VIII

Decoloniality

On the understanding that coloniality can fairly be regarded as a 'psychoepistemic disorder plaguing modern forms of knowledge to the core', an 'obvious corridor through which knowledge about the [o]ther is transmitted' and through which knowledge is transmitted to the other,[1] I find that a major concern must be addressed within comparative law harbouring even greater significance than any argument in favour of more Vietnam and less Canada or more Kenya and less Germany. Beyond the obvious fact that one also wants more Indonesia and more Nigeria and the possibly less obvious fact that comparative law likewise needs more *ubuntu* (a philosophical term that had a decisive impact on South Africa's Truth and Reconciliation Commission), more *sumak kawsay* (an idea that made its way into the constitutions of Ecuador and Bolivia in 2008 and 2009, respectively), and more Andean *pachamama*,[2] beyond the further fact that the field requires non-Eurocentric critiques of Eurocentrism and of non-Eurocentrism alike, I refer to the epistemic demand consisting in the unravelling of the logic of coloniality that has conspicuously informed law's comparisons, for example, in the guise of universalizing and totalizing claims. Easily traceable to what is plausibly identifiable as the first 'institutional' comparative law monograph, Eduard Gans's multi-volume text

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[1] WB Hallaq, *Restating Orientalism* (Columbia University Press 2018) vii and viii.

[2] For an introduction to these various notions, all pertaining to 'the epistemologies of the South', and for the observation that they are not necessarily to be found in a pristine state, because they may well have been subverted by local political practice, see B de Sousa Santos, *The End of the Cognitive Empire* (Duke University Press 2018) 10. For a detailed treatment of '*ubuntu*', see L Praeg, *A Report on Ubuntu* (KwaZulu-Natal 2014).

on the laws of inheritance,[3] going as far back as Sepúlveda's 1550 argument in Valladolid,[4] 'already at work' in Cartesianism,[5] such contentious contentions have long ago assumed the character of standardized illusions prevalently informing the orthodox comparison of laws.

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I borrow 'coloniality' from Aníbal Quijano, who coined this word as '*colonialidad*' to much acclaim, in order to refer to forms of colonialism that have survived the end of colonization.[6] Now, the deconstruction of coloniality, that is, the edification of decoloniality, allows one to see that instead of universals or totalities, there are, strictly speaking,

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[3] See E Gans, *Das Erbrecht in weltgeschichtlicher Entwicklung*, 4 vols (Scientia 1963 [1824]).

[4] For discussions of the Valladolid disputation, see eg E Andújar, 'Bartolomé de las Casas and Juan Ginés de Sepúlveda: Moral Theology Versus Political Philosophy' in K White (ed), *Hispanic Philosophy in the Age of Discovery* (Catholic University of America Press 1997) 69–87; DR Brunstetter and D Zartner, 'Just War Against Barbarians: Revisiting the Valladolid Debates Between Sepúlveda and Las Casas' (2011) 59 Political Stud 733; F Castilla Urbano, 'The Debate of Valladolid (1550–1551): Background, Discussions, and Results of the Debate Between Juan Ginés de Sepúlveda and Bartolomé de las Casas' in J Tellkamp (ed), *A Companion to Early Modern Spanish Imperial Political and Social Thought* (Brill 2020) 222–51.

[5] WD Mignolo, *The Politics of Decolonial Investigations* (Duke University Press 2021) 470. Mignolo's claim is that '[i]f Descartes arrived at the conclusion "I think, therefore I am", it was precisely because … he just took for granted this: if you feel and know that you are humanitas, you most likely will not be concerned about *where* you do and think – you would assume that you inhabit the universal house of knowledge, the epistemic zero point': WD Mignolo, *The Darker Side of Western Modernity* (Duke University Press 2011) 99.

