, concerns about persistent injustice, often dating back to the colonial era, have inspired legal reforms that make a decisive break with the past and are oriented toward social and economic change. The developments in constitutional law jurisprudence known as transformative constitutionalism are prominent recent examples of this phenomenon.[52] Other examples include steps toward recognition of legal rights for indigenous peoples and people of African descent in Latin America.[53]

1.5 THE CONCEPT OF LEGAL HETERODOXY

In light of its questionable economic and political appeal, it is reasonable to expect at least some countries in the Global South to diverge significantly from orthodoxy in ways that respond to their distinctive social, economic, and political circumstances. We label these kinds of deviations from orthodox approaches "legal heterodoxy." To be more precise, we define legal heterodoxy as the emergence of legal institutions that (i) deviate from orthodox approaches currently prevailing in the Global North by (ii) pursuing distinct and potentially broader public policy objectives or reflecting different values, ideologies, or worldviews.

Our definition of legal heterodoxy acknowledges the existence of variation within the Global North – for example, between the United States and Europe, as well as within Europe – around the policy objectives that are pursued through private law. Recall that our definition of orthodoxy encompasses legal norms adopted in *either* the United States or Europe. We downplay this variation because comparisons focused on legal differences within the Global North – or, more precisely, with respect to a small set of core "parent jurisdictions" in the Wealthy West – have been the object *par excellence* of comparative law scholarship.[54] Our point is that the dominant narrative's focus on intra-North differences has impoverished our understanding of private law institutions around the world. While acknowledging significant variation within the Global North, we aim to capture a portion of the spectrum of legal institutions that is captured by accounts of intra-North variation.

[51] Pargendler, The Grip of Nationalism on Corporate Law.

[52] Vieira, Baxi, and Viljoen (eds.), Transformative Constitutionalism.

[53] R. Sieder, Indigenous Peoples' Rights and the Law in Latin America, in C. R. Garavito (ed.), *Law and Society in Latin America: A New Map* (London: Routledge, 2014), pp. 143–56; T. S. Paschel, *Becoming Black Political Subjects: Movements and Ethno-Racial Rights in Colombia and Brazil* (New Jersey: Princeton University Press, 2016).

[54] Siems, The Power of Comparative Law.

We focus on instances of legal heterodoxy that simultaneously satisfy both components of our definition: rules that (i) differ along North–South lines; and (ii) embody different policies and values. Future works can and should explore each component separately, such as (a) by mapping the incorporation of different public policies and values into private law in the Global North, as well as (b) by examining "ultraorthodoxy" in the Global South (a term coined by Carlos Portugal Gouvêa in Chapter 8), by which we mean pursuing certain orthodox policy objectives even more vigorously than in the Global North.

In the following subsections, we highlight additional features of the concept of legal heterodoxy.

1.5.1 *Anti-modularity*

Our research so far suggests that objectives of heterodox institutions are often strongly "antimodular," i.e., they resist the traditional law-and-economics narrative of functional specialization across different areas of law. That narrative eschews the pursuit of distributional objectives through doctrines of contract, tort, or corporate law and holds that distributional objectives should be pursued exclusively through the fiscal system. We conjecture that there are at least two reasons why lawmakers in the Global South who choose to deviate from the path trodden by their counterparts in the Global North may be drawn to antimodularity.[55] First, lawmakers in countries with limited fiscal capacity but where economic inequality is a serious problem may be drawn to private law doctrines that serve to distribute resources to members of disadvantaged groups, or at least claim to do so. Second, lawmakers in developing countries might favor doctrines that ensure risk-sharing to compensate for the inadequacies of state-sponsored insurance schemes in societies plagued by economic instability.

1.5.2 *Varieties of Heterodoxy*

Our definition clearly implies that heterodoxy can take many different forms. Because there are numerous axes along which lawmakers can diverge from orthodoxy, there can be many varieties of legal heterodoxy. Take, for example, the distinction between *tailored* approaches to distribution through private law rules, on the one hand, and untailored or categorical approaches, on the other. Tailored approaches are based on a granular and context-specific inquiry into markers of vulnerability in each case. For instance, as described by Maria Guadalupe Martínez Alles in Chapter 3, Argentina's consumer protection regime has evolved toward greater tailoring by offering enhanced protection to "hypervulnerable" consumers. By contrast, untailored approaches to distribution determine vulnerability based on

[55] Pargendler, Controlling Shareholders in the 21st Century; A. Kovvali, Stakeholderism Silo Busting (2022) 90 *University of Chicago Law Review* 203–60.

less fine-grained analysis. For instance, the broad eviction moratorium discussed by Bianca Tavolari and Saylon A. Pereira in Chapter 6 protected all tenants, despite concerns that it was over-inclusive – both because some tenants were not poor and because some landlords were vulnerable.

Another reason why there are different varieties of heterodoxy is that our definitions of legal orthodoxy and heterodoxy are historically situated and contingent. The content of legal orthodoxy varies depending on the area of law and over time. What is deemed to be part and parcel of orthodoxy in the Global North today – such as workers' compensation schemes and minimum wage laws – was once deemed heterodox.[56] Features of corporatism, as well as some aspects of the era of "social" legal thought,[57] were heterodox before they became part of legal orthodoxy in the Global North, and then fell out of favor. Heterodoxy today may become orthodoxy in the future, and vice versa. Importantly, what we describe as legal heterodoxy from a comparative standpoint – such as the incorporation of social justice objectives into contract law – is often perceived as orthodoxy from the internal perspective of Global South jurisdictions.

1.5.3 *Collapsing the Public/Private Distinction*

While our focus lies on legal heterodoxy in private law, we do not want to reify a public–private law distinction or insist on an artificial decoupling between private and public law developments. In fact, we reject the idea that public and private law are conceptually or causally independent. Our theory of legal heterodoxy suggests that developments in public and private law in the Global South may have common origins and are likely to co-evolve because the distinctive economic, social, political, and legal factors that prompt adaptations and innovations in private law may also call for a distinct vision of the state and its relationship to private actors.

