Decolonial Comparative Law: A Conceptual Beginning

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This article introduces the intellectual motivations behind the establishment of the Decolonial Comparative Law research project. Beginning with an overview of the discipline of comparative law, we identify several methodological impasses that have not been resolved by previous critical approaches. We then introduce decolonial theory, generally, and decolonial legal studies, specifically, and argue for a decolonial approach to comparative law. We explain that decoloniality's emphasis on delinking from coloniality and on recognizing pluriversality can improve on some problematic and embedded assumptions in mainstream comparative law. We also provide an outline of a conceptual beginning for decolonial approaches to comparative law.

Dekoloniale Rechtsvergleichung: Ein konzeptioneller Anfang. – In diesem Beitrag werden die intellektuellen Beweggründe hinter dem Forschungsprojekt „Dekoloniale Rechtsvergleichung" vorgestellt. Wir beginnen mit einem Überblick über die Disziplin der Rechtsvergleichung und zeigen mehrere methodologische Sackgassen auf, die frühere kritische Ansätze nicht vermeiden konnten. Anschließend stellen wir die dekoloniale Theorie und existierende dekoloniale juristische Analysen vor und plädieren darauf aufbauend für einen dekolonialen Ansatz in der Rechtsvergleichung. Unser Argument ist, dass durch eine Abkopplung von der Kolonialität und eine Anerkennung von Pluriversalität, beides Kernpunkte der Dekolonialitätstheorie, einige problematische Annahmen korrigiert werden können, die bisher mit dem Mainstream der Rechtsvergleichung verbunden sind. Wir skizzieren auch einen konzeptionellen Anfang für dekoloniale Ansätze in der Rechtsvergleichung.

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I. Introduction

The discipline of comparative law, as it exists today, is structured and dominated by the Global North.[1] That is to say, conventional (or mainstream) comparative law is produced mainly by scholars from – or educated in – the Global North, focuses on Global North law or uses such law as the benchmark, and relies upon Global North methods of comparison, particularly those developed in Europe during the nineteenth century.[2] Despite

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[1] Our use of the term "Global North" does not refer to a simple geographical space, but rather a position of global power – both political and epistemological.

[2] As Teemu Ruskola noted, "it is hardly a coincidence that both international law and comparative law became professionalized in their modern form in the late nineteenth century, at the height of Western imperialism"; *Teemu Ruskola*, China in the Age of the World Picture, in: Oxford Handbook of the Theory of International Law, ed. by Florian Hoffmann / Anne

decades of expansion, law in the Global South still remains, more often than not, marginal to the discipline. As for methods, debates between doctrinal, functionalist, culturalist, critical, and postcolonial comparatists continue to proliferate.[3] These debates often propose alternative ways of comparing laws in or from Europe, rather than confronting the methodological challenges of comparative law in or from the Global South. Although mainstream comparative law methods have been criticized for several decades now,[4] a convincing alternative has not emerged.

One reason for this impasse in the field of comparative law may be that, despite significant differences, there is an underlying (and problematic) consensus regarding some basic premises. This consensus revolves around certain ideas, such as that of law as a semi-autonomous field of expertise and of community as being largely homogeneous. Both these ideas emerge from a modern European context and have subsequently been imposed on other societies, although they are often only partially compatible with non-European contexts. Nonetheless, mere attempts to reverse these approaches – with alternative ideas about law or communities – seem unable to break the spell of the consensus that endures even among those who challenge mainstream comparative law.

Arguably, the matter of *how* to compare should be preceded by the *why* and *what* and *whether* of comparison. While comparative lawyers in the Global North often view the discipline as both cosmopolitan and emancipa-

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Orford (2016) 138–155, 143; see also, e.g., *Upendra Baxi*, The Colonialist Heritage, in: Comparative Legal Studies: Traditions and Transitions, ed. by Pierre Legrand / Roderick Munday (2003) 46–75; *Veronica Corcodel*, Modern Law and Otherness: The Dynamics of Inclusion and Exclusion in Comparative Legal Thought (2019); *Daniel Bonilla Maldonado*, Legal Barbarians: Identity, Modern Comparative Law and the Global South (2021); *Judith Schacherreiter*, Postcolonial Theory and Comparative Law: On the Methodological and Epistemological Benefits to Comparative Law Through Postcolonial Theory, Verfassung und Recht in Übersee 49 (2016) 291–312; *idem*, Das Verhängnis von Ethnozentrismus und Kulturrelativismus in der Rechtsvergleichung: Ursachen, Ausprägungsformen und Strategien zur Überwindung, RabelsZ 77 (2013) 272–299; *Brenda Cossman*, Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project, 1997 Utah Law Review (Utah L.Rev.) 525–544 (1997); *Sherally Munshi*, Comparative Law and Decolonizing Critique, American Journal of Comparative Law (Am.J.Comp.L.) Suppl. 65 (2017) 205–235; *Prabhakar Singh*, Prolegomenon to a Southern Jurisprudence, (2019) 40 Liverpool Law Review 155–178; *Jorge González Jácome*, El uso del derecho comparado como forma de escape de la subordinación colonial, International Law: Revista Colombiana de Derecho Internacional 7 (2006) 295–338.

