ON COMPARATIVE LAW'S REPRESSED COLONIAL GOVERNANCE

Daniel Bonilla Maldonado, Legal Barbarians: Identity, Modern Comparative Law and the Global South (Cambridge University Press, 2021)†

*Reviewed by Pierre Legrand**

A half century after the cultural turn, it is trite that "identities are constructed within cultural frameworks," individuals therefore enjoying "limited autonomy."[1] Practically, there occurs a "naturalization" process whereby one's encultured identity becomes a standardized feature of one's self.[2] If you will, "[t]exts that narrate us end up being our life."[3] Given the lingering ascendancy of legal positivism, it remains more contentious, however, to maintain that "[l]aw . . . is a central component of modern culture."[4] For the cohorts of doctrinalists or dogmaticians, it continues to be problematic indeed to contend that the fashioning of one's identity is partly attributable to law and that it matters what singular law is involved in identity formation. Contrariwise, such determinations pertain to the sanguine (and perspicuous) conclusions that Professor Daniel Bonilla Maldonado heralds in his *Legal Barbarians*. An individual hailing from an ethnic minority may feel legally empowered in California on account of the recognition and respect that California law affirms towards ethnicity even as such empowerment might not operate in France, where the state is adamant that ethnicity must be erased as a marker of legal entitlement. Bonilla Maldonado (DBM)'s interpretation is persuasive: whether through validation or devalorization, law shapes the self.

Legal Barbarians concerns comparative law, an academic discipline whose marginality DBM acknowledges.[5] Yet, the book makes a paradoxical argument regarding comparative law's "thought structures,"[6] in particular its primordial distinction between legal self and

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1. Daniel Bonilla Maldonado, Legal Barbarians: Identity, Modern Comparative Law and the Global South 32 (2021).
2. *Id*. at 31.
3. *Id*.
4. *Id*. at 35.
5. *See*, *e.g*., *id*. at 6 n.21.
6. *Id*. at 25.

legal other or "legal subjects" and "legal barbarians."[7] For DBM, this delineation "dominate[s] an important part of the modern legal and political imagination."[8] *Legal Barbarians* is emphatic: "[C]omparative law has been central in the construction of the conceptual opposition between 'self' and 'other' . . . that is constitutive of modern law."[9] Probing this invented binary, DBM defends key epistemic considerations. What the self can say of the other must partake of epistemic projection.[10] If he can make sense of the other at all, the self must do so through the filter of his cultural horizon. Otherness, then, can never be understood on its own terms. Rather, it is "understood" (that is, not-understood) by way of the self's encultured predilections (including language). For example, a U.S. comparatist can only ascribe meaning to a Brazilian *Ministro* sitting on the *Supremo Tribunal Federal* via an ethnocentric or juricentric projection effectively instituting the U.S. Justice sitting on the U.S. Supreme Court as referent, as "dominat[ing]" or "control[ling]" figure.[11] Because the re-signification necessarily unfolds in line with the comparatist's prejudices (or anterior judgments), the elucidation of the *Ministro*'s "ministriness" cannot be complete: the *Ministro* will always keep a secret from the U.S. comparatist.[12] Beyond these unobjectionable epistemic observations, DBM contends that the self casts the other as a "poor versio[n] of the original legal subjec[t]."[13]

Consider "the law of the Global North" and "the law of countries of the Global South."[14] For the so-called "Global North," there is law—what DBM calls "true law."[15] A feature of "true law"—certainly in the eye of the positivist beholder—is that law exists as an entity "clearly differentiated from religion or politics."[16] And it is from this mysophobic standpoint that the other's law is apprehended: "[T]he law of the Global North is the criterion by which the law of countries of the Global South is evaluated."[17] For the Global Northerner contemplating the Global South's laws from the Northern perspective—the only framework of intelligibility at his disposal[18]—those laws reveal a seemingly unsurmountable *mélange* with religion and politics.[19] Indeed, "law intersects with religion, [in the case of] Islam [and] Hinduism, or with politics, in the case of the Chinese family."[20]

7. *Id*. at 7. Etymologically, a "barbarian" is a native of Barbary, the Saracen (or Arab) countries along Africa's North Coast—by extension, someone who is not Greek. Later, the term designated a foreigner or an uncouth individual.
8. *Id*. at 25.
9. *Id*. at 39.
10. *See id*.
11. *Id*. at 40.
12. Daniel Hachem—my friend, translator, colleague, and mentor *in rebus brasiliensibus*—advises me against the Portuguese neologism "*ministridade*" lest my argument fall prey to utter incomprehensibility.
13. Bonilla Maldonado, *supra* note 1, at 7.
14. *See*, *e.g*., *id*. at 9.
15. *See*, *e.g*., *id*. at 24.
16. *Id*.
17. *Id*. at 9.
18. *See id*. at 40.
19. *See id*. at 24.