We document multiple instances of the interrelationship of legal heterodoxy and innovative approaches to public law in the Global South. Some of these include "transformative" constitutions in the Global South, which have a symbiotic relationship with heterodox varieties of private law. Examples include explicit constitutional provisions on organizational law; judicial reliance on constitutional principles in reviewing and interpreting corporate law, contract law, and intellectual property; and constitutional justification for strong modes of consumer protection. Brazil's constitution explicitly challenges legal orthodoxy in private law by linking the

[56] M. J. Horwitz, *The Transformation of American Law, 1870–1960, The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992) (for a prominent account of the transformation of the United States in moving away from the old legal orthodoxy embodied in classical legal thought).

[57] D. Kennedy, Three Globalizations of Law and Legal Thought: 1850–2000, in D. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006), pp. 19–73.

protection of intellectual property to the "social interest and technological and economic development of the country" – a provision that was included in anticipation of international lawmaking that culminated in the TRIPs agreement.[58]

1.5.4 *Formal versus Functional Divergence*

As we define it, legal heterodoxy encompasses significant divergences from orthodox private law doctrines, but we do not presume that these differences correlate tightly with differences in the outcomes that will be realized in jurisdictions with orthodox and heterodox legal institutions.[59] Legal systems that embrace orthodoxy and heterodoxy may even be functionally equivalent. Such a finding would be consistent with a well-established tradition in comparative law scholarship, which posits that similar economic and social problems necessitate, and produce, similar solutions in different jurisdictions – even if those solutions might be similar in function and outcome, not in form.[60] Yet, even in the face of functional convergence, the existence of heterodoxy might still undermine elements of the traditional view of legal systems in the Global South.

To the extent that heterodoxy simply entails greater acceptance of antimodularity, it definitely need not lead to functional divergence. In various areas of private law, the orthodox view is that conscious policy interventions are more legitimate if they come from legislatures rather than courts.[61] This raises the question whether legal heterodoxy

[58] M. Pargendler, Análise Econômica e Comparada do Art. 40, Parágrafo Único, da Lei de Propriedade Industrial, in A. Frazão, R. R. Monteiro de Castro and S. Campinho (eds.), *Direito Empresarial e suas Interfaces – Homenagem a Fabio Ulhoa Coelho* (São Paulo: Quartier Latin, 2023), vol. II, pp. 65–106. This study reflects an expert opinion on comparative law and law and economics about the constitutionality of the patent extension rule provided in the sole paragraph of art. 40 of the Industrial Property Law. The expert opinion was commissioned by FarmaBrasil, a trade association of Brazilian pharmaceutical manufacturers. Chapter 8, by Carlos Portugal Gouvêa, examines the same controversy.

[59] On the distinction between convergence of form and function, R. J. Gilson, Globalizing Corporate Governance: Convergence of Form or Function (2001) 49 *The American Journal of Comparative Law* 329–57.

[60] For works embracing such a functional approach, see Zweigert and Kötz, An Introduction to Comparative Law; R. Kraakman et al., *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 3rd ed. (Oxford: Oxford University Press, 2017). See also R. Michaels, The Functional Method of Comparative Law, in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), pp. 339–82 (describing different modes and critiques of functionalism, including the dominant approach of "functional equivalence").

[61] See, e.g., K. A. Kordana and D. H. Blankfein-Tabachnick, Rawls and Contract Law (2005) 73 *The George Washington Law Review* 598–632, 623–24 (describing how John Rawls's first principle of justice requires non-constitutional institutions should be designed by a democratically elected legislature). Critical scholars have long resisted this view. See, e.g., D. Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power (1982) 41 *Maryland Law Review* 563–658, 564–65 (questioning the impact of "institutional competence" considerations by challenging the grounds for distinguishing between courts, legislatures and administrative agencies as

in the form of policy-infused judicial decision-making constitutes meaningful divergence from regimes in the Global North that pursue the same policies exclusively through legislation. Heterodox antimodular judicial decisions in the Global South may compensate for failures in the political process in reaching welfare-enhancing outcomes. In other words, judges in the Global South may do more precisely because legislatures do less.[62] This raises the possibility that at least some instances of legal heterodoxy in the Global South may mask functional convergence.

The contributions by Bianca Tavolari and Saylon Alves Pereira (Chapter 6) and by Carlos Portugal Gouvêa (Chapter 8) show how, in functional terms, there might be less to legal heterodoxy than meets the eye. Both chapters describe activist and socially-inspired decisions by Brazil's Supreme Court (imposing a moratorium on fast-track evictions in one case, and ruling a provision of the patent statute unconstitutional, in the other) that only serve to bring Brazilian law approximately into line with norms in the Global North. Nonetheless, the finding that an activist judiciary compensates for legislative failures in a developing country challenges the traditional view that developing countries generally lack judicial capacity.

Even when heterodoxy entails a system-wide commitment to different values or objectives, its direct effects may be mostly symbolic – yielding different optics and rhetoric without necessarily generating different outcomes, at least not directly. Several of the studies in this volume hint at this possibility. Benjamin Liebman et al.'s description of heterodox adjudication of Chinese tort cases in Chapter 5 distinguishes between larger awards, which can operate to create a safety net and compensate for a lack of insurance, and smaller awards, whose effects are mostly symbolic. In describing India's pioneering legal reform mandating spending on corporate social responsibility in Chapter 9, Vikramaditya Khanna highlights the role of optics in buying political legitimacy for market-oriented reforms: it was critical, in his view, that the payments were *seen* as coming from businesses, rather than the state. Neither of these studies rules out the possibility that heterodox institutions whose direct effects are purely symbolic still have important indirect effects.