[3] See e.g., *Maurice Adams / Jacco Bomhoff*, Practice and Theory in Comparative Law (2012); *Pier Giuseppe Monateri*, Methods of Comparative Law (2013); *Geoffrey Samuel*, An Introduction to Comparative Law Theory and Method (2014); *Mathias Siems*, Comparative Law[2] (2018); *Mark van Hoecke*, Methodology of Comparative Legal Research, Law and Method (2015) 1–35; *Mathias Reimann*, Comparative Law – An Overview of the Discipline, in: International Encyclopedia of Comparative Law, vol. II, ch. 4 (2020) nos. 178 ff.; *Robert Leckey*, Review of Comparative Law, 26 Social & Legal Studies 3–24 (2017); *Uwe Kischel*, Comparative Law (2019) ch. 3.

[4] See IECL/*Reimann*, Overview (n. 3) 225 ff.

tory, in the Global South, comparative law is frequently associated with legal colonialism. Indeed, the discipline of comparative law participated in colonialism both directly and indirectly, in addition to perpetuating neo-colonial rule after formal decolonization. Tapiwa Warikandwa and Samuel Amoo are not the only scholars to argue that "comparative law has largely been employed as a tool for advancing social engineering in pursuit of western imperialist agendas".[5] Mainstream comparative law is arguably intertwined with colonialism and neo-colonialism, from the modern beginnings of the discipline to its latest involvement in projects on law and development.[6] Consequently, the discipline of comparative law, like many others, should be decolonized. For that to be possible, it is first necessary to assess how – and in what specific ways – comparative law remains influenced by, mired in, or complicit in a project of colonization. Both steps require an adequate methodological and practical foundation, lest what is proclaimed as decolonization should lead to nothing more than a rearrangement of positions within a similar colonial framework.

Our proposal to challenge mainstream comparative law's coloniality lies in the idea of decolonial comparative law: a re-articulation of comparative law on the basis of decolonial theory. This article is not a manifesto for decolonial comparative law – not only because it would be too early to formulate one, but also because such an imposition would run against the impulses of decoloniality. At this stage, the (preliminary) ideas we outline in this article are intended to serve as a basis for discussions and collaborative engagement.[7] In this brief concept paper, we provide an overview of some mainstream ideas and debates in the discipline of comparative law. We also delineate what we mean by "decolonial comparative law", why decolonial comparative law is necessary, and how to engage in decolonial comparative law.

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[5] *Tapiwa V. Warikandwa / Samuel K. Amoo*, African Law in Comparative Law: A Case of Undermining African Jurisprudence and Promoting a New World Order Agenda?, in: Social and Legal Theory in the Age of Decoloniality: (Re-)Envisioning Pan-African Jurisprudence in the 21st Century, ed. by Artwell Nhemachena / Tapiwa V. Warikandwa / Samuel K. Amoo (2018) 299–326, 318. See also *Jedediah J. Kroncke*, The Futility of Law and Development: China and the Dangers of Exporting American Law (2016).

[6] *Arturo Escobar*, Encountering Development: The Making and Unmaking of the Third World (1995).

[7] An earlier version of this paper served as the background paper for an exploratory workshop at Duke University in March 2019. The Decolonial Comparative Law research project was established in Fall 2019 at the Max Planck Institute for Comparative and International Private Law in Hamburg; for more information, see <https://www.mpipriv.de/decolonial>. The first public, international event in connection with the Decolonial Comparative Law research project was a workshop held on 6–7 October 2020. The second workshop, focusing on decolonial comparative legal history, will take place in September 2022.

II. Mainstream comparative law and its critiques

In the several decades since Günter Frankenberg identified a "Cinderella complex" for the field of comparative law,[8] a plethora of theoretical and conceptual books and articles has appeared.[9] Much of this scholarship is critical of a perceived mainstream comparative law. However, truth be told, this alleged mainstream comparative law is often represented exclusively by a single decades-old chapter found in a single introductory treatise intended for students.[10] Many scholars have suggested new methods and conceptualizations of comparative law, though usually without concrete applications.[11] Radbruch's famous (and much-maligned) quip, repeated in Zweigert and Kötz's treatise, that "sciences which have to busy themselves with their own methodology are sick sciences"[12] may be at least half-true: long discussions on methodology (and method) reflect a high degree of anxiety. The paradigms of mainstream comparative law, which emerged in the 19th and early 20th centuries in Europe, no longer seem adequate for our globalized world. The perseverance of these paradigms coupled with the diversity of proposals for change suggest, however, that mainstream comparative law cannot be easily transformed.

1. Shared assumptions in mainstream comparative law

Within the mainstream of the discipline of comparative law, there are three prominent approaches: (i) doctrinal comparison that focuses on rules, (ii) functionalist comparison that understands distinct laws as often functionally equivalent responses to similar problems, and (iii) culturalist comparison that embeds law within societies and their culture. Despite the apparent diversity of these approaches, there are commonalities between comparatists who reduce and abstract law to its form or function and those who understand it contextually, between those who emphasize similarity or equivalence and those who celebrate difference. In spite of widely diverging methodological approaches, we can identify – albeit in a generalized and non-comprehensive fashion – shared assumptions in the discipline of comparative law that often contribute to the coloniality of the discipline.

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[8] *Günter Frankenberg*, Critical Comparisons, 26 Harvard International Law Journal 411–455 (1985).

[9] See above n. 3.

[10] That would be Chapter 3, "The Method of Comparative Law", in: *Konrad Zweigert / Hein Kötz*, An Introduction to Comparative Law[3] (1998) 32–47. The origins of the chapter go back to 1960. See *Konrad Zweigert*, Méthodologie du droit comparé, in: Mélanges offerts à Jacques Maury, vol. I (1960) 579–596.

[11] Legrand / Munday (n. 2).