[6] See A Quijano, 'Colonialidad y modernidad/racionalidad' (1991) 13(29) Perú indígena 11 [on file].

words that project the North Atlantic experience on a universal scale that they themselves helped to create. North Atlantic universals are particulars that have gained a degree of universality, chunks of human history that have become historical standards. They do not describe the world; they offer visions of the world. They appear to refer to things as they exist, but because they are rooted in a particular history, they evoke multiple layers of sensibilities, persuasions, cultural assumptions, and ideological choices tied to that localized history. They come to us loaded with aesthetic and stylistic sensibilities; religious and philosophical persuasions; cultural assumptions ranging from what it means to be a human being to the proper relationship between humans and the natural world; ideological choices ranging from the nature of the political to its possibilities of transformation.[7]

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[7] M-L Trouillot, 'North Atlantic Universals: Analytical Fictions, 1492–1945' (2001) 101(4) South Atlantic Q 839, 847. For a historical conspectus unveiling the geo-historical location of purportedly abstract universals and showing the development of the massive occidental epistemological machine promoting knowledge deemed superior to other knowledges elsewhere on the planet (thus suitably demonized), effectively making the planet into its object, and assuming the warrant of universalization on account of its self-proclaimed ascendancy, see WD Mignolo, 'The Decolonial Option' in WD Mignolo and CE Walsh (eds), *On Decoloniality* (Duke University Press 2018) 153–93. See also Sousa Santos (n 2) 39: 'There is no European universalism; there is rather a European foundational experience that, due to its overriding economic and military power, imposed itself on other foundational experiences existing in the world and thereby granted itself the prerogative of proclaiming its universal validity.' Adde: P Fitzpatrick, *The Mythology of Modern Law* (Routledge 1992) 65. A particularly important illustration of the movement I describe, perhaps the 'master epistemic code', concerns Christian cosmology, which proceeded to displace itself from being a local phenomenon to a would-be universal totality. I quote from Mignolo, 201. Capital constitutes another paramount example of European

Even as Konrad Zweigert and Hein Kötz's orthodox comparatism aspires to 'a unitary concept of justice' harking back to 'natural law',[8] a universalizing and totalizing framework that a practice of comparative law as '*science pure*' would make possible,[9] decoloniality helps one to discern that '[n]othing is less rational, finally, than the pretension that the specific cosmic vision of a particular ethnie should be taken as universal rationality, even if such an ethnie is called Western Europe [or Germany or German legal culture!] because this is actually [to] pretend to impose a provincialism as universalism'.[10] Decoloniality also makes it possible to appreciate that when James Gordley writes that he is 'concerned with what the law [i]s',[11] he is choosing to overlook the fact that '[d]ecolonially speaking, ontologies are cosmologies/epistemic creations': it is epistemology that prescribes ontology, that institutes it.[12] Indeed, '[e]pistemologies are always derived from cosmologies' – '[t]he Big Bang theory of the creation of the

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distension. Without capitalism, Eurocentrism would arguably have unfolded as just another ethnocentrism – hence Partha Chatterjee's insight: 'If there is one great moment that turns the provincial thought of Europe to universal philosophy, the parochial history of Europe to universal history, it is the moment of capital … . It is the narrative of capital that can turn the violence of mercantile trade, war, genocide, conquest and colonialism into a story of universal progress, development, modernization, and freedom': P Chatterjee, *The Nation and Its Fragments* (Princeton University Press 1993) 235.

[8] K Zweigert and H Kötz, *Einführung in die Rechtsvergleichung* (3rd edn, Mohr Siebeck 1996) 3 and 44.

[9] ibid 6.

[10] A Quijano, 'Coloniality and Modernity/Rationality' (2007) 21 Cultural Stud 168, 177.

[11] J Gordley, 'When Is the Use of Foreign Law Possible? A Hard Case: The Protection of Privacy in Europe and the United States' (2007) 67 Louisiana LR 1073, 1081. See also B Markesinis, 'Comparative Law: A Subject in Search of an Audience' (1990) 53 Modern LR 1, 13, where the author writes that '[c]ase law can reveal what the law really is'.