1.5.5 *Progressive Politics*

The primary aims of this project are descriptive and conceptual: we seek to capture legal phenomena that have been ignored by existing scholarship and offer a framework for

lawmakers"); R. M. Unger, The Critical Legal Studies Movement (1983) 96 *Harvard Law Review* 561–675, 561, 565 (challenging "the belief that lawmaking and law application differ fundamentally").

[62] R. Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014) (raising, and questioning, the "common and intuitively plausible claim" that "because the socioeconomic gaps in the global south are often considerably wider than those in the north, and because state capacity is, by and large, lower in the south, constitutional courts in these countries will be more inclined to intervene on behalf of the poor, or to support the constitutional recognition and progressive realization of social and economic rights").

understanding them. The main vision (or politics, if you will[63]) of this comparative law project is to augment the scope of comparative legal analysis in private law, and to reap the associated epistemological gains, with the aim of improving wellbeing and justice in the Global South and beyond. This commitment is, in theory, compatible with a vast array of legal responses and worldviews, but less so with those that are committed to the continued neglect of the particular conditions and values of the South.

This volume aims to document and interpret legal heterodoxies, not to *evaluate* them. It should not be read as glorifying heterodoxy, and disparaging orthodoxy, or vice versa. We leave this critical task – which is not without challenges, as discussed in Section 1.7 – to future work. Indeed, the contributors to this volume may have different views on these matters. Moreover, our theoretical framework suggests that context is key and that legal heterodoxies are unlikely to be uniformly "good" or "bad."

In choosing the orthodoxy/heterodoxy labels as our markers of North–South differences, we sought to use language that lacked a clear ideological or normative connotation, but we acknowledge that the valence of the terms is ambiguous. In our experience, the term heterodoxy functions analogously to a Rorschach test. Those who embrace orthodoxy are often proud of its tenets and ascendance and are disdainful of heterodoxy. Heterodox thinkers, by contrast, proudly view themselves as denouncing mistakes in dominant views. The label orthodoxy – in Greek, "right" (orthos) + "doxa" (opinion) – captures the current (though historically contingent) dominance and power of certain legal ideas and institutions, which critical scholars are, of course, happy to denounce. From this perspective, given past and continued instances of colonialism, present-day legal heterodoxy in the Global South is not "just another type of animal," but a subordinated type of animal.[64] This volume aims to help transform this vision.

In terms of political and ideological leanings, one could argue that modularity tilts right, and antimodularity tilts left. Viewed this way, there is a clear progressive overtone to legal heterodoxy in the Global South. However, that perspective is only valid if one assumes that heterodox policies are adopted in good faith and will be effective in achieving their objectives. A common critique of progressive policies is that their proponents are, wittingly or unwittingly, guilty of "hurting the people one's trying to help."[65]

1.5.6 *Civil Law Approaches*

Some of the distinctive features of legal heterodoxy resemble the features that, according to some scholars, distinguish civil law systems from common law systems,

[63] For a critique of the "no-method method" and "no-politics politics" of mainstream comparative law, see D. Kennedy, The Methods and the Politics, in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003), pp. 345–434.

[64] We thank Thiago Amparo for this comment and formulation.

[65] For a critique of such arguments, see D. Kennedy, The Bitter Ironies of Williams v. Walker-Thomas Furniture Co. in the First Year Law School Curriculum, Unpublished Working Paper, 2023.

but the concept of legal heterodoxy captures more than the distinction between common law and civil law. According to the economists behind the influential "legal origins" literature, a critical distinction between common law and civil law systems is that the latter are more likely to use private law to pursue policy objectives besides encouraging private contracting and protecting property rights.[66] Although we may disagree with aspects of their legal analysis, we agree that civil law institutions in Continental Europe are generally less modular than corresponding institutions in the United States and the United Kingdom.[67] At the same time, the European civil law institutions appear more modular than some of their counterparts in the Global South.

The idea that legal heterodoxy resembles but cannot be assimilated to distinctively civilian approaches to business law is consistent with several of the studies in our volume. Weitseng Chen's contribution on contract law in China (Chapter 4) and Jorge Esquirol's account of property and security interests in Latin America (Chapter 7) both argue that these jurisdictions have followed the civil law's greater amenability to antimodularity in their respective fields. At the same time, both chapters describe heterodox approaches that are not captured by the spectrum of solutions represented in Europe. Moreover, the contributions on corporate law in India by Vikramaditya S. Khanna (Chapter 9) and on India and South Africa by Mariana Pargendler (Chapter 10) reveal significant high-level commonalities between heterodox approaches in common law (India), civil law (Brazil and Colombia), and mixed jurisdictions (South Africa[68]) in embracing heterodox modes of stakeholder protection through corporate law. These shared features of legal institutions in the Global South have been obscured by comparative efforts, in both academic works and the World Bank's Doing Business reports, based on "hypermodular" metrics derived from a certain view of the US and UK common law experiences.

If there are significant commonalities among legal institutions in the Global South, then it may be time to reconsider the traditional method of classifying legal systems. For over a century, comparative lawyers have grouped legal systems into legal families defined by a dichotomy between the common law and civil law and,

[66] R. La Porta et al., Law and Finance (1998) 106 *Journal of Political Economy* 1113–55; La Porta, Lopez-de-Silanes, and Shleifer, The Economic Consequences of Legal Origins.

[67] H. Spamann, The "Antidirector Rights Index" Revisited (2010) 23 *The Review of Financial Studies* 467–86.