[12] *Gustav Radbruch*, Einführung in die Rechtswissenschaft[12] (1969) 253, as cited in *Zweigert / Kötz*, Introduction (n. 10) 33.

a) Legal rules

Legal rules play a central role in mainstream comparative law. A doctrinalist focus on rules – comprising almost exclusively comparative legislation (*législation comparé*) – has long been subjected to criticism. Yet functionalists also focus on legal rules when they emphasize that these must be understood with regard to the functions they provide for society.[13] Finally, culturalists, when they ask that legal rules be placed within their cultural contexts, also start analysis with rules.[14] This common emphasis on legal rules reflects their prominence in European legal traditions: opponents of a rule must, in their critique, still provide center place to them. Mainstream comparative law emerges from comparative legislation, with both positivist and anti-positivist strands sharing this heritage. Such a focus makes comparison with normative traditions or with systems that are not based on such legal rules difficult, if not impossible.

b) Methodological nationalism

Because legal rules are typically state law, a second commonality follows almost automatically: methodological nationalism. The central object of modern comparative law is frequently the *national unit*. We compare the rules of French and English law; we investigate their functions in, respectively, French and English society; we use national cultures in order to explain national rules. Non-state laws (such as customary laws or religious laws) are often ignored.[15] When non-state law is not ignored, it is often either reduced to the law of states – for example, Islamic law as the state law of Muslim-majority states – or construed like state law to fit the discipline's paradigms. Simon Roberts warned, "[l]aw, long so garrulous about itself, is now, in its contemporary enlargement, graciously embracing others in its discourse, seeking to tell those others what they are".[16] Nevertheless, the hegemony of positive law will not be overcome merely by rejecting the equation of law with state law, as long as the state paradigm itself is not overcome.[17]

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[13] See *Ralf Michaels*, The Functional Method of Comparative Law, in: The Oxford Handbook of Comparative Law, ed. by Mathias Reimann / Reinhard Zimmermann[2] (2019) 345–389 with references.

[14] See *Ralf Michaels*, Legal Culture, in: Max Planck Encyclopedia of European Private Law, ed. by Jürgen Basedow / Klaus J. Hopt / Reinhard Zimmermann / Andreas Stier, vol. II (2012) 1059 with references.

[15] See *Ralf Michaels*, Religiöse Rechte und postsäkulare Rechtsvergleichung, in: Zukunftsperspektiven der Rechtsvergleichung, ed. by Reinhard Zimmermann (2016) 39–102.

[16] *Simon Roberts*, Against Legal Pluralism, (1998) 30 Journal of Legal Pluralism and Unofficial Law 95–106, 98; *idem*, After Government? – On Representing Law without the State, (2005) 68 Modern Law Review (MLR) 1–24.

[17] See *Ralf Michaels*, The Mirage of Non-State Governance, 2010 Utah L.Rev. 31–45 (2010).

c) Assumed homogeneity

A third, related, commonality evident in the methodological debates of mainstream comparative law is the assumption of relative homogeneity within, and relative heterogeneity between, different legal systems. Whether we speak of "French law" or of "Jewish law", we assume that what we speak of is an order that has resolved internal tensions over concrete questions and that can therefore provide coherent answers: Do contract damages include interests in French law? What is the punishment for murder in Jewish law? When we inquire into the interrelations between the First Amendment and U.S. culture, we assume that U.S. culture is relatively homogeneous internally and relatively different from other cultures. We are aware of internal inconsistencies and ambiguous issues within legal systems, but we tend to think of them as secondary or as shortcomings, rather than as constitutive features. We have difficulty, therefore, in accounting for legal orders in ways that include necessary ambivalences and internal insuperable frictions.[18]

d) Implied superiority of the Global North

A fourth common assumption may not be obvious, but is nonetheless relevant: comparison has the dual risk of being reductionist and judgmental. Comparative law is reductionist where comparison happens through a *tertium comparationis*, which is when legal systems are viewed as similar or different with regard to a certain quality (i.e., their function, their formulation, etc.), rather than being subject to a comprehensive analysis. Comparative law becomes judgmental when such comparison leads to evaluation, or even ranking, as in the (problematic and now abolished) Doing Business Reports.[19] Both of these risks lead to an implied superiority of the Global North because it is the Global North (and its legal systems) that is used – knowingly or not – as the benchmark against which other legal systems are measured. One could go on, but the general gist should be clear: mainstream comparative law is a modern European discipline that remains wedded to modern Eurocentric ideals and paradigms. Accordingly, mainstream comparative law is intrinsically conservative. It tends to recreate and reinforce specific ideals from the Global North; it implicitly assumes superiority over laws and norms that fall short of these specific ideals and paradigms – predominantly those from the Global South.

[18] *Thomas Bauer*, Die Kultur der Ambiguität: Eine andere Geschichte des Islams (2011).

[19] *Ralf Michaels*, Comparative Law by Numbers? – Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law, 57 Am.J.Comp.L. 765–795 (2009).

2. Internal critique: critical comparative law

The limitations embedded within the aforementioned shared assumptions have garnered notice and provoked responses in the discipline. Some comparative law scholars have sought to challenge these shared assumptions, using tools from critical or postmodern theory.[20] Critical comparative law provides, one could say, an internal critique of mainstream comparative law, by turning its own demands and ideals against the discipline itself.

We can perhaps best see the promises and limitations of critical comparative law by looking at the so-called Watson / Legrand debate: whether transplants are simple and frequent (because legal rules travel easily even between very different cultures) or whether transplants are actually impossible (because laws are inseparably linked to the cultures from which they emerge).[21] Watson argued on the basis of a modern-doctrinalist framework; Legrand's critique is based on critical (and postmodern) theories.

