

ON COMPREHENSIVE PLURALISM: TWO PLURALISTIC DEFICITS

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INTRODUCTION

A Pluralist Theory of Constitutional Justice offers a powerful normative theory of liberal constitutionalism: comprehensive pluralism.¹ This theory links liberal constitutionalism with distributive justice. Comprehensive pluralism requires that the three dimensions that compose this concept of justice—redistribution, recognition, and representation—drive the attempts to balance ethos and demos in liberal constitutional democracies, as well as the attempts to balance the singular, plural, and universal dimensions that constitute such political

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¹ MICHEL ROSENFELD, *A PLURALIST THEORY OF CONSTITUTIONAL JUSTICE* 16 (2022) (“But given that the main focus of this book will be on whether it is possible to establish a cogent and persuasive basis of legitimation and justification for contemporary liberal constitutionalism . . .”).

communities.² The normative proposal offered by Michel Rosenfeld in his book has numerous strengths. Three of them, which cut across the entirety of his proposal, are particularly noteworthy. On the one hand, the dialogue between theory and practice that guides the construction of the normative proposal is tremendously interesting. For Rosenfeld, liberal constitutionalism must respond to the challenges imposed by contemporary political, economic, and cultural reality. The articulation of theory must therefore be empirically informed. Normative proposals should not be constructed solely on the basis of the demands of political and legal theory.³

On the other hand, comprehensive pluralism is constructed through a critical dialogue with tradition. Rosenfeld both draws on and questions the major contemporary theories of justice and legal philosophy perspectives, including Rawls's liberal egalitarianism,⁴ Derrida's deconstructionism,⁵ Kelsen's positivism,⁶ Critical Legal Studies,⁷ and Kantian deontology.⁸ Rosenfeld takes these theories seriously: he examines them rigorously and critiques them sharply but respectfully.⁹ Finally, Rosenfeld's normative proposal offers a robust defense of the

² *Id.* at 8 (“As it moved forward from its Enlightenment origins, liberal constitutionalism had to mediate between an *ethnos* with its inescapable particular identitarian imprint and a *demos* with its inevitable universal grounding and reach.”); *id.* at 10 (“As simultaneously anchored on an *ethnos* and a *demos*, modern liberal constitutionalism must strive to mediate successfully between the universal, the singular, and the plural.”); *id.* at 15 (“To sum up, liberal constitutionalism aims for an equilibrium between the singular, the plural and the universal as expressed through a working integration between a coherent *demos* and a unifying *ethnos* capable of sustaining a sufficient level of solidarity throughout the relevant constitutional unit.”).

³ *Id.* at 3 (“Actually, pressing questions of distributive justice have also arisen within working liberal constitutional democracies themselves and have often stood in the forefront of public debate. As a dramatic example one can cite recent revelations in the United States to the effect that in the course of the COVID-19 pandemic, the country's billionaires vastly increased their wealth while many formerly employed citizens who lost their livelihood due to the pandemic had to line up for hours to collect food donations. In view of this, the key questions relating to the nexus between the constitution and justice are whether the current seeming increases and exacerbations of distributive injustices are facilitated by liberal constitutional democratic rule or whether they are entirely independent from such rule; and whether liberal constitutionalism can, or ought to be calibrated to promote distributive justice, or at least to thwart or reduce the threats posed by the proliferation of distributive injustices.”); *id.* at 6–7 (“Accordingly, to be in a better position to assess what contemporary liberal democratic constitutions could, or should, address regarding relevant questions of distributive justice it is necessary briefly to outline the principal features and trends that confront present-day encounters between such constitutions and pressing issues of distributive justice.”).

⁴ *Id.* at 167–73.

⁵ *Id.* at 199–202.

⁶ *Id.* at 107–13.

⁷ *Id.* at 140–45.

⁸ *Id.* at 160–66.

⁹ *Id.* at 105–24, 129–51, 160–85, 197–219.

cultural, political, and moral diversity that characterizes contemporary liberal democracies. Rosenfeld offers a theory that seeks to protect the plurality that exists among individuals, groups, and the political community. Liberal constitutionalism should protect the diverse types of pluralism that constitute liberal democracies.¹⁰

Despite these notable strengths, comprehensive pluralism is weakened by the following two pluralistic deficits. These deficits limit the theoretical strength and practical reach of Rosenfeld's normative proposal. The first deficit is a consequence of the insufficiently pluralistic dialogue between theory and practice through which Rosenfeld constructs his theory. I would like to call this the empirical pluralistic deficit. It is caused by the reproduction of questionable discursive and practical patterns of comparative law and politics. The implementation of these discursive patterns, in turn, generates an epistemic injustice that contradicts the central value of Rosenfeld's normative proposal: pluralism. The second deficit is a consequence of the monism to which comprehensive pluralism is actually committed. The normative proposal that Rosenfeld offers privileges a strong concept of individual autonomy that radically limits the space for moral and political diversity that exists in contemporary liberal democracies. The second-order norms that make up comprehensive pluralism demand the radical transformation of the first-order moral norms that shape the moral conceptions with which they coexist. Contrary to its purposes, comprehensive pluralism demands that the moral conceptions that coexist in a liberal democracy conform to this strong concept of individual autonomy. It also requires that conflicts between conceptions of the good be resolved in favor of autonomy. I would like to call this the theoretical pluralistic deficit. In the following two Parts I will present and substantiate these two pluralistic deficits that weaken comprehensive pluralism.

I. THE EMPIRICAL DEFICIT: LEGAL BARBARIANS AND EPISTEMIC JUSTICE

Comprehensive pluralism is a consequence of the dialogue between theory and practice. Rosenfeld believes that theory must be informed by practice and practice must be guided by theory.¹¹ Comprehensive

¹⁰ *Id.* at 228–29.