[68] Curiously, the "legal origins" literature classifies South Africa as a common law jurisdiction. See La Porta, Lopez-de-Silanes, and Shleifer, The Economic Consequences of Legal Origins. However, comparative law scholars typically categorize South Africa as a mixed legal system that blends elements of English common law, Dutch law, and local customary law. See, e.g., J. Du Plessis, Comparative Law and the Study of Mixed Legal Systems, in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), pp. 477–512.

within those two broad categories, proximity to the laws of individual European colonizing powers.[69] If our findings on heterodox stakeholder approaches to corporate law are replicated in other areas of law, then perhaps the traditional classification scheme should be revised to place large economies in the Global South in a class of their own.[70]

1.5.7 *Resistance to International Influence*

Legal heterodoxy marks a form of resistance to international forces that, more or less forcefully, aid in the diffusion of orthodoxy around the world. Those forces include, historically, colonialism. More recent examples include exercises of "soft" (and not so soft) power by modern states and international organizations such as legal technical assistance, harmonization projects, and governance indicators.[71] In recent years, international actors have often pressed countries in the Global South to embrace a distinctively neoliberal orthodoxy that favors providers of financial capital over other economic actors, and economic actors in the Global North over actors in the Global South. For instance, the orthodox view of debtor–creditor and bankruptcy law rejects its use to achieve objectives such as favoring specific industries (as described in Chapter 7 by Jorge Esquirol) or giving workers' claims priority over secured creditors.[72] Meanwhile, Pargendler argues in Chapter 10 that upholding limited liability of parent companies vis-à-vis the protection of stakeholders may systematically favor Global North companies and investors at the expense of Global South victims.

Legal heterodoxy in the Global North sometimes emerges as a direct reaction to international forces. The experience of South Africa described in Chapter 10 is illustrative in this regard. In 2010, a foreign investor filed suit under a bilateral

[69] Pargendler, The Rise and Decline of Legal Families.

[70] Cf. E. A. Farnsworth, A Common Lawyer's View of His Civilian Colleagues (1996) 57 *Louisiana Law Review* 227–238, 228 (noting "differences between industrialized and the developing countries," as well as differences "between the free market economies and the socialist countries").

[71] T. C. Halliday and B. G. Carruthers, The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes (2007) 112 *American Journal of Sociology* 1135–202; K. Davis et al. (eds.), *Governance by Indicators: Global Power through Quantification and Rankings* (Oxford: Oxford University Press, 2012); Pargendler, The Rise of International Corporate Law.

[72] See, e.g., The World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems: Introduction, Executive Summary and Principles* (Washington: World Bank Group, 2001) ("Any priority placed ahead of the secured party represents a substantial cost, which is generally transferred back to borrowers in the form of higher interest rates and transaction costs. Often the public policy represented by the priority (say, benefiting workers) receives a minor and occasional benefit at a substantial cost to the entire commercial system. Such priorities should be eliminated, reduced, and, where public policy concerns are compelling, addressed *by other legal reforms* that do not compromise the system for secured lending").

investment treaty, claiming that one of South Africa's initiative of Black Economic Empowerment initiatives (which required the transfer of 26 percent of mining assets to historically disadvantaged South Africans) constituted an expropriation and violated the obligation of fair and equitable treatment. While the case was settled before a final decision on the merits, it contributed to South Africa's decision to terminate various bilateral investment treaties and adopt the more heterodox Protection of Investment Act of 2015. The new legislation not only provides for dispute resolution in domestic courts, as opposed to international arbitral panels, but also recognizes considerations of "historical, social and economic inequalities" to "achieve the progressive realization of socio-economic rights."[73]

1.6 OVERVIEW OF THE VOLUME

The chapters in this volume document examples of legal heterodoxy in contract, property, tort law, as well as in the concept of legal personality in several parts of the Global South. As noted, the selection of countries and areas of law was determined in part by our knowledge of the authors and their availability. Consequently, this collection of studies is intended to be illustrative and provocative rather than comprehensive and definitive. In this section we summarize the chapters and their key findings.

1.6.1 *Summary of the Contributions*

Chapter 2 ("Contract Law and Inequality in the Global South"), by Kevin Davis and Mariana Pargendler, describes how courts in South Africa, Brazil, and Colombia have recently deviated from orthodoxy to embrace the task of using contract law to address societal inequality (as opposed to inequality between the parties to a contract). In a series of decisions, the Constitutional Court of South Africa has held that contract terms must conform to constitutional values, including the African value of *ubuntu*. *Ubuntu*, which relates to values of humanness, social justice, and solidarity, operates to infuse contract law with distributive considerations. For instance, the Court cited the legacy of racism and apartheid in disavowing prejudgment interest, noting its potentially catastrophic effect on consumer debtors. Brazilian courts repeatedly appeal to "social justice" in contract disputes, and have developed distinct doctrines to benefit weaker parties, such as by allowing consumers to terminate contracts for the purchase of real estate in installments through the payment of a limited judicially-imposed fine – thereby switching labor and real estate market risks from consumers to construction companies.

[73] M. A. Forere, The New South African Protection of Investment Act: Striking a Balance between Attraction of FDI and Redressing the Apartheid Legacies, in F. Morosini and M. R. S. Badin (eds.), *Reconceptualizing International Investment Law from the Global South* (Cambridge: Cambridge University Press, 2017), pp. 251–83, p. 252.

In Colombia, constitutional review applies to contract disputes potentially impinging on fundamental rights such as life, health, or the vital minimum, at least when affecting "subjects of special constitutional protection," such as the elderly, the ill, minors, the disabled, female heads of households, and persons earning less than the minimum wage. While the statute generally allows interruption of public service for nonpayment, the Court found that denial of water to a 54-year old woman who was the head of her household, physically incapable of working, and responsible for two minor sons, was disproportionate and unconstitutional. This chapter suggests that mounting inequality can increase the appeal of contract law heterodoxy and that the dominance of current contract law orthodoxy is neither universal nor inevitable.