At first sight, Legrand seemed to oppose everything in Watson's approach: that law can be confined to rules, that law is separable from society, that legal rules can be transplanted from one system to another, that comparative lawyers can find objective knowledge and are not necessarily situated vis-à-vis the object of their analysis. Nevertheless, Legrand's powerful and important critiques are based on commonalities with Watson. That is, beyond their fundamental differences, Watson and Legrand share a modern, Eurocentric concept of law as formal rules or as being based in national culture. Both the idea of legal transplants and the proclaimed "impossibility" of such transplants presume a common scenario: the neat separation between a donor and a recipient state.

An additional commonality between Watson and Legrand concerns the implicit hierarchy between donor and recipient. To some extent, this hierarchy is conceptual: the transplanted legal rule or institution is perceived as belonging to the donor law and as alien, at least initially, to the recipient system. Quite frequently, however, the hierarchy represents an actual power

[20] Critical comparative law is not a clear school; the term has been used by scholars as different as Esin Örücü, Günter Frankenberg, and Pierre Legrand. See, e.g., *Esin Örücü*, Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition (1999); *Frankenberg*, Critical Comparisons (n. 8); *idem*, Comparative Law as Critique (2016); *Pierre Legrand*, Comparative Legal Studies and Commitment to Theory, (1995) 58 MLR; cf. *Roger Merino Acuña*, Comparative Law from Below – The Construction of a Critical Project in Comparative Legal Studies (2012); for critique, see, e.g., *Anne Peters / Heiner Schwenke*, Comparative Law Beyond Post-Modernism, (2000) 49 International and Comparative Law Quarterly 800–834; *Ugo Mattei*, Comparative Law and Critical Legal Studies, in: Oxford Handbook of Comparative Law (n. 13) 805–825; *Kischel*, Comparative Law (n. 3).

[21] *Pierre Legrand*, The Impossibility of "Legal Transplants", Maastricht Journal of European and Comparative Law 4 (1997) 111–124; *Alan Watson*, Legal Transplants and European Private Law, Electronic Journal of Comparative Law 4:4 (2000) 1–13; for a summary and assessment, cf. *Andrew Harding*, The Legal Transplants Debate – Getting Beyond the Impasse?, in: Legal Transplants in East Asia and Oceania, ed. by Vito Breda (2019) 13–33.

imbalance: the transplant proceeds from a "developed" to a "developing" state, from a "highly sophisticated" to a "less sophisticated" legal system. The legal transplant is aimed at improving the law in the recipient state, which means bringing the recipient state closer to the donor state. Implicit in this idea of legal transplant, more often than not, is the assumed superiority of Global North law over Global South law.

One example does not establish our claim, but it hints at the problem of critical comparative law: its inability to escape the framework that it criticizes. This is not so surprising, given that its critique stems from the same Eurocentric tradition as the mainstream comparative law that it criticizes.[22] The culturalist critique of rule-centrism is itself, ironically, obsessed with rules as the centre of the analytical project. Thus, when Pierre Legrand posits a "negative comparative law",[23] his negation implicitly reinforces the negated. And although such critique has the potential to turn the modern European project against itself, it cannot overcome the Eurocentric aspects of that project.

3. External critique: postcolonial comparative law

The Eurocentrism of modern comparative law is a target for another strand of critique that might be identified as postcolonial comparative law.[24] Based on postcolonial theory,[25] postcolonial comparative law seeks to both critique and overcome the role of colonialism in mainstream comparative law. Postcolonial approaches to comparative law place legal transplants within histories of colonial expansion in order to either criticize them as colonial impositions or illustrate that they are more complex processes than the mere replacement of local law with foreign law.[26] For example, it has been demonstrated that legal transplants can happen "in reverse", from the colo-

[22] By way of example, some critical legal studies comparatists advocate for secular law, despite the modern European basis of secularism; *Mattei* (n. 20).

[23] *Pierre Legrand*, Negative Comparative Law and Its Theses, 16 Journal of Comparative Law 647 (2021). See also *Jean d'Aspremont*, Comparativism and Colonizing Thinking in International Law, 57 Canadian Yearbook of International Law 89–112 (2020) ("counter-comparability").

[24] E.g. *Cossman*, Turning the Gaze Back (n. 2) 525; *Schacherreiter*, Methodological and Epistemological Benefits (n. 2) 291; *idem*, Das Verhängnis (n. 2) 72; *Teemu Ruskola*, Legal Orientalism – China, the United States, and Modern Law (2013); *Maldonado*, Legal Barbarians (n. 2); *Munshi*, Comparative Law and Decolonizing Critique (n. 2) 207–235; *Raphael Carvalho de Vasconcelos / Deo Campos Dutra*, Direito Comparado e Política: Reflexões Necessárias, Revista de Direito Internacional 17 (2020) 42–55; *Bonilla Maldonado*, Legal Barbarians (n. 2).

[25] *Leela Gandhi*, Postcolonial Theory – A Critical Introduction[2] (2019); *María do Mar Castro Varela / Nikita Dhawan*, Postkoloniale Theorie[3] (2020).