¹¹ *Id.* at 6–7 (“What distributive justice requires or what any of its above highlighted three dimensions command are, and have been, highly controverted subjects over which philosophers, judges, lawyers, and politicians have long very much disagreed. Accordingly, to be in a better position to assess what contemporary liberal democratic constitutions could, or should, address regarding relevant questions of distributive justice it is necessary briefly to outline the principal features and trends that confront present-day encounters between such constitutions and pressing issues of distributive justice.”).

pluralism, as a normative theory of liberal constitutionalism, must therefore respond not only to the challenges generated by moral, political, and legal theory, logic, or rhetoric. It must also respond to the problems that weaken or challenge contemporary liberal democracies. Theory must be articulated in such a way that it can offer useful conceptual tools for the practice of the political communities it seeks to regulate. Rosenfeld considers these problems to be, principally, the following: economic, racial, and ethnic inequalities caused by globalization; terrorism; the alienation that citizens feel with regard to the national and international law that regulates them; and the health inequalities caused by the pandemic.¹² Rosenfeld also points out that these practical problems intersect with some theoretical problems, primarily that liberal constitutionalism originating in the U.S. and French revolutions has been structured around individual rights and, therefore, has been little concerned with the problems of redistribution that legal instruments such as social and economic rights are intended to solve.¹³

The challenges Rosenfeld describes and interprets are central to the life of contemporary liberal democracies. It is problematic, however, that the empirical information underpinning the descriptions and interpretations of these challenges comes, in its vast majority, from the liberal democracies of the Global North. In the book, references to the experiences of Global South liberal democracies are marginal, amounting to one or two references to the constitutional courts of Colombia and South Africa.¹⁴ This way of empirically supporting the theory can be interpreted in the following two ways: On one hand, we could argue that the empirical information Rosenfeld offers in his book is really only meant to *illustrate* some of the problems faced by contemporary liberal democracies. We could also argue that Rosenfeld, like all authors, has limited knowledge of world political realities. The examples Rosenfeld presents in his book are, therefore, taken from the regions or countries he knows best: Western Europe and the United States. However, if we accept this interpretation, we should conclude that comprehensive pluralism is not really constructed through a dialogue between theory and practice. Rather, this theory attempts to dialogue with the intellectual tradition within which it is embedded, to respond to the conceptual challenges this tradition generates, and to offer as persuasive an interpretation as possible of the values to which it is committed, including pluralism, autonomy, and equality. This understanding of the argumentative move, however, would generate a contradiction between the purposes that

¹² See generally *id.* at 2, 19–20, 31–102.

¹³ *Id.* at 1–5, 9, 65–102.

¹⁴ *Id.* at 76, 80–81, 87, 144.

Rosenfeld has and the way in which he materializes these purposes. This does not seem to be a desirable interpretation of his work.

On the other hand, we could argue that, although the empirical information Rosenfeld offers in the book refers primarily to the liberal democracies of the Global North, this information describes problems that all liberal democracies in the world face today. Thus, although Rosenfeld describes terrorism as a phenomenon associated primarily with radical Islam or racial and ethnic inequalities caused by globalization as a phenomenon caused predominantly by African or Middle Eastern immigration to Western Europe,¹⁵ terrorism and immigration are issues that all liberal democracies in the world confront nowadays. This interpretation would also point out that the global problems Rosenfeld describes are the ones that actually contribute to theory building. Given the limited knowledge that all authors have about political reality, these global problems are filled with detailed information from the regions of the world that Rosenfeld knows best.

This interpretation takes the purposes of the book seriously and offers a coherent reading of the relationship between these purposes and the means by which they are realized. However, this interpretation generates the following two problems that weaken comprehensive pluralism: the reproduction of questionable traditional patterns of comparative law and politics¹⁶ and an epistemic injustice.¹⁷ These problems are rooted in the particular way in which Rosenfeld constructs his theory through a dialogue, primarily, with the practice of liberal democracies in the Global North. This form of argumentation obscures the ways in which the global problems Rosenfeld describes materialize in the liberal democracies of the Global South. Thus, for example, the challenges that terrorism generates for much of the liberal democracies of the Global South have nothing to do with radical Islam or radical Islam emerging and acting from abroad. Rather, they have to do with internal armed conflicts that originate in political differences, such as the conflict between the Colombian State and the National Liberation Army or the dissidences of the Revolutionary Armed Forces of Colombia and the conflict between the Mexican State and the Zapatista Army of National Liberation;¹⁸ state terrorism operating in countries such as Pakistan,

¹⁵ *Id.* at 89–98.

¹⁶ See generally DANIEL BONILLA MALDONADO, *LEGAL BARBARIANS: IDENTITY, MODERN COMPARATIVE LAW AND THE GLOBAL SOUTH* (2021).

¹⁷ See generally MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* (2007).

¹⁸ See generally Daniel Bonilla Maldonado, *Beyond the State: Can State Law Survive in the Twenty-First Century?*, in *THE CAMBRIDGE HISTORY OF LATIN AMERICAN LAW IN GLOBAL PERSPECTIVE* 513 (Thomas Duve & Tamar Herzog eds., 2024).