In Chapter 3 ("Reducing Inequality in Consumer Transactions"), María Guadalupe Martínez Alles contrasts the different approaches to consumer protection in the European Union and in Latin America. Even though EU consumer law has been hailed as too interventionist compared to US law in this area,[74] it is more timid and far less imbued with distributive considerations than the laws of Latin American jurisdictions. Martínez describes EU consumer law as traditionally focused on *consumer empowerment* based on the paradigmatic *average consumer* – with the primary goal of EU law in this area being regulatory harmonization in service of economic integration. By contrast, consumer protection in Argentina, as in Latin America more generally, centers on the broader goal of *consumer protection* based on a paradigm of the *vulnerable consumer*, a concept that both pays greater heed to inequality and is more sensitive to context-specific forms of vulnerability. Recent reforms in Argentine consumer protection law have accentuated its heterodox traits by introducing a regime of enhanced protection for *hypervulnerable* consumers, defined as those in a situation of aggravated vulnerability due to age, gender, physical or mental state, or social, economic, ethnic, and/or cultural circumstances. At the same time, European scholars have begun advocating for the concept of "structural vulnerabilities" in the context of the digital economy, which happens to be dominated by US companies.

Chapter 4, by Weitseng Chen ("Contracts, Inequality, and the State"), examines contract disputes in China during the pandemic. He argues that, in many respects, Chinese legal responses resembled those implemented elsewhere in Asia and in other civil law jurisdictions. For instance, to the extent they applied contract law doctrine, Chinese courts used the change in circumstances provision of the Civil Code to alter or waive contractual obligations that would result in unfairness or inequality. Similarly, like their counterparts in other countries, Chinese regulators required lenders to grant temporary, procedural relief to debtors and encouraged

[74] For a critical appraisal of European consumer protection from an orthodox US perspective, see O. Bar-Gill and O. Ben-Shahar, Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law (2013) 50 *Common Market Law Review* 109–26.

landlords to reduce rents for tenants. Chen's ultimate argument, however, is that Chinese courts, the Party and government officials used distinctive "ultra-heterodox" measures to alter or nullify contractual terms in cases that raised serious concerns about inequality, social unrest, or systemic financial risk. Specifically, courts would refer such disputes to either mediation, insolvency, or a "macro-prudential" proceeding that involved courts collaborating with government agencies, party officials, and stakeholders of firms experiencing financial distress to negotiate and implement resolutions of disputes. These procedures allow the party-state to achieve its objectives of preventing market disruption, social unrest, and financial crisis triggered by unfair and unequal contracts. These objectives may diverge from the interests of either party to the contract, which would be the focus of orthodox contract doctrine.

Chen argues that Chinese ultra-heterodoxy can be explained in part by distinctive elements of the Chinese situation, namely, the dominance of the party-state and widespread acceptance among contracting parties of a communitarian understanding of liability and responsibility. He also points out that having courts and state actors determine risk allocation at the enforcement stage relieves contracting parties of the costs of allocating risks at the contract formation stage. Chen also suggests that this shift in responsibility for risk allocation may be efficient in emerging markets where there are a relatively large number of material risks to address.

In Chapter 5 ("Tort Law Heterodoxy in China"), Benjamin Liebman, Rachel Stern, Eva Wenwa Gao, and Xiaohan Wu explore how Chinese courts use concepts of fairness and justice to impose liability in tort cases. China's civil code provisions on "equitable liability" allowed courts to impose liability on defendants who had the ability to pay even if they had tenuous links to the accident and were neither negligent nor within the limited set of cases subject to strict liability. These provisions, which reflected China's socialist legal heritage, produced significant debate in China, and were curtailed by the Civil Code that came into effect in 2021. Liebman et al. read over 2,000 cases, including a representative sample drawn from a dataset of over 9,000 cases released between 2013 and 2018 that cited the equitable liability provisions. They also read cases that used phrases associated with fairness or dealt with child drowning or death-by-drinking, several of which did not cite the provisions on equitable liability. They identified two broad types of cases in which Chinese courts relied on fairness as a basis for imposing liability: "participant liability" and "space-based liability." In cases of the first type the parties were participating in the same activity. In the second type of case the parties were either businesses and their customers or employees, or public institutions and their users. They found that courts continued to impose liability on these bases in the years immediately after the Civil Code came into effect. Liebman et al. describe these forms of loss sharing as "blunting the sharp edges of inequality by redistributing wealth." They interpret these judicial practices as a form of "socialist tort law heterodoxy" that may survive the shift of formal law toward orthodoxy.

In Chapter 6 ("Evictions during the Pandemic"), Bianca Tavolari and Saylon Alves Pereira compare the regimes that govern evictions of residential tenants in the United States and Brazil during the COVID-19 pandemic. It shows how seemingly heterodox and activist decisions by a Global South court can in fact represent substantive convergence (if imperfect) to Global North solutions – with the judiciary effectively compensating for the legislature's failure to act. Tavolari and Pereira describe how the US Congress enacted a temporary evictions moratorium as part of the CARES Act, which was signed into law by President Trump on = March 27, 2020. Initially valid for 120 days, the federal moratorium was successively extended by Congress until July 2021. When the legislative moratorium expired in 2021, the Centers for Disease Control announced a new moratorium, though its authority to do so was successfully challenged before the US Supreme Court.

Ironically, it was precisely in July 2021 – well into the second year of the pandemic – that the Brazilian Supreme Court placed restrictions on evictions, despite the absence of legislative action. The interim decision by Justice Luis Roberto Barroso is heterodox in appealing to the constitutional right to health and housing of vulnerable persons during the COVID-19 pandemic to impose restrictions on evictions. From a functional standpoint, however, the decision was "too little, too late" compared to the US response. The decision came only after it became clear that the legislature would not act to address this problem, since a timid statutory provision suspending fast-track evictions – for example, a special procedure for eviction in 15 days without hearing the tenant – expired in October 2020 after being in force for only two months. Moreover, far from offering a broad moratorium on evictions, the Brazilian Supreme Court's decision (like the previous short-lived statutory response) only prevented *fast-track* evictions. Interestingly, Tavolari and Pereira show how flawed distributional arguments were invoked to frustrate a more ambitious response, by both the legislature and the judiciary. While opponents of the eviction ban and Justice Barroso expressed concern about how a moratorium on evictions could have perverse distributional consequences in harming vulnerable landlords, Tavolari and Pereira challenge this argument with data showing that tenants are on average far poorer and more numerous than landlords.