[12] Mignolo (n 7) 135.

universe, for instance, is within Christian cosmology not within Islamic or Chinese cosmologies'.[13] Ultimately, 'ontology is an epistemological concept',[14] which means that there is no law that meaningfully 'is' without an interpretive assignment of 'isness' by someone like Gordley – which means further that the meaningfulness of a law-text, as Gordley states it, is indissociable from an interpretive Gordleyization of the law.[15] In Gordley's account of the French law of '*erreur sur la substance*', there is not the French law of '*erreur sur la substance*' as such, but there is the French law of '*erreur sur la substance*' as Gordley interprets it (no doubt most sophisticatedly). And there can be nothing else.

From a decolonial standpoint, Zweigert, Kötz, and Gordley can readily be shown to be acting as mystifiers. Formulations like 'a unitary concept of justice' or 'the law as it [i]s', for example, or others yet such as 'scientific exactitude',[16] are so many confounding statements, all the more obfuscatory perhaps if they are inscribed in French, thus '*science pure*' or '*école de vérité*' (what could be more bewildering indeed than assertions crafted in French in a German text?).[17] But these phrases effectively 'distrac[t] [one] from the tricks and designs of the enunciator'.[18] (Arguably, they are *meant* so to distract.) Decolonially speaking, however, there cannot be an enunciation

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[13] ibid.

[14] ibid. Indeed, Martin Heidegger acknowledges that even 'the ontological investigation that [he] is … conducting is determined by its historical situation': M Heidegger, *Die Grundprobleme der Phänomenologie* (F-W Von Herrmann ed, Klostermann 2005 [1927]) 31.

[15] cf G Agamben, *Signatura rerum* (Bollati Boringhieri 2008) 7: '[D]octrine can be espousing legitimately only the form of interpretation.'

[16] Zweigert and Kötz (n 8) 44.

[17] ibid 6 and 14. Both expressions appear in French and without italics in the German text.

[18] Mignolo (n 7) 144.

without enculturation, not even Zweigert and Kötz's statements, not even Gordley's pronouncement. Consider Gordley. When he claims that there is 'the law as it [i]s' and that he, Gordley, can tell 'the law as it [i]s' as it is, he has the matter the wrong way around, for '[w]hat *there is* depends on how [h]e ha[s] been programmed to name what [h]e know[s]'.[19] For example, 'no continent named America existed to be discovered' without further ado.[20] And no cultural traces constituting the French statute on religious attire in public schools exist to be discovered without further ado either. Pace positivism, the French statute's meaning 'is' not. Rather, it is the French statute's interpreter who brings the law-text to meaningfulness as he *enacts* the cultural traces haunting the law-text through a phenomenon of encryption.[21] And the interpreter's enactment can only take the form of an encultured assertion, because the enactment ascribing meaning to the statute is *the interpreter's* enactment, and no interpreter exists beyond culture (no interpreter exists 'in the air').

Decoloniality, as 'it aims at altering the principles and assumptions of knowledge creation, transformation, and dissemination',[22] effectively calls for the deconstruction of the hegemonic character of colonial epistemology and of its controlling, managerial disposition with a view to (1) acknowledging that orthodox enunciations are not planetary representations or planetary renderings, but local institutions, the process of

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[19] ibid 148.

[20] ibid 184. Likewise, there is no atherosclerosis until the physician has diagnosed and named it. See generally A Mol, *The Body Multiple* (Duke University Press 2002). I propose a treatment of this question from the standpoint of comparative law in P Legrand, 'What Is That, to Read Foreign Law?' (2019) 14(2) J Comp L 294.

[21] Annemarie Mol talks about the physician 'enacting' atherosclerosis: Mol (n 20) 32–33 and passim. See also Legrand (n 20) 293–94 and 300. cf RM Cover, '*Nomos* and Narrative' (1983) 97 Harvard LR 4, 4: 'No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.'