[26] *Schacherreiter*, Methodological and Epistemological Benefits (n. 2) 301 ff.; *Matteo Solinas*, The Nature of Legal Transplants – Inspirations from Postcolonial Scholarship, New Zealand Association for Comparative Law Yearbook 22 (2016) 179–216.

nized society to the colonial society.[27] Postcolonial scholars criticize mainstream comparative law's classifications of legal families for being overly ethnocentric and thus in need of replacement.[28] Likewise, postcolonial scholars emphasize that Eurocentric evaluations of non-European law are insufficiently sensitive to the importance of local culture. For postcolonial comparative law scholars, the dominating and universalizing role of the Global North and its law should be reduced; Europe (and its law) should be "provincialized".[29]

There is much that is attractive in postcolonial critiques of mainstream comparative law. Whereas critical comparative law provides an internal critique of mainstream comparative law's Eurocentricsm, postcolonial comparative law provides an external (i.e., Global South) critique.[30] Postcolonial comparative law scholars emphasize that modern comparative law emerged during the heyday of late colonialism and is implicated in colonialism to an underappreciated degree.[31] The historical process of formal decolonization, therefore, necessitates a new conception of comparative law.

Nonetheless, there are some limitations to postcolonial comparative law. Some of the literature views postcoloniality as importing insights from and about the Global South into a European liberal paradigm and thereby leaving Global South epistemologies behind. Take, for example, the widespread admiration that comparative constitutional law scholars had for the South African Constitution.[32] Established as a device to overcome the racist apartheid regime, the new Constitution managed, in the eyes of many, to combine the best of two worlds: it imported from foreign models (especially the German Basic Law) and simultaneously integrated local and domestic legal and cultural traditions. The South African Constitution appeared to be a document that was both progressive and attuned to local requirements.[33] Only somewhat later did criticism emerge of what was recognized as essen-

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[27] See *Prakash Shah*, Globalisation and the Challenge of Asian Legal Transplants in Europe, Singapore Journal of Legal Studies 2005, 348–361; *Sital Kalantry*, Reverse Legal Transplants, 99 North Carolina Law Review 49–99 (2020).

[28] *Ugo Mattei*, Three Patterns of Law: Taxonomy and Change in the World's Legal Systems, 45 Am.J.Comp.L. 5–44 (1997); *Patrick Glenn*, Comparative Legal Families and Comparative Legal Traditions, in: Oxford Handbook of Comparative Law (n. 13) 423–441; *Schacherreiter*, Methodological and Epistemological Benefits (n. 2) 297–301.

[29] *Dipesh Chakrabarty*, Provincializing Europe: Postcolonial Thought and Historical Difference (2000).

[30] *Roger Merino Acuña*, Comparación Jurídica Desde El Sur Global: Genealogía de Un Proyecto Crítico, Themis – Revista de Derecho 73 (2018) 131–145; see also *idem*, Comparative Law from Below (n. 20).

[31] See *Jakob Zollmann*, German Colonial Law and Comparative Law, 1884–1919, in: Entanglements in Legal History: Conceptual Approaches, ed. by Thomas Duve (2014) 253–296.

[32] E.g. *Cass R. Sunstein*, Social and Economic Rights? – Lessons from South Africa, Constitutional Forum 11 (2001) 123–132. For debate, see, most recently, *Joel M. Modiri*, Conquest, Constitutionalism and Democratic Contestations: South African Perspectives (2019).

[33] According to *Karl E. Klare*, Legal Culture and Transformative Constitutionalism,

tially a liberal Constitution, good for individual rights, but insufficient to help with issues of general economic inequality.[34] Nevertheless, that criticism has been criticized for essentializing the Constitution, not realizing its own transformative and emancipatory potential.[35] In short, the postcolonial critique of the Constitution still remains wedded to a perspective emerging from coloniality because it may attribute too much importance to the constitutional text. In addition, some postcolonial comparative law focuses on "provincializing Europe", but this is difficult in a world effectively dominated by European paradigms. If there is more scholarship on transplants from the Global North to the Global South than vice versa, this may show bias, but it may also simply "reflect the directionality of transplants in practice. In other words, there are few reverse legal transplants in practice."[36] The application of postcolonial theory in the discipline has frequently resulted in merely inserting Global South vocabulary into Global North sentences about comparative law.[37]

Despite its considerable contributions, the limitations of postcolonial comparative law are then structurally comparable to those of critical comparative law.[38] Both approaches provide important critiques of mainstream comparative law. But neither critique can overcome the structures of the discipline because they remain wedded to these structures. The internal critique manages to lay out internal frictions and tensions within the modern project of comparative law, but it cannot, on its own, provide alternatives, let alone criteria by which to choose. The external critique tends to merely reverse existing hierarchies.

III. Decolonial theory and legal studies

Can decolonial theory, or decoloniality, provide a more radical structural challenge to mainstream comparative law? This section provides a brief and introductory summary of decolonial theory and a literature review of deco-

(1998) 14 South African Journal on Human Rights (SAJHR) 146–188, it is a "postliberal Constitution".

[34] *Luyolo Mkentane*, Forum Calls for SA to Ditch Constitution (2017), <https://www.iol.co.za/news/politics/forum-calls-for-sa-to-ditch-constitution-7498118> (7 September 2021).

[35] *D. M. Davis*, Is the South African Constitution an Obstacle to a Democratic Post-colonial State?, (2018) 34 SAJHR 359–374; *Modiri*, Conquest (n. 32); *Firoz Cachalia*, Democratic Constitutionalism in the Time of the Postcolony: Beyond Triumph and Betrayal, (2018) 34 SAJHR 375–394; *Catherine Albertyn*, (In)equality and the South African Constitution, (2019) 36 Development Southern Africa 751–766; see also *Peter Fitzpatrick*, The New Constitutionalism: The Global, the Postcolonial and the Constitution of Nations, 10:2 (2006) Law, Democracy & Development 1–20.