Israel, or Sudan;¹⁹ or the national Islamist movements that in countries such as Nigeria intertwine their religious and political aspirations with internal economic, cultural, and historical issues.²⁰

Likewise, one of the most complex and vast immigration processes of the last decades, the migration from Venezuela, does not generate the racial or religious problems generated by the African or Middle Eastern immigration to Western Europe to which Rosenfeld refers profusely. The tensions generated by the immigration of the approximately seven million Venezuelans to other Latin American countries have nothing to do with race, religion, or language.²¹ The Venezuelans who have immigrated to countries such as Colombia, Peru, Argentina, or Chile are mainly Mestizo or white, Spanish speaking and Christian, as are most of the inhabitants of the Latin American countries that have received them.²² Finally, to continue with the examples, the levels and forms of poverty or inequality experienced in the countries of the Global South are quite different from those experienced in the Global North. The levels of extreme poverty in countries such as South Africa or India are quantitatively and qualitatively different from those in the Global North: the poverty levels are much higher and are partly related to factors such as religion, castes in India, or to the consequences of a formal legal and political system of discrimination, apartheid, which do not exist in the Global North.²³

Similarly, the way Rosenfeld constructs his theory excludes some problems that are central to the liberal democracies of the Global South but have not been relevant to those of the Global North. The main problem that Rosenfeld obscures is that of (neo)imperialism and

¹⁹ CONTEMPORARY STATE TERRORISM: THEORY AND PRACTICE (Richard Jackson, Eamon Murphy & Scott Poynting eds., 2010).

²⁰ See Abimbola O. Adesoji, *Islamic Social Movements and Political Unrest in Nigerian History*, in THE OXFORD HANDBOOK OF NIGERIAN POLITICS 567 (A. Carl Levan, and Patrick Ukata eds., 2018).

²¹ See Mauricia John, *Venezuelan Economic Crisis: Crossing Latin American and Caribbean Borders*, 8 MIGRATION & DEV. 437 (2018).

²² For information on the number of persons that have left Venezuela in recent years, see Marco Arena, Emilio Fernandez Corugedo, Jaime Guajardo & Juan Francisco Yopez, *Venezuela's Migrants Bring Economic Opportunity to Latin America*, INT'L MONETARY FUND (Dec. 7, 2022), <https://www.imf.org/en/News/Articles/2022/12/06/cf-venezuelas-migrants-bring-economic-opportunity-to-latin-america#:~:text=More%20than%207%20million%20Venezuelans,to%20meet%20their%20basic%20needs> [<https://perma.cc/A4FY-3L2F>]. For information on the Venezuelan migration crisis, see ROGER HOSEIN, ANTHONY GONZALES, BHOENDRADATT TEWARIE & REBECCA GOOKOOL-BOSLAND, ECONOMIC DEVELOPMENT IMPLICATIONS OF THE VENEZUELAN MIGRANT CRISIS 1–38 (2010).

²³ Daniel Bonilla Maldonado, *Introduction: Toward a Constitutionalism of the Global South*, in CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA 1 (Daniel Bonilla Maldonado ed., 2013).

(neo)colonialism. Despite the notable differences among the liberal democracies that make up the Global South, they all share a colonial past and a neocolonial present.²⁴ This is a problem that affects issues central to any contemporary liberal democracy in the Global South, from matters related to the definition of borders to the legal capacity to control the economic activities of multinational corporations or the influence that these corporations have on national political affairs; from the construction of legal systems through more or less imposed legal transplants coming from the legal systems of the Global North, to the implicit or explicit, direct or indirect, political and economic influence of the governments of the liberal democracies of the Global North on the governments of the liberal democracies of the Global South; and from the explicit or implicit, direct or indirect, military presence of the Global North on the Global South to the impacts that the war on drugs or the war on terrorism defined and promoted by the Global North have on the Global South.²⁵

The flip side of the exclusion of some problems that are common in the Global South but are not common in the Global North is the inclusion of problems that are relevant to a small number of liberal democracies in the Global North. These are not global problems that have local nuances. Rosenfeld mentions several times the relevance of the discussion on whether liberal constitutionalism can recognize rights other than individual rights. He also highlights the tensions between this constitutional tradition and social, economic, and cultural rights.²⁶ This argument contrasts markedly with the fact that most of the world's liberal constitutions recognize some social, economic, or cultural rights.²⁷ The conceptual concern, therefore, seems to have no practical relevance for most liberal democracies around the globe. The conceptual problem,

²⁴ Philipp Dann, Michael Riegner & Maxim Bönnemann, *The Southern Turn in Comparative Constitutional Law: An Introduction*, in *THE GLOBAL SOUTH AND COMPARATIVE CONSTITUTIONAL LAW* 1, 5–7 (Philipp Dann, Michael Riegner & Maxim Bönnemann eds., 2020).

²⁵ *Id.* at 15–30.

²⁶ ROSENFELD, *supra* note 1, at 1–2; *id.* at 3 (“One may well think that the incorporation of social welfare rights in several contemporary liberal constitutions provides an at least partial affirmative answer to the second question raised. But, on closer consideration, and as will be more fully discussed in Chapter 2, there are several objections both on philosophical grounds and on those of constitutional theory and practice against the incorporation of social welfare rights within liberal constitutions. According to these objections, social welfare benefits do not fit adequately within the right/remedy framework that has worked well for traditional liberal constitutional rights, such as those that afford protection to liberty, property, privacy, and non-discrimination. Although, as we shall see, these objections are far from conclusive, I propose to launch this book’s inquiry from a standpoint of complete neutrality regarding the right answers to the two key questions posed.”).

²⁷ Courtney Jung, Ran Hirschl & Evan Rosevear, *Economic and Social Rights in National Constitutions*, 62 *AM. J. COMPAR. L.* 1043, 1044 (2015).

moreover, has been solved by the political and legal practice of these political communities. The courts, politicians, and scholars of these liberal democracies peacefully accept that liberal constitutionalism is compatible with social and economic rights. This does not mean, of course, that there are no important interpretative problems about the interactions between individual rights and economic, social, and cultural rights, or about their enforcement, for example. It does mean, however, that the concerns of the U.S. legal and political community, which does not recognize any economic, social, and cultural rights in its constitution, should not be seen as a problem that afflicts liberal democracies around the globe and that should be central to the articulation of a universalist normative theory of liberal constitutionalism.