[22] Mignolo (n 7) 145.

institutionalization manifesting itself through the 'doing' of the enunciations;[23] and (2) triggering an alternative manner of thinking and living. Along the way, decoloniality requires the deconstructor to focus squarely on the comparatist-at-law-as-knower, for it is he, for instance, who does the (colonial) doing, that is, it is he who holds the priority of science as rigorous and incontrovertible knowledge; who defends universalism as a configuration existing independently from enculturation; who promotes truth as a device existing to valorize a representation of reality that would be exclusively accurate; who supports disciplinary specialization along the lines of 'law is law' and 'philosophy is philosophy'; and who fosters a distinction between knower and known allegedly making objectivity achievable. It is he who peddles this mythological caravanserai. Yes.

I discern, then, a colonial attitude having implanted identifiable cognitive habits in the minds of orthodox comparatists-at-law and their disciples. Hiding behind the fig-leaf of 'convenient fictions',[24] these individuals are readily willing to forget that all theories and all conceptual frames (not least neo-liberalism or other discourses extolling an enhanced commodification of the planet) are tenaciously encultured, that is, they are firmly ensconced in what is inevitably a local-knowledge arrangement (no matter how dilated), which means that any attempt to evoke or convoke transcendental tenets effectively mobilizes a colonial matrix of power intervening as a predatory approach to thinking, feeling, analyzing, knowing, living – and being-in-the-law and being-in-the-comparison-of-laws. Accordingly, I plead in favour of decoloniality as an

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[23] cf ibid 151: '[R]epresentation … makes us believe that there is a world out there that can be described independently of the enunciation that describes it.' The two most influential critiques of such an epistemological strategy as, effectively, a rhetorical sleight-of-hand remain M Foucault, *Les Mots et les choses* (Gallimard 1966) and R Rorty, *Philosophy and the Mirror of Nature* (Princeton University Press 1979).

[24] Trouillot (n 7) 839.

attitude that would overcome and relativize the mindset ultimately inherited from the Renaissance and the Enlightenment, whereby both the thinking and the doing animating comparative law (the theory and the practice), which I regard as an assemblage rather than discrete configurations, are distortingly apprehended as being able to extirpate themselves – as being self-extirpable! – from any and all cultural belonging. (I hold that 'the detached individual self is only a fiction of the North Atlantic geography of imagination, an ideological by-product of the internal narrative of modernity'.[25]) And accordingly, too, I defend another way of theorizing the comparative, and I advance another strategy governing the implementation of comparison, which means that the colonial mindset and its impact on 'lived experience' (in the comparison of laws) – which, for instance, has been framing one's experience of difference as a phenomenon at once unproductive and discardable – must be *unlearned*.[26] In this regard, thoughtful comparatists-at-law can derive assistance from a leading anthropologist's critique chastising as 'utterly unsupportable' Zweigert and Kötz's view that a finding of difference or significant conflict across laws must mean bad comparative research.[27]

The forging of decolonial pathways that would overcome the violent epistemic tendency to dominate under the guise of various metaphysical conceits (such as the universal) implies, crucially, that the comparatist must train himself to *think-with* and

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[25] ibid 853. For a critique of selfhood as autonomy with specific reference to comparative law, see S Glanert, 'The Comparatist and the Illusion of Autonomy' in S Glanert, A Mercescu, and G Samuel, *Rethinking Comparative Law* (Elgar 2021) 31–60.

[26] For an important argument regarding the extent of coloniality's impact, see N Maldonado-Torres, 'On the Coloniality of Being' (2007) 21 Cultural Stud 240, 242.