The Global South's laws thus exist beyond law as understood in the North. They are out of this law: they are *outlaws*. Hence, the basic epistemic dichotomy between "legal subjects" and "legal barbarians."

To return to comparative law and its epistemic influence, one of DBM's crucial contentions is that, although "[c]omparative law is . . . a form of learning about the legal barbarian that has existed for centuries and that controls both the legal consciousness of the subjects of modern law and the conscience of the legal barbarians that have internalized it,"[21] the connections between comparative legal thought and the creation of the modern legal subject have been ignored.[22] But DBM holds that if one is prepared to engage in a genealogical enterprise, one can identify three principal moments in the history of comparative law as articulator of a legal "self" and legal "other," as shaper of the legal consciousness of individuals. He names those as "instrumental comparative law" (Montesquieu is his emblematic author), "comparative legislative studies" (Henry Sumner Maine is his paradigmatic scholar), and "comparative law as autonomous discipline" (René David and Konrad Zweigert/Hein Kötz are his representative writers).[23]

The significance of Montesquieu (1689–1755) arises from the fact that his claims lie "at the basis of comparative law."[24] Far from being "a thing of the past,"[25] Montesquieu's narrative "remains rooted in the contemporary legal and political imagination."[26] Alleging a "neutral" account,[27] Montesquieu "describes European societies like England, France, Spain, Greece, Rome, and Holland, and non-European, primarily Asian, societies like China, Persia, and India."[28] He asserts that most Asians "do not even have the idea" of what is a republic and can only understand despotism.[29] In fact, "[p]ower must always be despotic in Asia,"[30] so that "the political figures are the pasha, the vizier, and the mogul."[31] Unsurprisingly, China has confused "laws" ("*les lois*") with "manners" ("*les manières*").[32] And as one travels south, one soon realizes that one is moving away from "morality itself" ("*la morale même*").[33] While in the north individuals goad themselves

20. *Id*. at 23.
21. *Id*. at 40.
22. DBM draws a challenging analogy with the work of Victor Diop, a Senegalese artist: *see id*. at 41–45. A photograph of Diop's illustrates *Legal Barbarians*.
23. *Id*. at 12.
24. *Id*. at 67.
25. *Id*. at 48 n.17.
26. *Id*.
27. *Id*. at 68.
28. *Id*. at 62.
29. MONTESQUIEU, LETTRES PERSANES letter CXXXI, at 284–85 (J. Starobinski ed., Gallimard ed. 2003) (1721).
30. 1 MONTESQUIEU, DE L'ESPRIT DES LOIS bk. XVII, ch. 6, at 525 (L. Versini ed., Gallimard ed. 1995) (1758). Having released his book in 1748, Montesquieu subsequently corrected it extensively. The revised version, Versini's text of record, appeared three years after Montesquieu's death.
31. BONILLA MALDONADO, *supra* note 1, at 53.
32. MONTESQUIEU, *supra* note 30, bk. XIX, ch. 16, at 579.
33. *Id*. bk. XIV, ch. 2, at 447.

through labor, in the south they seek consolation in "laziness" ("*paresse*").[34] Referring to the "barbaric peoples" ("*peuples barbares*") having been able, "like impetuous torrents," "to spread themselves all over," Montesquieu observes how "[t]here are still peoples on Earth where a passably educated monkey could live with honor: it would be more or less at the level of the other inhabitants."[35] In sum, for Montesquieu "[t]he northern man is . . . inextricably linked with law and with the best forms of political organization,"[36] while "the southern man is inescapably tied to . . . despotism . . . , . . . has no laws, only uses and customs,"[37] "[t]he norms that regulate . . . society [being] identified with the will of the ruler."[38]