We could counterargue that comprehensive pluralism is a theory that has a high degree of abstraction and is committed to a flexible and contextual application of its categories. Consequently, the theory could be adapted to include and resolve empirical problems that were not considered in its articulation or to address the distinct ways in which some global problems materialize in the Global South. This counterargument, however, misses the mark. If theory is empirically informed, then theory has built into its structures ways of understanding what is relevant, as well as the ways in which that which is relevant is to be interpreted and confronted. To the extent that comprehensive pluralism does not consider some problems that are peculiar to the liberal democracies of the Global South, its conceptual structures would not have the capacity to describe, interpret, and resolve them appropriately. They would simply be off the conceptual radar of comprehensive pluralism. In the same way, the theory would tend to understand, evaluate, and solve global problems that have different local materializations following the forms in which they are concretized in the Global North. It should also be reiterated that comprehensive pluralism is presented as a universalist theory, that is, as a theory that would be applicable to any liberal democracy in the world.²⁸

I believe that an analogy with some of the discussions that have taken place within feminism could vividly illustrate the problem weakening comprehensive pluralism. Black and Latina feminists have criticized white and upper-middle class feminists because they construct their normative theories from their life experiences, although they present them as the experiences of all women. Some white feminists have responded that all women, no matter their skin color, are discriminated against in patriarchal societies and, therefore, that their right to equality is not generally protected in such societies. Mainstream feminist

²⁸ ROSENFELD, *supra* note 1, at 16, 20.

normative theory would therefore also apply to Black or Latina women.²⁹ Some white feminists have added that equality can be interpreted in a variety of forms and that, consequently, it can be interpreted in ways that respond to the needs or interests of nonwhite women. Black and Hispanic feminists have responded that this is not enough. There is a need to change the structures of theory, not just its margins or its application, so that its backbone considers the life experiences of women of color (and poor white women), for example, considering the intersectional nature of their identities.³⁰

A. *The Legal Barbarians: Traditional Comparative Law and Politics*

One of the sources of the empirical pluralistic deficit that undermines comprehensive pluralism is the reproduction of dominant discursive and practical patterns of comparative law and politics. Historically, comparing these two disciplines has meant describing and analyzing the differences and similarities between a few countries in the Global North, usually the United States, Great Britain, Germany, and France.³¹ In comparative law, this practice has been grounded by appealing in two ways to legal families, one of the main products of the discipline in the twentieth century. On one hand, mainstream comparative law considers that the only relevant legal families are the civil law and the common law. Dominant comparative law considers that the Hindu, Islamic, and Jewish traditions, among others, are not really legal traditions but religious or political ones.³² The only true law is Western positive law, which is interpreted as an autonomous or semiautonomous

²⁹ See KYLA SCHULLER, *THE TROUBLE WITH WHITE WOMEN: A COUNTERHISTORY OF FEMINISM* 1–12 (2023).

³⁰ Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1242 (1991).

³¹ BONILLA MALDONADO, *supra* note 16, at 100–32.

³² See, e.g., René David, *On the Concept of “Western” Law*, 52 *U. CIN. L. REV.* 126, 131 n.8 (1983) (“Islamic law can be isolated only artificially from the theology and morality of Islam, with which it is blended in a general science of the rights and duties of man (*fiqh*). . . . [I]t proposes in reality the ideal of a society firmly established on a base other than law.”); RENÉ DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 27–28 (1985) (“The Muslim world, India, the Far East and Africa are far from having adhered to it without reservation. These countries remain very largely faithful to philosophies in which the place and function of law are very different from what they are in the West. . . . In non-western societies the governing social principles to which reference is made are of two types. On the one hand law is fully recognised as being of great value but the law itself is framed in a different concept than it is in the West; on the other, the very notion of law is rejected, and social relations are governed by other extra-legal means. The first view is that of Muslim and Hindu societies, while the latter is that adopted in countries of the Far East and large parts of Africa and Malagasy.”).

normative system (although this argument forgets the close relations between liberalism and Christianity).³³

On the other hand, the dominant practice in comparative law appeals to the difference between parent legal systems and child legal systems in each of the Western legal traditions.³⁴ Dominant comparative law suggests that it is epistemologically and morally justified to study only the parent systems of the most important legal traditions of the globe. These systems are those of the United States and Great Britain for the common law tradition and those of Germany and France for the civil law tradition. Since these legal systems are the source of the only relevant legal families, it would be sufficient to compare these legal orders in order to know the central conceptual structures of the legal families.³⁵ It would not be efficient, and therefore it would not make sense from the point of view of a cost-benefit analysis, to analyze the legal systems of other countries, particularly those of the Global South. For mainstream comparative law, these legal systems merely reproduce the legal styles articulated by the mother systems of the most powerful liberal democracies of the Global North.³⁶

The argument of mainstream comparative political theory would be analogous. The only stable and prosperous political communities would be the liberal democracies of the Global North. These political communities, moreover, would be the sole source of the normative political theory that justifies them and of the political practices that keep them in operation.³⁷ Consequently, to understand the theory and practice of liberal democracies it would be sufficient to describe, analyze, and evaluate the realities of the major liberal democracies of the Global North, fundamentally, Germany, France, the United States, and Great Britain. The liberal democracies of the Global South, as institutionally weak and conceptually mimetic political communities, should not be considered relevant objects of study. What happens in the liberal democracies of the Global North, theoretically and practically, will be reproduced in the liberal democracies of the Global South. The problems that afflict the liberal democracies of the Global South or the way some global problems are concretized in these polities would be irrelevant for comparative political theory. These experiences are generally interpreted by mainstream comparative politics as idiosyncratic, exceptional, or not

³³ See DAVID & BRIERLEY, *supra* note 32, at 27–28.