[27] L Rosen, 'Beyond Compare' in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003) 505. The reference is to Zweigert and Kötz (n 8) 39, where the authors dismiss conclusions heralding 'differences or even total contradictions' and enjoin the comparatist-at-law then to start his investigations afresh.

think-from other peoples, other knowledges, and other laws – other cultures! – rather than simply think about them (or, worse, think about them from a place imagined to be *above* them).[28] Moreover, as he proceeds to operate through an interpretive approach that manifests itself as a worthy response to otherness – that is prepared 'to take seriously the epistemic force of local histories'[29] – the comparatist-at-law is invited to cultivate a mode-of-being-in-the-comparison acknowledging that his own analytical frame is incorporated or embodied, which means accepting that the questions, reflections, and considerations that occupy him are themselves existence-based – in effect, to recognize, pace Descartes, that 'I am where I think'.[30] Only then do such epistemic configurations actively purport to transgress the colonial mindset and say no to totalizing validity-claims. Once the law-worlds beyond one's own are re-signified as genuine and signifying heterorealities, instead of being cast as realities awaiting appropriation to one's model effectively advocating for one-solution-fits-all – that is, much too often, *my*-solution-fits-all – it becomes possible to recognize and respect the other's law. In sum, it becomes plausible to envisage the other's law as a contribution to the emergence of new understandings from an alternative epistemic place of enunciation deserving critical consideration, that is, beyond colonial epistemology.

I claim that the comparatist must equip himself so as to overcome the cancellation of epistemic otherness in which the colonial-minded orthodoxy within the field of comparative law has long engaged. It is not, of course, that coloniality as one has

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[28] A fine example of thinking-with and thinking-from is in RA Shweder, '"What About Female Genital Mutilation?" and Why Understanding Culture Matters in the First Place' in RA Shweder et al (eds), *Engaging Cultural Differences* (Sage 2002) 216–51.

[29] A Escobar, 'Beyond the Third World: Imperial Globality, Global Coloniality and Anti-Globalisation Social Movements' (2004) 25 Third World Q 207, 217.

[30] Mignolo (n 5) 80–81.

known it can ever disappear completely. In this sense, the decoloniality that I promote is not so much the fully fledged absence of all coloniality as a process of sensing, thinking, interpreting, and living other-wise in the law and in the comparison – 'other-wise' as in 'differently from before' *and* 'in a way that is wise to the other'. Now, wisdom to the other can materialize, for example, in terms of the interrogatings, actionings, and understandings that will take place beyond 'a set of self-serving narratives' facilitating the deployment of epistemic power over other experiences of the legal – indeed beyond all strategies purporting to apply epistemic power imperially, and all the more imperially the more differentiated the experience of the other appears to be in the eyes of the comparing self.[31] In particular, comparative law other-wise prevents the articulation of foreign law as *lack* vis-à-vis one's 'own' law.[32]

To overcome the universalist or totalizing tendency is to surmount at once the marginalization of difference and the denial that difference is being marginalized (a disavowal that is typical of the colonial logic). And to differentiate – rather than imperially and imperiously bringing into equivalence or commonality – is precisely one

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[31] Mignolo (n 7) 110. cf Fitzpatrick (n 7) 65, where the author observes a connection between 'racialization' (that is, 'defining a savage Other') and the Enlightenment, the former discourse being 'woven into the very fabric' of the latter.

[32] Simply put, the ascription of 'lack' installs otherness as subordinate to selfness, thereby cancelling its legitimate status as genuine otherness. I oppose such hierarchization as unbecoming to comparative law 'other-wise'. Rather than a lesser experience – which the idea of lack assumes – the other must be seen to have a different one. See P Legrand, 'Book Review' (2013) 8(2) J Comp L 444, 450 (review of T Ruskola, *Legal Orientalism* [Harvard University Press 2013]). In reaction, Donald Clarke brings to bear a positivist mindset and misses my epistemic argument altogether. See D Clarke, 'Anti Anti-Orientalism, or Is Chinese Law Different?' (2020) 68 Am J Comp L 55, 60n19. cf D Chakrabarty, *Provincializing Europe* (2nd edn, Princeton University Press 2008) xii: 'No country … is a model to another country, though the discussion of modernity that thinks in terms of "catching up" precisely posits such models.'