[36] *Kalantry*, Reverse Legal Transplants (n. 27) 68.

[37] *Lena Salaymeh*, Comparing Islamic and International Laws of War: Orthodoxy, Heresy, and Secularization in the Category of Civilians, 69 Am.J.Comp.L. 136–167 (2021).

[38] *Munshi*, Comparative Law and Decolonizing Critique (n. 2) 205.

lonial legal studies.[39] The next section will consider applications of decolonial thought to comparative law.

1. What is decolonial theory?

a) Coloniality

Decolonial theory begins with the recognition that the formal end of colonial states did not end "coloniality". Whereas colonialism is the socio-political domination of a territory, coloniality is a mode of thought that legitimizes colonialism and neo-colonialism while espousing universalism.[40] Because coloniality is not limited to colonized regions, decolonization is necessary in both colonial centres and colonized (or supposedly post-colonial) regions.[41] Catherine Walsh explains that coloniality is "a matrix of global power that has hierarchically classified populations, their knowledge, and cosmological life systems according to a Eurocentric standard".[42] Simply put, coloniality is the epistemology of colonialism and neo-colonialism.

b) Myth of modernity as coloniality

Decolonial theory views coloniality as producing a myth of modernity. Modernity is a periodization category that refers to a block of time, often dated as beginning in the sixteenth century. Modernity is a descriptive con-

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[39] Although there is significant overlap between postcolonial theory and decolonial thought, we concentrate on unique dimensions of decolonial thought. On the overlap, see *Prasenjit Duara*, Decolonization: Perspectives from Now and Then (2003); *Ramón Grosfoguel*, Decolonizing Post-Colonial Studies and Paradigms of Political-Economy: Transmodernity, Decolonial Thinking, and Global Coloniality, 1:1 TransModernity – Journal of Peripheral Cultural Production of the Luso-Hispanic World (TransModernity) 1–13 (2011); *Gabriel Antonio Silveira Mantelli / Julia de Moraes Almeida*, Entre o Pós-Colonial, o Decolonial e o Socioambiental: Leituras Sociojurídicas Na América Latina, Sociedade Em Debate 25:2 (2019) 11–23. See also *Fernando Coronil*, Elephants in the Americas? – Latin American Postcolonial Studies and Global Decolonization, in: Coloniality at Large: Latin America and the Postcolonial Debate, ed. by Mabel Moraña / Enrique D. Dussel / Carlos A. Jáuregui (2008) 396–416; *Gurminder Bhambra*, Postcolonial and Decolonial Dialogues, (2014) 17 Postcolonial Studies 115–121, 118.

[40] On coloniality, see *María Marta Quintana*, Colonialidad Del Ser, Delimitaciones Conceptuales (2008); see also *Aníbal Quijano*, Des / Colonialidad Del Poder (2011), <http://praxisdigital.wordpress.com/2011/01/22/descolonialidad-del-poder-el-horizonte-alternativo-anibal-quijano/> (7 September 2021); on the distinctions between colonialism and coloniality, see *Pedro Pablo Gómez*, La Paradoja Del Fin Del Colonialismo y La Permanencia de La Colonialidad, Calle 14 – Revista de Investigación en el Campo del Arte 4:4 (2010) 26–38.

[41] *Pablo González Casanova*, Colonialismo Interno (Una Redefinición), Rebeldía 12 (2003) 409–434.

[42] *Catherine Walsh*, Development as Buen Vivir: Institutional Arrangements and (De)Colonial Entanglements, in: Constructing the Pluriverse, ed. by Bernd Reiter (2018) 184–196.

cept that does not imply a status or a level of development.[43] However, the ideology of coloniality produces a historiographic narrative about modernity that elevates Global North societies for having generated a set of political, scientific, and social changes that are perceived as advanced or superior. Coloniality's "myth of modernity" alleges that European civilization is superior because it developed enlightened progress; this modernity myth ignores contemporaneous and intertwined European colonialism.[44] Gurminder Bhambra explains, "the modernity that Europe takes as the context for its own being is, in fact, so deeply imbricated in the structures of European colonial domination over the rest of the world that it is impossible to separate the two: hence, modernity/coloniality".[45] Colonialism has been and continues to be a devastating form of oppression that affects every aspect of life for colonized peoples. Hence, Eduardo Mendieta argues that "whoever wants to talk about modernity must talk about colonialism and the cultural and ethnic devastation that came along with European imperialism".[46] Decolonial theory contests coloniality's myth of modernity by emphasizing that modernity and coloniality are intertwined, such that the "freedom" and "progress" of colonial societies cannot be disentangled from the material and epistemic oppression of colonized (or neo-colonized) societies.[47]

c) Anticolonial, not anti-Western

A primary objective of decolonial critique is to expose the epistemic assumptions of the modernity/coloniality matrix. Importantly, the geographic location of scholarly production is not an indicator of coloniality. Ramón Grosfoguel observes, "the success of the modern/colonial world-system consists in making subjects that are socially located in the oppressed side of the colonial difference, to think epistemically like the ones on the dominant positions".[48] Decolonial scholarship resists the coloniality of scholarship – whether it is being produced in the Global North or the Global South – by rejecting universalist assumptions and cultivating diverse alternatives. Coloniality is evident in many aspects of scholarship, such as the claimed universality of scholarly categories. Accordingly, decolonial theory

[43] See *Lena Salaymeh*, The Beginnings of Islamic Law: Late Antique Islamicate Legal Traditions (2016) ch. 5.