³⁴ Mariana Pargendler, *The Rise and Decline of Legal Families*, 60 AM. J. COMPAR. L. 1043, 1069 (2012).

³⁵ See generally *id.*

³⁶ *Id.*

³⁷ Anna Kuteleva, *A Critical Survey of the Field of Comparative Politics*, RUDN J. POL. SCI. 93–94, 96–97 (2015).

significant for political theory. The difference in category, not degree, between well-organized societies and societies that are not well-organized, a distinction that was paradigmatically articulated by John Rawls, underpins and conveys this type of argument within traditional comparative politics.³⁸

We could counterargue these objections in two ways. First, one could point out, again, that all authors have limited knowledge with respect to their object of study. Rosenfeld does not reproduce the discursive patterns of comparative law and politics. What Rosenfeld does is to present empirical information from the liberal democracies he knows best, those with which he is familiar. This argument would point out that it is inevitable, or inescapable in practice, for an author from the Global North to articulate his theory from the experiences of liberal democracies in the Global North just as it would be inevitable or inescapable in practice for an author from the Global South to ground her theory in the experiences of liberal democracies in the Global South. These are the conceptual geographies in which these scholars are immersed and, therefore, the ones with which they are most familiar. I do not believe, however, that this is a form of theory building that is inevitable or that would be avoided only by paying a high personal cost, that is, one in which the scholar would have to invest considerable and unnecessary amounts of her time, energy, and money. In my interpretation, this would be a decision, not a necessity or an excessive burden imposed on the political or legal theorist. If we contrast this practice, common among legal and political theorists in the Global North, with the practice of legal and political theorists in the Global South we will see why this is so.

The works of Global South theorists very often include references to both Global North and Global South legal and political theories and practices.³⁹ This epistemological attitude would be, in part, a consequence of the power imbalance between the theoretical communities of the Global North and the Global South. Southern authors may have internalized the argument that their political and legal communities are not strong contexts for knowledge creation, or it may be a consequence of the theoretical cosmopolitanism generated by the weak position they occupy in global epistemic communities. In order to enter international academic networks, it is inevitable that they are aware of, and refer to, the

³⁸ JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 8–9 (2001).

³⁹ See, e.g., Carlos Santiago Nino, *Transition to Democracy, Corporation and Constitutional Reform in Latin America*, 44 U. MIA. L. REV. 129 (1989); Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD. 107 (1985); B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L CMTY. L. REV. 3 (2006).

theories and practices of the Global North. It may also be a strategy for authors to avoid their texts being even less read in the Global North and generating less interest among their colleagues in the Global South. This, in contrast, is not a demand that Global North authors commonly make to themselves or that is usually made to them by the epistemic communities in the Global South with which they interact.⁴⁰ Even when their theories have universalist ambitions or are presented in the academic networks of the Global South with normative pretensions, it is not necessary that Global North scholars refer to the experiences of the countries of the South that they seek to regulate with their normative theories or with which they interact in their academic visits to Africa, Latin America, or Asia. I wonder then why, if Global South scholars routinely know and refer to Global North authors and practices, Global North authors do not know and refer to Global South authors and practices, when they have far more scarce resources than their Southern colleagues.

Second, one could also counterargue that comprehensive pluralism is a theory that arises and should be applied only in the liberal democracies of the Global North. The dialogue between theory and practice through which the theory is articulated is a dialogue between the political and legal theory of the Global North and the political and legal experiences of the Global North. This would be an entirely legitimate alternative: normative theories need not be universalist. However, this counterargument is unpersuasive as far as comprehensive pluralism has such aspirations. Rosenfeld believes that his normative theory of liberal constitutionalism can (and should) be applied in all liberal democracies around the globe.⁴¹

B. *Epistemic Justice and Participation*

A problematic consequence of the pluralistic empirical deficit is that it generates an epistemic injustice.⁴² The voices that should be heard in the building of the theory are not all heard. If comprehensive pluralism is a universalist theory, and if it is a theory that is constructed through a dialogue with practice, the empirical issues that inform the theory should be those of all the political communities it purports to regulate. The epistemic injustice that comprehensive pluralism then creates is one

⁴⁰ See generally Daniel Bonilla Maldonado, *The Political Economy of Legal Knowledge*, in CONSTITUTIONALISM IN THE AMERICAS 29 (Colin Crawford & Daniel Bonilla Maldonado eds., 2018).

⁴¹ ROSENFELD, *supra* note 1, at 16, 20.

⁴² See generally FRICKER, *supra* note 11.

related to participation. The normative conceptual structures that shape the theory should be articulated considering the perspectives of all members of the set of collective subjects it seeks to control. Even if we accept that the empirical problems Rosenfeld uses to construct his theory are global issues or that the theory can be interpreted in a way that accounts for the problems (or nuances of problems) that were excluded when it was constructed, the epistemic injustice would remain. The voices that were not heard in constructing comprehensive pluralism could have been heard: they were available and taking them into account did not imply excessive costs for its author. It is important to reiterate that this is a cost that researchers from the Global South usually pay in their academic work.