of 'those actions [that] are at the very root of the critical task'.[33] It is to move the governing epistemology from an otherization of the stigmatizing type to one of the respectful kind whereby fragmented singularities are allowed to recover their name and their materiality. Vis-à-vis the orthodoxy that prevails within comparative law, decoloniality thus takes the form of 'the exercise of power within the colonial matrix to undermine the mechanism that keeps it in place requiring obeisance', and because '[s]uch a mechanism is epistemic … so decolonial liberation implies epistemic disobedience'.[34] Decoloniality disconnects from universalizing and totalizing schemes in order to reconnect with local knowledge. This passage operates at the level of cognition, of course, but it also harbours an affective or aesthetic dimension as it touches upon emotions and desires. For the comparatist-at-law, it is about leading one's life consciously, giving it form and direction through constant, probing attention to the local, an attitude existing in perceptible tension with the goals of an abstract configuration such as universalization or totalization heralding its long-institutionally-defined-and-simplified appraisals and pathways.

Even as I earnestly advocate for a theory and practice of decoloniality within comparative law, I must accept, lest I lapse into contradiction, that decoloniality cannot assert itself in the guise of truth, truth being precisely one of the self-interested fictions that the doxa has been touting – recall Zweigert and Kötz's '*école de vérité*'[35] – and that decoloniality is meant to interrupt and overcome, to 'le[t] … go'.[36] It is indeed crucial that 'critical theory does not become a method for truth', that '[w]e … get beyond the

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[33] BE Harcourt, *Critique and Praxis* (Columbia University Press 2020) 155.

[34] Mignolo (n 7) 114.

[35] Zweigert and Kötz (n 8) 14.

[36] Mignolo (n 7) 148

idea that critical theory, as the unmasking of illusions, unveils the truth'.[37] Indeed, '[t]hat is precisely the problem: the claim to truth, the dangerous appropriation of truth, the will to truth'.[38] It follows that comparative law must oppose the 'power play' that any truth-regime effectively countenances,[39] no matter how obdurately stubborn its hegemonic contention proves to be.[40] Otherwise (or other-wise) said, then, I must accept that decoloniality can only offer itself as an epistemic opportunity.[41] It follows that 'decoloniality … cannot be a missionary imperative to control and dominate',[42] which means that '[n]o universal decoloniality can be mapped by one single local history and one single project'.[43]

Bereft of the argument from truth, it is then up to *me* to carry the decolonial comparative claim within the framework of any research. On each occasion, 'I have to be confident, convincing, and empowering'.[44] What remains the case every time, though, is that decoloniality as epistemological shift is an option that is explicitly political inasmuch as it wants to obviate the prevailing politics of validation of knowledge that would have one believe in positivism being able to warrant something like (universal) veridiction. Decoloniality operates to subvert global design – it is therefore unlike, say, Christianity, neo-liberalism, or Marxism – and it is indeed earnestly confronting and rejecting these or other purported universals acting as fundamentalisms (or

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[37] Harcourt (n 33) 46.

[38] ibid 505.

[39] ibid 184.

[40] cf ibid 220: '[T]he claims to truth always come back.'

[41] See Mignolo (n 7) 115.

[42] ibid 225.

[43] ibid 231.

[44] ibid 224.

'totalitarian totalities') ultimately arrogating to themselves an entitlement to governance of the planet.[45]

'[T]he mirage of universality of knowledge' notwithstanding,[46] then, '[e]very enunciation is local'.[47] While the argument for relativism – cultural, legal, or otherwise – is thus inescapable, because the facts as recorded by anthropologists regarding cultural diversity and enculturation compel one to conclude that relativism is intellectually irrefutable (such that 'right and wrong are not detached universals but are based on