In Chapter 7 ("Heterodox Legal Informality"), Jorge L. Esquirol describes different strands of heterodoxy in property law and the law of security interests in Latin America. He notes that heterodox approaches to property law have a long historical pedigree in the region, ranging from a right to extinguish title without compensation in Colombia in the early twentieth century to the constitutional protection of *campesino* lands in Mexico which lasted until recently. Esquirol observes that what counts as heterodoxy is historically and geographically contingent, with some of these earlier manifestations of socially-inspired legal innovation following the globalization of "social law" in the first part of the last century.

Esquirol then spotlights two recent developments in the law governing property and security interests in the region. On the one hand, he identifies an orthodox turn

in the law of security interests, resulting from pressures by international organizations (such as the Organization of American States, the World Bank, and UNCITRAL) to adopt the US liberal and "nonselective" model. This illustrates how international organizations seek to promote modularity through private law. Prior to the reforms, selective models of secured lending – which offered a favored regime to certain sectors – served as channels for the implementation of industrial policy through private law, both in Latin America and in continental European jurisdictions such as France and Italy. On the other hand, Esquirol describes new emerging forms of legal heterodoxy in Latin America, as exemplified by Colombia's transitory property regime adopted in 2011 to address the wrongs of property's despoilment generated by the country's civil conflicts. In lieu of command-and-control regulation, Colombia modified the basic private law rules of ownership to introduce modified presumptions and burdens of proof. Esquirol also formulates a broader critique of the use of "informality" as a label that proponents of orthodoxy use to disqualify heterodox features of legal systems in the Global South as antiquated and dysfunctional. Instead, he shows that elements of formality and informality in property rights coexist both in Global North and Global South legal systems, even if the precise locus of informality can differ in each case.

Chapter 8, by Carlos Portugal Gouvêa ("Heterodoxy of the Brazilian Supreme Court"), considers intellectual property law. He focuses on a decision of the Brazilian Supreme Court overturning a statute that he describes as "ultra-orthodox" because it allowed patent terms to be extended for a period longer than any patent law regime in the world. Portugal Gouvêa explains the Brazilian legislature's support for ultra-orthodoxy by reference to the influence of foreign economic interests, specifically the international pharmaceutical industry. He also notes that some of the dissenting judges defended the statute based on the works of foreign law-and-economics and constitutional scholars without citing any supporting empirical evidence.

Portugal Gouvêa identifies several heterodox features of the Court's reasoning and procedure, such as its attention to distributional considerations, reliance on human rights norms, reference to comparative and empirical analyses that included experiences in the Global South, and openness to interventions by academics independent of interested parties. Portugal Gouvêa acknowledges that the effects of the decision may yet be undone by legislative and judicial backlash. Moreover, even in the absence of effective backlash, the ultimate effect of the decision may be only to bring Brazilian law into line with the provisions of the TRIPS agreement, a quintessentially orthodox instrument. In that case the court's heterodoxy will have merely balanced out a legislative tendency toward ultra-orthodoxy, echoing the argument made by Tavolari and Pereira in Chapter 6.

In Chapter 9 ("The Political Economy of India's Corporate Social Responsibility Reforms"), Vikramaditya S. Khanna examines India's pioneering decision to mandate corporate spending on corporate social responsibility (CSR). The new provision introduced in the Companies Act of 2013 required companies

exceeding certain thresholds to either spend 2 percent of average profits on CSR activities defined by the government or explain why they did not do so. Khanna aims to address an apparent puzzle: why did India opt for a CSR spending requirement rather than using a tax on the same firms to fund increased social spending? He argues that India's heterodox CSR spending rules responded both to considerations of limited state capacity (relative to the capacity of private firms) and to the optics of the reform. Prior to the reform, there was rising concern that the previous wave of market-oriented liberalization had led to rising income and wealth inequality. In this context, the CSR spending requirement was superior to a tax in making it *look like* firms, rather than the state, were benefitting the citizenry. The chapter thus illustrates how, in contexts of mounting inequalities, legal heterodoxy may serve to legitimate – and therefore buy political support for – market-based institutions.

In Chapter 10 ("Corporate Law in the Global South"), Mariana Pargendler documents and analyzes the incorporation of a diverse array of policy and distributional objectives in the corporate laws of developing countries, an approach she terms "heterodox stakeholderism." The instances of heterodox stakeholderism in the Global South include the mitigation of limited liability in India and its elimination in Brazil vis-à-vis various stakeholders, such as workers, consumers, and victims of environmental harm; the adoption of mandatory corporate social responsibility in Indonesia and India; the requirement of social responsibility committees in India and South Africa; workers' and unions' rights to enforce directors' duties in South Africa; and a large-scale program of Black corporate ownership and empowerment in South Africa, among many others. Beyond addressing inequality and externalities, Pargendler argues that heterodox stakeholderism in the Global South also responds to distributional implications of corporate law rules along North–South lines. For instance, limited liability for environmental harm caused by corporate subsidiaries tends to enrich Global North companies and investors at the expense of Global South victims. She also suggests that the dearth of South–South comparison has produced an "odd-duck syndrome" in the comparative literature, to the effect that the heterodox regimes of individual developing jurisdictions are described as unique, even if similar responses exist in other Global South countries. Pargendler then describes the recent resurgence of stakeholderism in corporate laws of developed countries as a form of "reverse convergence," with Global North regimes converging to approaches previously embraced in the Global South, rather than the other way around.