The experiences of all liberal democracies, for comprehensive liberalism, therefore, are not all equal. There would be some that would have more value than others for the construction of political and legal knowledge. The construction of comprehensive pluralism, thus, would go against the central value it defends as a normative theory of liberal constitutionalism: pluralism. Only the experiences of a set of the universe that Rosenfeld should consider for articulating the theory are effectively considered to do so. An example might help me to strengthen my argument. In private law, the standard of the reasonable person (no longer that of the reasonable man or the *pater familias*) is widely accepted in determining what is required of a consumer or producer of goods or services.⁴³ The judge, a man, who interprets it may consider the experiences of men and women in a particular society to meet this objective. However, probably inertially, he might also interpret this category only from the experiences of men—a likely argumentative move in a patriarchal society.⁴⁴ The consequence of this way of constructing the legal category would be that the experience of about half of that society would not be considered in meeting this objective. The judge could argue that the category “reasonable person” is a general one and that, therefore, when a specific case involves a woman, the interpreter could (and should) reinterpret the category to consider the experience of women. He could also argue that the experiences of men and women are quite similar and that, therefore, there would be no relevant differences if only men are taken as the empirical source of the category. Finally, the judge could argue that as a man he knows best the experiences of men and that knowing the experiences of women would involve an excessive

⁴³ Margo Schlanger, *Gender Matters: Teaching a Reasonable Woman Standard in Personal Injury Law*, 45 ST. LOUIS U. L.J. 769, 769–70, 770 n.3 (2001).

⁴⁴ *Id.*

investment of time and energy, resources that are not available to him as a public official.

Now, if we take seriously the idea that theory is built through a dialogue with practice, conceptual structures should reflect, should have the marks of the empirical situations that nourish them. The reasonable person would then already be the reasonable man. Even if it were to be applied differently to a woman, the theory would already be intertwined with the male perspective. This situation, moreover, would be consolidated, until it became naturalized, by the continuous use of the category in the form in which it was originally conceived. Feelings or care, for example, would then be excluded from the outset as possible contents of the category "reasonable person." Values, practices, and ideas historically or normatively associated with women would consequently fall outside the category "reasonable person." The problem with the judge's argumentative move, then, would not only be moral or legal (it violates the principle of equality) but would be an epistemological problem (it constructs legal knowledge without considering all the participants that it should consider). The problem, in short, would not only be who and what the judge (or comprehensive pluralism) leaves out, but also what he does and what he marginalizes.

II. THEORETICAL DEFICIT: INDIVIDUAL AUTONOMY AND COMPREHENSIVE PLURALISM

Comprehensive pluralism connects liberal constitutionalism with justice.⁴⁵ Rosenfeld considers that all liberal democracies should satisfy minimum standards of justice.⁴⁶ These standards are related to the three dimensions that make up distributive justice: redistribution, recognition, and representation.⁴⁷ Liberal democracies should take these three categories into account when attempting to balance ethnos and demos, as well as when attempting to balance the demands of the singular, the plural, and the universal.⁴⁸ These minimum standards of justice add up to a defense of what Rosenfeld calls the four pillars of any liberal democracy: separation of powers, individual rights, free and continuous

⁴⁵ ROSENFELD, *supra* note **Error! Bookmark not defined.**, at 21.

⁴⁶ *Id.* at 20 ("I start from the constitution as framed by the ideal of liberal constitutionalism and propose to defend the thesis that the justification and legitimation of any constitution depends on it being capable of dispensing a certain (yet undefined) minimum of (distributive) justice to which I refer as that constitution's 'justice essentials.'").

⁴⁷ *Id.* at 4.

⁴⁸ *Id.* at 15–16.

democratic processes, and the rule of law.⁴⁹ Rosenfeld further argues that, when these pillars of liberal constitutionalism intersect with comprehensive pluralism, liberal democracies could more effectively and sustainably protect the diversity that constitutes them.⁵⁰ Pluralism, therefore, is the central value defended by Rosenfeld's normative theory.⁵¹

Rosenfeld argues that comprehensive pluralism is a conception of the good that is in competition with other conceptions of the good that exist in a liberal democracy.⁵² He also argues that his normative theory is a set of second-order norms that regulates the first-order set of norms of the competing conceptions of the good. The theory operates in two distinct moments and forms. In the first moment, comprehensive pluralism equates all conceptions of the good that exist in a liberal political community. None has priority over the others.⁵³ In the second moment, comprehensive pluralism demands that these conceptions of the good conform to the demands of its normative theory—demands that would be thin, that would have the central aim of maintaining plurality.⁵⁴ Comprehensive pluralism as a conception of the good would have legal and political consequences. There would be no discontinuity between the good and the just. The sphere of morality would have close communicating vessels with the sphere of justice.

Comprehensive pluralism, similarly, considers that we should solve the tensions between *ethnos* and *demos*, as well as those between the singular, the plural, and the universal, in a context-sensitive and flexible manner.⁵⁵ The normative theory that Rosenfeld articulates consciously avoids offering an a priori solution to all these tensions. Comprehensive

⁴⁹ *Id.* at 1.

⁵⁰ *Id.* at 228 (“I pursue an alternative that starts from the middle, namely from the plural, and I endeavor to make the case that pluralism is better suited than its rivals to provide an adequate grounding and a sufficient delimitation of the justice essentials that ought to be incorporated into liberal constitutions. In this chapter, I inquire into the kind of pluralism that seems best suited for the task at hand, namely what I have referred to in previous work as ‘comprehensive pluralism,’ and which is characterized by a normative commitment to pluralism all the way up and all the way down.” (citation omitted) (citing MICHEL ROSENFELD, *JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS* (1998))).

⁵¹ *Id.* at 230.