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[45] ibid 147. To be sure, the argument from universalism can prove less strident, perhaps even seemingly reasonable. However, it is doomed to fail nonetheless. Consider the following 'anecdata'. On 28 May 2018, an interlocutor in São Paulo asked me if comparative law can address the problem of colour-blindness. I answered that it must be able to do so, that it simply cannot be the case that comparative law would be confined to topics along the lines of breach of contract, vicarious liability, and such like – which is, however, precisely how Zweigert and Kötz would have it. As the 'negotiation' continued, my interlocutor emphasized that the matter of colour-blindness is 'the same everywhere' – at least, this is what I heard him to be saying, this is the claim that I understood him to be making about what he seemed to regard as a necessary universal. Now, he was 'Black', and I was 'White'. I sensed that he had expertise, while I did not (I would later learn that he had conducted postgraduate work on colour-blindness at Harvard Law School). Still, no matter how sensible this presumption of universal identity might appear, I could not accept it. I replied that, in advance of empirical study, I must hold that colour-blindness could not be identical or mean something identical in France, Brazil, and the United States (I deliberately kept myself to national 'units', but I appreciate that colour-blindness is also unlikely to mean something identical in Nancy and Marseille, in Recife and Curitiba, in Stowe, Vermont, and Mobile, Alabama.) In short order, I found information suggesting that the late Brazilian sociologist Milton Santos agreed with me. Writing about his experience of having been a 'Black' person over four continents, Santos observed that in each location being 'Black' had meant differently: see M Santos, 'Ser negro no Brasil hoje' in *O país distorcido* (WC Ribeiro ed, Publifolha 2002) 157–61.

[46] Mignolo (n 5) 3.

[47] ibid 224.

premises argued by actors grounded in institutions'),[48] there is no question of condoning an 'anything-goes' approach. Crucially, the relativist does not contend that all cultural or legal practices are equally valid, but rather asserts that no cultural or legal practice – not one's own, not anyone else's – is valid 'in any event' or 'come what may'. In sum, a relativist holds that every cultural or legal practice is apophantic. Such is the subversive or negative aspect of the relativist doctrine, which saves it from being re-framed as a universalist argument.[49] Indeed, critics cannot claim that relativism contradicts itself by entering an absolute proposition. After Theodor Adorno, the relativist claim is intrinsically subversive or negative rather than assertive, and no relativist enunciation can be other than relative to its enunciator's encultured ways, in any event. There is one more important reason why the relativism that I defend cannot be absolute, why it cannot put all worldly configurations on a level footing, certainly from the standpoint of the comparatist-at-law: a model that would implement the juggernaut of imperialism or colonialism cannot deserve recognition or respect as if it were not so imperialist or colonialist.[50]

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As I consider comparative law in its various institutional guises, I note, to borrow Walter Mignolo's felicitous form of words, that '[c]oloniality is not over, [that] it is all

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[48] ibid 220.

[49] See eg BH Smith, *Belief and Resistance* (Harvard University Press 1997) 86–87. Such is Theodor Adorno's well-known position. See TW Adorno, *Negative Dialektik* (Suhrkamp 1966) 45–46.

[50] Mignolo worries that cultural relativism should be 'blind to colonial[ism] and imperial[ism]', that it should 'mis[s] … the power differentials': Mignolo (n 5) 223 and 226. While Mignolo's concern is legitimate, the ignorance he addresses is evitable.

over'.[51] The challenge, of course, cannot be only the undoing of decoloniality. Rather, it must extend to the redoing of the field – the goal must be to pursue the *re-existence* of comparative law.[52] Just like '"taking hold" of the [colonizing] state was the fundamental task of *decolonization*',[53] comparatists-at-law must challenge the imposition of weasel terms like 'objectivity', 'truth', 'scientificity', or 'universality', with a view to 'decolonizing knowledge … [so as] to liberate knowing and becoming what coloniality of knowledge … prevents to know and become'; such is 'at this point the fundamental task of *decoloniality*'.[54] The idea is therefore to change the terms of the conversation in order to modify the contents of the conversation, that is, to delink the theory and practice of comparative law from the damaging narratives that have informed it through the insistent application of a positivist matrix of power reeking of imperialism and