[44] *Enrique Dussel*, Eurocentrism and Modernity (Introduction to the Frankfurt Lectures), 20:3 Boundary 2 65–76, 75 (1993); see also *Walter D. Mignolo*, Enduring Enchantment: Secularism and the Epistemic Privileges of Modernity, in: Postcolonial Philosophy of Religion, ed. by Purushottama Bilimoria / Andrew B. Irvine (2009) 273–294, 277.

[45] *Bhambra*, Postcolonial and Decolonial Dialogues (n. 39) 118.

[46] *Eduardo Mendieta*, Imperial Somatics and Genealogies of Religion: How We Never Became Secular, in: Bilimoria / Irvine (n. 44) 235–250, 235.

[47] *Walter D. Mignolo*, Epistemic Disobedience and the Decolonial Option: A Manifesto, 1:2 TransModernity 44–66 (2011).

[48] *Grosfoguel*, Decolonizing Post-Colonial Studies (n. 39) 5.

rejects coloniality's construction of national, racial, ethnic, religious, and gender classifications as universal categories. Hence, decolonial theory "is critical of both Eurocentric and Third World fundamentalisms, colonialism and nationalism".[49]

Nevertheless, decoloniality does not entail an outright rejection of Western knowledge. Boaventura de Sousa Santos explains,

> "keeping a distance does not mean discarding the rich Eurocentric critical tradition and throwing it into the dustbin of history, thereby ignoring the historical possibilities of social emancipation in Western modernity. It means, rather, including it in a much broader landscape of epistemological and political possibilities. It means exercising a hermeneutics of suspicion regarding its 'foundational truths' by uncovering what lies below their 'face value.' It means giving special attention to the suppressed or marginalized smaller traditions within the big Western tradition."[50]

Put differently, decolonial scholarship is not anti-Western scholarship. Coloniality emerged from the Western world and in engagement with Western ideas, but coloniality is not essential to the West because the West can be decolonized.

d) Delinking

To counter the power of coloniality and the universalism of modernity, decoloniality begins with a delinking from Eurocentrism.[51] Walter Mignolo defines delinking – an important dimension of decolonial thinking – as "not accept[ing] the options that are available to you".[52] Delinking results in imagining alternatives that the status quo in the Global North views as impossible; envisioning an alternative to the modern nation-state is an example of delinking. Nonetheless, delinking from Eurocentrism is a necessary, but not sufficient, component of decolonial scholarship because it is a deconstructive move that must be followed by a reconstructive strategy. The reconstructive dimensions of decolonial scholarship are intensely challenging precisely because coloniality both eradicated many subaltern epistemologies and marks epistemologies from the Global South as inadequate or antiquated. Bernd Reiter clarifies that "European colonization has destroyed not only people and their cultures, but also their diverse knowledge systems. Genocide thus

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[49] *Grosfoguel*, Decolonizing Post-Colonial Studies (n. 39) 4.

[50] *Boaventura de Sousa Santos*, Epistemologies of the South: Justice against Epistemicide (2016) 44.

[51] *Walter D. Mignolo*, Delinking: The Rhetoric of Modernity, the Logic of Coloniality and the Grammar of Decoloniality, (2007) 21 Cultural Studies 449–514; see also *Fernando Coronil*, Beyond Occidentalism: Toward Nonimperial Geohistorical Categories, 11 Cultural Anthropology 51–87 (1996).

[52] *Walter D. Mignolo*, Geopolitics of Sensing and Knowing: On (De)Coloniality, Border Thinking and Epistemic Disobedience, (2011) 14 Postcolonial Studies 273–283, 276.

went hand in hand with 'epistemicide'."[53] Consequently, decoloniality is concerned with recognizing and strengthening epistemologies from the Global South that managed to survive, as well as developing anti-colonial epistemologies from any region.[54]

e) Pluriversality

The alternative to Northern universalism is pluriversality.[55] Ulrich Oslender explains that pluriversality refers to the recognition that "there are worlds out there (and have always been) that have historically been marginalized and suppressed by a Western cosmology and universalizing tendency that claimed a superior position for itself vis-à-vis those other worlds".[56] Decolonial thinkers view decoloniality as revealing options without any claim to universal truth or objectivity.[57] By way of example, mainstream comparative law frequently reinforces moral universalism. Jonathan Hill observes that natural law scholars within the field of comparative law attempt to identify "moral principles which are both eternally valid and universal".[58] Decolonial theory rejects the notions of "eternally valid" or "universal" morality, advocating instead for fluctuating and pluriversal morality. Pluriversality is not only an epistemology, it is also an ethical and political stance because anti-universalism and anti-colonialism overlap.

2. Decolonial legal studies

Scholars are increasingly drawing from decolonial theory to propose alternatives to the coloniality of certain expressions and understandings of law.[59] Decolonial legal studies is a growing field of interdisciplinary legal scholarship. Thus far, decolonial legal studies has contributed primarily to international law, constitutional law, and philosophy of law. In addition,

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[53] *Bernd Reiter*, Introduction, in: idem (n. 42) 1–18, 4.

[54] On decolonization of knowledge, see *Zulma Palermo*, Desde la Otra Orilla: Pensamiento Crítico y Políticas Culturas en América Latina (2005); see also *de Sousa Santos*, Epistemologies of the South (n. 50).