⁵² *Id.* at 228 (“In other words, as a conception of the good in its own right, comprehensive pluralism prescribes a set of fixed norms that are not susceptible of compromise. But as a unique conception of the good that seeks to accommodate as many other conceptions of the good as possible—and that would, in fact, be rendered meaningless if no plurality of such conceptions were in play—comprehensive pluralism commands as extensive as possible a flexibility toward, and openness to, alternative conceptions of the good; that is, so long as the latter prove *compatible* though not necessarily *consistent* with comprehensive pluralism by not materially trampling on its bare minimum.”).

⁵³ *Id.* at 235.

⁵⁴ *Id.* at 235–37.

⁵⁵ *Id.* at 228–29.

pluralism promotes that the conflicts between thesis and antithesis achieve a synthesis that considers the situations in which they emerge. This process, which is nourished by an interpretation of the Hegelian dialectic, would have the possibility of achieving an adequate balance between the conflicting conceptions of the good. The synthesis does not totally subordinate the thesis to the antithesis or vice versa.⁵⁶ The interpreter, on the contrary, must articulate a solution that allows the two perspectives to coexist as much as possible, even if one must be privileged over the other to resolve the conflict.⁵⁷ The interpreter must consider the values promoted by comprehensive pluralism to solve the problem; without having these values as a guide she would act capriciously or blindly.⁵⁸ The interpreter, moreover, must use tools such as reversible reciprocity: the parties defending opposing conceptions of the good in a conflict must try to imagine the way their adversaries understand it.⁵⁹ By doing so, each party could comprehend the relevance of the issue for the others and imagine a reasonable solution for all involved.⁶⁰

Rosenfeld considers that the goals, premises, and conceptual means defended by comprehensive pluralism would prevent it from falling into the monism or relativism that weaken other moral theories or theories of justice.⁶¹ Rosenfeld considers that his normative theory has the virtue of including elements of these two extremes. The second-order norms that constitute comprehensive pluralism would assume a relativistic position when they first interact with other conceptions of the good (they would equalize them, and none would be superior to the others).⁶² Then, however, comprehensive pluralism would require that the other conceptions of the good be transformed so that the pluralism of the political community could be protected (the first-order norms would be modified by the second-order norms).⁶³ In the first moment, comprehensive pluralism breaks the hierarchies between competing conceptions of the good in a liberal democracy. In the second moment, comprehensive pluralism imposes itself on other conceptions of the good for the sole purpose of protecting the moral diversity of the political community.

I share the central goal pursued by comprehensive pluralism. A liberal democracy should protect as much as it can the moral diversity

⁵⁶ *Id.* at 237–38.

⁵⁷ *Id.* at 238.

⁵⁸ *Id.* at 236.

⁵⁹ *Id.* at 237.

⁶⁰ *Id.* at 237.

⁶¹ *Id.* at 231.

⁶² *Id.* at 233.

⁶³ *Id.* at 234.

that constitutes it. However, I do not believe that comprehensive pluralism can satisfactorily fulfill its goal. The normative theory that Rosenfeld defends is committed to a strong concept of individual autonomy that is prioritized internally (*vis-à-vis* the other values that comprehensive pluralism defends) and imposed externally (on the other conceptions of the good that exist in the political community). Consequently, comprehensive pluralism would leave a remarkably limited space for diversity within the liberal democracies it claims to regulate. All conceptions of the good would have to be modified to become compatible with this concept of individual autonomy.

Comprehensive pluralism does not present itself as a theory that can be justified in an absolute way, it does not own the moral truth that must be accepted by any autonomous and rational individual who is in a particular ideal situation (Rawls's original position, for example)⁶⁴ or who follows a specific procedure for the construction of moral norms (Habermas's communicative action, for example).⁶⁵ This is a significant difference with respect to rival normative theories. In practice, however, the conceptual commitments of comprehensive pluralism do not allow it to deliver on its promises to accept and protect greater levels of moral diversity than its rival theories.

Comprehensive pluralism argues that diversity must be protected for three reasons. First, because it allows individuals to choose, modify, and materialize their good life projects.⁶⁶ The existence of a plurality of conceptions of the good in the political community allows the individual to self-realize. The autonomous construction of identity depends on the individual having options, being able to evaluate them, as well as choosing those that satisfy him morally.⁶⁷ Second, because it allows for the creation and reproduction of a normative aesthetic; that is, it allows for a diversity of perspectives on life and society.⁶⁸ Third, because it allows conflicts between different conceptions of the good to be resolved in such a way that they can reasonably coexist.⁶⁹ Comprehensive pluralism does not require the elimination of rival conceptions of the good (unless they

⁶⁴ See *supra* note 38, at 8–9.

⁶⁵ *Id.* at 239. On Rosenfeld's analysis of Habermas, see *id.* at 174–85.

⁶⁶ *Id.* at 239 (“The case for comprehensive pluralism as the best means to the good and to the promotion of justice—which can made generally, but which will be largely limited here to the constitution and to its justice essentials—is essentially threefold. Comprehensive pluralism best promotes and sustains enrichment of the self; it is uniquely positioned to foster what I have termed ‘a superior normative aesthetics’; and it provides for the best possible mutual accommodation among proponents of different perspectives and conceptions of the good.”).

⁶⁷ *Id.* at 239–40.

⁶⁸ *Id.* at 241.

⁶⁹ *Id.* at 244.

are incompatible with pluralism) and requires that moral conflicts be resolved contextually and in a balanced way.⁷⁰

We can make explicit comprehensive pluralism's commitment to a strong concept of individual autonomy that radically limits plurality by the following three intersecting arguments. On the one hand, to avoid a circular defense of pluralism (pluralism must be protected because pluralism is valuable), Rosenfeld must show that pluralism has value because it serves to safeguard other important goods. Rosenfeld offers the three arguments I enunciated above to accomplish this goal: self-realization of the subject, normative aesthetics, and proper harmonization of conceptions of the good when they conflict. I think, however, that the latter two arguments are really instruments to enable the materialization of the first.