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[51] Mignolo (n 7) 119. For an illustrative celebration of Europe's conquering and expansionist ways, of the export of 'civilization' to 'backward' territories, an encomium well embedded in the twenty-first century and thus offering substantial vindication of Mignolo's claim, see JC MacLennan, *Europa* (Pegasus 2018). For a reference to 'the old colonial reflex', see R Gildea, *Empires of the Mind* (Cambridge University Press 2019) 223. In this regard, one is minded to think of European museums exhibiting the spoils of wars waged against colonized peoples and rationalizing such displays as a great custodial and educational service to the world. In effect, these museums are extending imperial violence into the present (while, of course, extracting economic gains from tourism in the process). To be sure, Europe is not the only imperial power warranting decolonial (and comparative) interest. For instance, consider KL Thornber, *Empire of Texts in Motion* (Harvard University Press 2009), where the author explores the dynamics between the Chinese, Korean, and Taiwanese literary worlds, on one hand, and Japan, on the other, with specific reference to the period between 1895 and 1945, that is, when the Japanese colonization of East Asia was in full pursuit. For a general treatment of the contemporary relevance of post-imperial legacies, see S Puri, *The Shadows of Empire* (Pegasus 2021).

[52] See CE Walsh, 'Decoloniality in/as Praxis' in WD Mignolo and CE Walsh (eds), *On Decoloniality* (Duke University Press 2018) 120.

[53] Mignolo (n 7) 136.

[54] ibid.

colonialism.[55] Or, if you will, the idea is to foster decolonized interventions into foreign law that will provoke the decolonizing that must materialize in the name of the justice due to the other, not least for the sake of comparative law. Specifically, any strategy of recognition and respect will make an auspicious epistemic start if it acknowledges that it does not have objective access – and that it *cannot* have objective access – to anything like the truth about the other law or about the other-in-the-law, to the other law or to the other-in-the-law 'as it is'. To recognize and respect otherness does not mean (and *cannot* mean) to get otherness 'right', exactly – which is, in fact, precisely the assumption of supremacy that must be surpassed. Rather, I must accept that '[w]hat I am telling is not the truth, but an interpretation'.[56]

It follows that one must aim for a *just* interpretation, a reading of foreign law that wants to do justice to the other. I evoke the idea of aspiration advisedly, since if there will be interpretation, as there must be, there will necessarily be a failure to achieve *justice*, which can only figure as an ideal. Again, no encultured interpreter can tell an encultured foreign law objectively or truly, 'as it is'.[57] And every interpreter must acknowledge his inevitable interpretive input in the act of representation, better inscribed, then, as a *re-presentation*. Unavoidably affecting the foreign law that is his focus of study and decisively being shaped by it also, the critical theorist's reflexivity – the mental constructs he applies to his reading, the power dynamics he implements to shape the interpretive moment – resolutely prevent him from speaking in universal

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[55] See ibid 144.

[56] Harcourt (n 33) 28.

[57] Eg: J Kramnick, 'Criticism and Truth' (2021) 47 Critical Inquiry 218, 234: 'The epistemic virtue of a given reading cannot be separated from its making of something that has never exactly existed before.'

terms, hence Bernard Harcourt's exclamation: 'First, there are no universals.'[58] Crucially, thinking decolonially means thinking *differentially*, and it means acknowledging, accepting the *differential* character of one's thinking, whether vis-à-vis the foreign law – word will differ from world – or as regards other interpretations of foreignness.[59] In effect, decoloniality is a contrarian plea both for enhanced 'thereness' (a more perceptive attunement to foreign law-as-culture) and for increased 'hereness' (a heightened discernment of the comparatist's implication as inventor of foreignness).

[58] Harcourt (n 33) 436.

[59] For a survey on decolonial thinking and practice addressing more than forty artists or intellectuals and ranging over 120 pages or so, see H Copeland et al, 'A Questionnaire on Decolonization' (2020/174) October 3.