Last but not least, Daniel Bonilla Maldonado's Chapter 11 ("Global Legal Pluralism and the Rights of Nature") considers a particularly striking example of heterodoxy: legal recognition of rights of nature. Several countries have recognized natural objects as legal subjects entitled to protection of their rights and have created systems of representation to enable those rights to be defended. This development is a radical departure from the orthodox view that only human beings and legal entities

established by human beings or other legal entities can be legal subjects and that nature is only an object to be dominated by human beings. Bonilla Maldonado argues that rights of nature are a hybrid legal product that reflects the expression of indigenous traditions in the grammar and vocabulary of modern law.

Bonilla Maldonado's focus in this chapter is on the emergence and diffusion of discourse about rights of nature. He identifies three distinct types of discourse about the topic: poietic, mimetic, and resistance. Poietic patterns define and support recognition of rights to nature and emerged in the legal systems of Ecuador, Bolivia, and New Zealand (although, interestingly, a US NGO played an important role). Mimetic patterns reproduce and sometimes modify the poietic patterns. These discourses have appeared in several countries in the Global South, as well as in countries such as Australia, Canada, and Spain. Finally, discourses of resistance oppose recognition of rights of nature and are particularly prevalent in Europe. Bonilla Maldonado argues that the diffusion of discourse supporting rights of nature from peoples and countries which tend to be peripheral in global legal dialogue to countries in both the Global North and South upsets the traditional view that legal knowledge typically diffuses from central actors in the Global North.

1.6.2 *Key Findings*

The main contribution of these chapters is to illustrate the variety of forms that legal heterodoxy can take. For instance, many of the chapters describe developments in substantive doctrines and underlying conceptions of legal personality that lead to deviations from orthodox outcomes in contract, tort, and property law. Some chapters focus on heterodox reasoning rather than the outcomes, such as the Brazilian courts' reliance on human rights norms to supplement or challenge legislation governing rights over real and intellectual property. These Brazilian cases also highlight the fact that seemingly heterodox legal developments might simply offset the orthodoxy-enhancing effects of other components of the legal systems. This possibility calls into question the feasibility of assessing the overall level of orthodoxy or heterodoxy of a legal system.

Some of the examples of heterodoxy involve deviations from the orthodox procedures used to generate private law norms and to resolve private disputes. These include the use of mediation, insolvency, and macro-prudential approaches in China.

The chapters also display the range of policy objectives, or combinations of objectives, which can be embodied in heterodox approaches. Some of the examples of heterodoxy involve attempts to protect or benefit vulnerable groups in society. These sorts of distributional objectives appear to underlie the contract law doctrines discussed by Davis and Pargendler and Martínez Alles, the protections against eviction discussed by Tavolari and Pereira, and the corporate law initiatives described by both Pargendler and Khanna. Khanna raises the possibility that

India's reliance on corporate law to induce private firms to help achieve distributional objectives might have been an efficient response to the Indian state's limited capacity to achieve those ends on its own.

The chapters in this volume also contain indications that legal heterodoxy can be used to pursue other objectives, including objectives that seem to be especially important in societies in the Global South. Esquirol explains how heterodox sector-specific versions of the law of secured transactions can be used to pursue industrial policy by influencing the cost of credit in certain sectors. He also explains how property law in Colombia has been deliberately altered to compensate for the effects of civil conflict. Pargendler suggests that certain aspects of corporate law in the Global South represent efforts to influence the distribution of wealth between domestic actors and actors based in the Global North. Chen argues that the ultra-heterodox elements of Chinese contract law may qualify as an efficient response to a risky environment, but he also suggests they are designed to maintain social, political, and financial stability. Liebman argues that Chinese tort law is also designed to provide social stability, but also serves as a form of social insurance.

Some of the chapters point out that heterodox legal developments serve to express distinctive local values and to legitimate certain institutions as opposed to merely influencing behavior or the distribution of resources.[75] For instance, Davis and Pargendler identify respect for the African value of *ubuntu* as part of the underpinning for the reasoning in South African contracts cases. Chen and Liebman et al. suggest that Chinese courts' decisions in contracts and torts cases, respectively, are consistent with local communitarian values. And Bonilla Maldonado emphasizes that recognition of rights of nature is grounded in the practices and beliefs of indigenous peoples in Ecuador, Bolivia, and New Zealand. Meanwhile, Khanna argues that India's mandatory corporate social responsibility law helped to legitimate the Indian state at a critical juncture.

Most of the chapters focus on challenging the traditional view that orthodoxy fully captures formal laws in the Global South by documenting and explaining the emergence of legal heterodoxy in a single country's legal system, but some go further and discuss South–South diffusion or convergence between the Global North and Global South. Bonilla Maldonado's chapter documents an example of legal heterodoxy diffusing from the Global South and the periphery of the Global North to other sites in both the Global South and the Global North. After evaluating various instances of "heterodox stakeholderism" in the corporate laws of Global South jurisdictions, Pargendler suggests that the current renaissance of stakeholder approaches in the Global North represents an unforeseen form of "reverse

[75] There are, to be sure, numerous non-instrumental and value-oriented accounts of private laws in the Global North. See, e.g., J. C. P. Goldberg and B. C. Zipursky, *Recognizing Wrongs* (Cambridge, MA: Harvard University Press, 2020); D. Markovits, Contract and Collaboration (2004) 113 *Yale Law Journal* 1417–518.

convergence." As the Global North faces growing socio-economic and environmental challenges it will look more like the Global South and may resort to similar legal responses. Likewise, the analysis by Maria Guadalupe Martínez Alles of consumer protection in Latin America and the European Union suggests that reverse convergence may well be on the horizon, with EU scholars increasingly calling for a more protective approach based on "structural vulnerabilities" in the digital economy.