Normative aesthetics is valuable because it recognizes and protects the arts, which in turn recognizes and protects the diverse options for understanding individual and collective life that exist (or could exist) in a liberal democracy. Aesthetics intersects with morality. Now, all this has value because it allows the subject to have alternatives to build, modify, and materialize his good life project. If this were not so, normative plurality would be valuable because it allows plurality to exist; the argument would be circular. Likewise, the harmonization of conflicting moral projects allows them to continue to exist as options for the subject who considers them valuable (and for those who in the future might consider them as such). Allowing the coexistence of the greatest possible number of conceptions of the good has value because it allows the individual to exercise his autonomy, that is, to choose, maintain, or change his moral commitments. Again, if this were not so, the argument would be circular: harmonizing the plurality of conceptions of the good would be valuable because it maintains the plurality of conceptions of the good.

On the other hand, the commitment of comprehensive pluralism to a strong concept of individual autonomy is related to the relationship between pluralism and autonomy. Autonomy is the cause of the plurality of conceptions of the good. The diverse ways of understanding what it means to live a good life is a consequence of the moral imagination of the subjects. Good life projects, unless one defends some form of moral objectivism, are an effect of human creativity. In the same way, plurality becomes a tool that empowers the moral imagination of the subjects (the combination of or opposition to existing options can generate new moral alternatives) and makes possible exercising autonomy (one can only choose if there are options that can be chosen). The commitment of

⁷⁰ *Id.*

comprehensive pluralism to plurality is, therefore, a commitment to autonomy. Autonomy is the true supreme value of comprehensive pluralism.

Finally, the basic unit of comprehensive pluralism is the individual. The primary form through which plurality manifests itself is the subject. Groups are composed of individuals, as is the political community. Consequently, when comprehensive pluralism attempts to balance the singular, the plural, and the universal, it has no choice but to privilege the subject. Comprehensive pluralism cannot avoid the triumph—the prioritization, the prevalence—of the individual. Why should we prioritize the group or a universal manifestation of plurality if plurality is always an effect of autonomy? The individual, moreover, always has the capacity to create new conceptions of the good; he can continue to increase the levels of pluralism that exist in the world. The individual is the original source of plurality. The group and the political community are his creation.

We can see the way in which comprehensive pluralism is bound to subordinate the group and the political community when it conflicts with the subject in Rosenfeld's analysis of *Wisconsin v. Yoder*,⁷¹ as well as in his answer to the question of compulsory civics classes in liberal democracies.⁷² For Rosenfeld it is incorrect for a cultural minority to decide that minors in the community should not fully comply with the number of years of mandatory education imposed by the state (twelve years as opposed to the eight years that the minority accepts). To do so would imply that the subject does not acquire the tools to be able to self-realize, that is, to choose, modify, and materialize his good life projects. The group does not want its members to be exposed to realities it considers immoral. The group needs its members to reproduce its first-order rules to continue to exist. The group demands to be able to educate its new generations following the conceptions of the good life to which it is committed. In a context where the difference in power between the majority and the minority is notable, this is the only option available for survival. However, Rosenfeld considers that the price the individual would have to pay would be too high. The primary manifestation of diversity, the individual, should be prioritized over a second-level manifestation of plurality (the group, which is a creation of the subject).⁷³ Paradoxically, what Rosenfeld does not share in the *Yoder* case is what he demands the universal to do in the hypothetical about mandatory civics classes. Liberal democracies based on comprehensive pluralism could not

⁷¹ *Id.* at 251 (discussing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

⁷² *Id.* at 271.

⁷³ *Id.* at 251.

continue to exist if public education does not include civics classes in which the new generations internalize the values to which this perspective of the good is committed. Civics classes historically have not included only the discussion of the value of pluralism. These classes have included a denser discussion of all the values that shape a liberal democracy. Rosenfeld, however, argues that these classes should teach only the “rudiments of civic virtues” when addressing nonliberal or illiberal minorities.⁷⁴ However, Rosenfeld understands these rudiments as the recognition and internalization of pluralism, which, as I have argued above, would imply the recognition and internalization of individual autonomy. The civics class would thus not be a thin class, but one loaded with dense content that would clash with the group not only on issues related to tolerance. Likewise, presumably, the rudiments of civic virtues would include the four pillars of liberal democracies (separation of powers, fundamental rights, rule of law, and free and continuous democratic processes).⁷⁵ The teaching of these pillars would imply promoting individual autonomy, with which they are conceptually intertwined. For example, the state is a creation of the will of the subjects, individual rights are instruments to protect individual autonomy from the possible arbitrariness of the state, democracy guarantees the protection of the political voice of each individual, and law must always be self-imposed—it should be a decision of the sum of political decisions made by each individual or his representatives.

CONCLUSION

In sum, comprehensive pluralism offers a vigorous foundation for liberal constitutionalism. The dialogue between theory and practice with which Rosenfeld builds his theory, the critical dialogue with tradition, and the strong defense of pluralism are three of its main strengths. Nevertheless, two pluralistic deficits weaken comprehensive pluralism, one empirical and one theoretical. The first reproduces discursive and practical patterns of comparative law and politics and produces an epistemic injustice. The second, given the commitment of comprehensive pluralism to individual autonomy, leaves little room for diversity. The second-order norms that make up this normative proposal demand a transformation of the competing conceptions of the good that would turn them into variations of the former, a paradox for a theory that defends normative pluralism.

⁷⁴ *Id.* at 271.

⁷⁵ *Id.* at 1.