Maine (1822–1888), the anthropologist who first occupied the Oxford chair of historical and comparative jurisprudence instituted in 1869, someone "widely regarded as a founding figure of modern comparative law,"[39] opines that "Europe is the locus of progress while India, as a paradigmatic representation of the Orient and an undifferentiated 'rest of the world' is the locus of barbarianism."[40] In India, which is "Europe's past,"[41] there are indeed to be found "many of the phenomena of barbarism."[42] In China, too, "progress seems to have been . . . arrested [on the discrimination of a rule of law from a rule of religion]."[43] Unlike Montesquieu, whose primary focus is geographical conditioning, Maine's priority is diachronic as he "compar[es] diverse moments in the history of humanity."[44] But like Montesquieu, whom he acknowledges,[45] Maine has Asia, "Europe's 'other,'"[46] "represent[ing] the 'uncivilized' . . . around the world."[47]

For their part, David's *Major Legal Systems in the World Today* and Zweigert/Kötz's *Introduction to Comparative Law* are "inevitable references for the discipline [of comparative law] in the twentieth-century."[48] As they defend the "creati[on] [of] a neutral knowledge,"[49] an "objective knowledge,"[50] a "scientific" knowledge[51]—iterations of

34. *Id*. bk. XIII, ch. 2, at 418.
35. Montesquieu, *supra* note 29, letter CVI, at 236.
36. Bonilla Maldonado, *supra* note 1, at 65.
37. *Id*. at 66.
38. *Id*.
39. *Id*. at 17 n.61.
40. *Id*. at 19.
41. *Id*. at 97.
42. Henry Sumner Maine, Village-Communities in the East and West 16 (London, John Murray 1871).
43. Henry Sumner Maine, Ancient Law 23 (London, John Murray 1861).
44. Bonilla Maldonado, *supra* note 1, at 75.
45. For Maine on Montesquieu, *see id*. at 77.
46. *Id*. at 95.
47. *Id*. In Maine's works, "[t]here is no reference to any American Indian, African, or Oceanic tribe": Robert Redfield, *Maine's* Ancient Law *in the Light of Primitive Societies*, 3 W. Pol. Q. 574, 576 (1950).
48. Bonilla Maldonado, *supra* note 1, at 22. David's and Zweigert/Kötz's texts initially appeared as Les Grands systèmes de droit contemporains (1964) and Einführung in die Rechtsvergleichung (1969).
49. Bonilla Maldonado, *supra* note 1, at 103.
50. *Id*. at 101.
51. *Id*. at 125.

the credulous trust in the metaphysical division between description and commentary—both books focus on the "collective subject" in the guise of "legal families."[52] Mobilizing compelling evidence, DBM demonstrates the commitment of these French and German comparatists to a hierarchization of laws featuring the commendation of Europe (above all, of their own legal systems—whether French or German) and the devaluation of the African, Asian, and Latin American models.[53] In the process, DBM mentions some contemporary comparative voices, whether from North or South, that earnestly refute this colonial narrative,[54] one author having evidently made such a deep impression on him that his assemblage of quotations is apt to raise copyright issues.

DBM leaves me with two puzzles. First, given that modern comparative law has been steadfastly Eurocentric, thereby featuring studies that typically involve German and U.S. laws or French and English laws, is it not awkward to affirm that "[m]odern comparative law is structured around the conceptual opposition 'subject of law/legal barbarian'?"[55] Is France the German comparatist's legal Barbary? Secondly, and taking into account the marginality of comparative law, is it not contradictory to argue that the field's distinction between self and other "dominate[s] the modern legal consciousness?"[56] How does a minor legal discourse proceed to inform the entire discipline of law?

While I occasionally struggled with the text—and did not always emerge victorious—I learned much from DBM's insightful and courageously anamnestic monograph on the spectral persistence of colonialism within comparative legal thought. Comparatists who assiduously deploy an inquisitive and introspective disposition in their research and teaching will particularly benefit from *Legal Barbarians*. In my view, the section on the colonial mindset that David applied to the drafting of the Ethiopian civil code in the 1950s—a study in abuse of epistemic privilege—is well enough to warrant interest in the book.[57]

52. *Id*. at 101.
53. *See id*. at 100–32. I address a disturbing iteration of the colonial inclination in Pierre Legrand, *Kischel's Comparative Law:* Fortschritt ohne Fortschritt, 15 J. COMP. L., no. 2, 2020, at 292, 296–99.
54. See BONILLA MALDONADO, *supra* note 1, at 133–76.
55. *Id*. at 70.
56. *Id*. at 25.
57. See *id*. at 117–26.