1.7 A RESEARCH AGENDA

An important aim of this volume is to stimulate additional research on legal heterodoxy in the Global South and beyond. The hope is that, by providing examples of studies of legal heterodoxy, we will inspire scholars to pay more attention to the distinctive attributes of the work being done by courts, legislators, and regulators in the Global South. The fruits of these efforts will benefit both scholars and lawmakers.

The focus of the contributions in this volume is on describing rather than explaining instances of legal heterodoxy. Many of the chapters also identify basic structural conditions that explain the emergence of legal heterodoxy. However, in most of the cases there is additional room to explore the sociology and political economy that have led to specific legal developments, as well as their economic consequences. To what extent is legal heterodoxy a bottom-up or a top-down process? What are the roles of elites and social movements? What processes led to the adoption of heterodox doctrines? What is the degree of South–South or South–North diffusion (or suppression) of legal heterodoxy? What are the relevant actors and institutional channels? What are the economic consequences of legal heterodoxy? Do heterodox rules help transform the allocation of wealth and power, legitimize and maintain the status quo, or instead have the perverse effects of reinforcing poverty, inequality, and injustice?

Subsequent stages of the research agenda should strive to go beyond description or explanation and attempt to evaluate legal heterodoxy and predict its future course. We suspect, however, that moving on to those modes of analysis will be challenging. Lawmakers in the Global South embrace a diverse set of objectives and values that diverge not only from those embedded in legal orthodoxy but also, potentially, from the ones favored by other lawmakers in the Global South. This normative diversity creates a significant probability that any given heterodox approach will be designed to pursue objectives that diverge from the values or objectives favored by the person evaluating them.

Turning to prediction, the challenge will be to sort through the many possible futures of legal heterodoxy. One possible future, as suggested by Bonilla Maldonado's study of rights of nature, is diffusion. We have documented several examples of legal heterodoxy that respond to conditions that are widespread in the

Global South and suspect that there are many more. It seems plausible to expect that such responses will diffuse to countries that experience similar conditions, particularly if they receive positive evaluations. Another possibility is convergence across the North–South divide. This seems especially plausible when we consider that many of the conditions that stimulate heterodoxy are also present in the Global North. Moreover, as Esquirol, Bonilla Malsonado, and others point out, some examples of legal heterodoxy represent approaches that have been considered and rejected in the Global North. This last point suggests yet another possibility: legal heterodoxy will be resisted and eventually defeated by the forces of orthodoxy.

All these predictions about whether jurisdictions will converge upon or reject heterodoxy seem likely to depend, at least in part, upon whether the relevant form of heterodoxy receives positive evaluations from key actors. Consequently, the tasks of prediction and evaluation appear to be inextricably linked.

Finally, while our principal goal is to extend the scholarly literature, research on legal heterodoxy is also potentially valuable to lawmakers. Like other branches of comparative law, research on legal heterodoxy promises to expand the range of possibilities that lawmakers consider when contemplating reforms. Expanding the imagination in this way is particularly important for lawmakers in the Global South who might otherwise only consider orthodox options that are poorly suited to local conditions.

1.8 RELATIONSHIP TO EXISTING LITERATURE

The research agenda sketched in this chapter relates to, and builds on, several strands of existing literature. Scholars associated with legal pluralism, comparative constitutional law and TWAIL, as well as critical or decolonial approaches to comparative law have all documented deviations from legal orthodoxy in developing countries.[76] The line of scholarship on "varieties of capitalism" explores the role of institutional complementarities in various areas of law, suggesting that different bundles of institutional features produce comparative advantages in different modes of production.[77] While Alisha Holland has characterized forbearance from enforcement of legal norms as a form of politically motivated redistribution, we explore how distributional objectives have shaped the very content of legal rules in the Global

[76] Maldonado, Legal Barbarians. Salaymeh and Michaels, Decolonial Comparative Law.

[77] P. Hall and D. Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001); B. R. Schneider, *Hierarchical Capitalism in Latin America: Business, Labor, and the Challenges of Equitable Development* (Cambridge: Cambridge University Press, 2013). The concept of institutional complementarities refers to the idea that the effectiveness of an institution depends on its relationship to other institutions. An institution is complementary to another institution when it raises the returns from the former. Hall and Soskice famously argued that certain private law institutions, such as corporate law and contract law, are complementary to legal institutions in other fields, such as institutions of industrial relations, education and training, and labor and employment laws.

South.[78] In addition, the burgeoning literature on Chinese law yields many insights about both justifications for and potential consequences of deviating from legal orthodoxy.[79] The literature on critical legal studies (CLS) and law and political economy (LPE) draws attention to the conformation of power and wealth distribution through private law rules.[80]

Our proposed research agenda diverges from these other approaches in terms of emphasis and object of study. The literature on legal pluralism and, perhaps to a lesser extent, decolonial approaches, tends to emphasize the importance of non-state law. TWAIL is, naturally, focused on international law. The literature on comparative constitutional law is, of course, focused on constitutional law. Holland's research on regulatory forbearance focuses on variations in levels of enforcement, rather than on the content of legal doctrine. Beyond discursive contributions, both CLS and LPE are highly US centric, and have largely neglected comparative law, in general, and Global South legal institutions, in particular. The literature on varieties of capitalism leaves aside multiple areas of private law, such as property, torts, and consumer protection, and pays little attention to legal doctrines and judicial decisions, even in areas that it examines more closely, such as corporate, contract, and labor laws. By contrast, we propose to focus on domestic law and doctrines, including those of central areas of private law, emanating from state sources. We focus on the content of legal norms rather than how they are enforced. We also propose to emphasize the production of scholarship aimed at international audiences in order to explore potential opportunities for mutual learning across countries. Finally, our project is inspired by and arguably subsumed within critical approaches to comparative law devoted to documenting deviations from legal orthodoxy. However, we focus on a specific class of deviations that are consistent with a specific set of theoretical explanations.

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