[55] *Walter D. Mignolo*, Foreword: On Pluriversality and Multipolarity, in: Reiter (n. 42) ix–xvi.

[56] *Ulrich Oslender*, Local Aquatic Epistemologies among Black Communities on Colombia's Pacific Coast and the Pluriverse, in: Reiter (n. 42) 137–150, 138.

[57] *Zulma Palermo*, La Opción Decolonial (2008), Centro de Ciencia, Educación y Sociedad, <http://www.cecies.org/articulo.asp?id=227> (20 September 2020).

[58] *Jonathan Hill*, Comparative Law, Law Reform and Legal Theory, (1989) 9 Oxford Journal of Legal Studies (OJLS) 101–115, 103.

[59] For a collection of such texts in German, though without clear distinction between decolonial and postcolonial approaches, see: Dekoloniale Rechtskritik und Rechtspraxis, ed. by Karina Theurer / Wolfgang Kaleck (2020).

decolonial theory illuminates dynamics of "law and gender" and "law and religion".

a) Decolonial international law

Decolonial approaches to international law have focused on human rights and other broader international legal movements.[60] Artwell Nhemachena and Esther Dhakwa argue that "real human rights" did not "originate from Euro-America – real human rights emanate from Ubuntu-informed jurisprudence which explains why Africans did not colonise the world".[61] They propose that "decolonial jurisprudence needs to prioritise the underlying logics of human rights and humanness that are more universal".[62] Motivated by an interest in decolonizing human rights, Nhemachena and Dhakwa seek inclusion of Ubuntu in human rights discourse; however, in doing so, they accept the notion of universalism. Similarly, José-Manuel Barreto argues for "a decolonisation of human rights in the sense of unearthing and recognising the contribution made by Third World countries and cultures".[63] In comparison, Emile Zitzke describes human rights as neo-colonial law be-

[60] See, for example: Human Rights from a Third World Perspective – Critique, History and International Law, ed. by José-Manuel Barreto (2013); *idem*, Eurocentric and Third-World Histories of Human Rights: Critique, Recognition and Dialogue, in: Critical Perspectives on Human Rights, ed. by Birgit Schippers (2018) 159–178; *idem*, Visiones Eurocéntricas y Tercermundistas de La Historia Del Derecho Internacional: La Crisis Del Paradigma Estado-Céntrico, Estudios Sociales 59:2 (2020) 17–39; *Luis Eslava / Michael Fakhri / Vasuki Nesiah / Justice Georges Abi-Saab / Partha Chatterjee*, Bandung, Global History, and International Law: Critical Pasts and Pending Futures (2017); *Richard Falk / Balakrishnan Rajagopal / Jacqueline Stevens*, International Law and the Third World: Reshaping Justice (2009); *Giovanna Maria Frisso*, Third World Approaches to International Law: Feminists' Engagement with International Law and Decolonial Theory, in: Research Handbook on Feminist Engagement with International Law, ed. by Susan Harris Rimmer / Kate Ogg (2019) 479–498; *James Gathii*, The Agenda of Third World Approaches to International Law (TWAIL), in: International Legal Theory: Foundations and Frontiers, ed. by Jeffrey Dunoff / Mark Pollack (forthcoming), see <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3304767> (25 October 2021); *Allison Geduld*, Decoloniality, Ubuntu and Human Rights in South Africa: A Bridge to Social Justice, (2020) 7 KAS African Law Study Library 381–390; *Lucy Mayblin*, Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking (2017); *Roger Merino / Areli Valencia*, Descolonizar el derecho: pueblos indígenas, derechos humanos y estado plurinacional (2018); *Walter D. Mignolo*, The Making and Closing of Eurocentric International Law: The Opening of a Multipolar World Order, 36 Comparative Studies of South Asia, Africa and the Middle East 182–195 (2016); *Yasuaki Ōnuma*, A Transcivilizational Perspective on International Law: Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century (2010); *Ruskola*, China in the Age of the World Picture (n. 2); *Salaymeh*, Comparing Islamic and International Laws of War (n. 37).

[61] *Artwell Nhemachena / Esther Dhakwa*, Beyond Eurocentric Human Rights Jurisprudence and Towards Animality? – Humanoid Robots and the Decomposition of African Humanism and Personhood, in: Nhemachena / Warikandwa / Amoo (n. 5) 73–120, 104.

[62] *Nhemachena / Dhakwa*, Beyond Eurocentric Human Rights Jurisprudence (n. 61) 75.

[63] *José-Manuel Barreto*, Decolonial Strategies and Dialogue in the Human Rights Field: A Manifesto, (2012) 3 Transnational Legal Theory 1–29, 12.

cause it was "developed in Europe as a universal, hegemonic, and dominant discourse".[64]

Although we recognize the value of identifying Global South antecedents to and participants in human rights discourse, we suspect that the project of altering human rights by including Global South traditions will not resolve the coloniality of the notion of human rights. Put simply, the notion of "universal human rights" is suspect from a decolonial perspective, which emphasizes pluriversality (i.e., local normativity) over universality. There is no global consensus on what human rights should include; consequently, the key questions are "who will determine what is a human right?" and "who will implement human rights?". While the abstract ideal of "universal human rights" is appealing to many groups – particularly those interested in securing rights against oppressive states – they can only be implemented through asymmetrical power relations that perpetuate coloniality.

Decolonial theory also illuminates the dimensions of neo-colonialism that underlie other areas of modern international law. For instance, international law's legitimization of (neo)colonialism is particularly evident in matters of property (re)distribution.[65] More specifically, Felichesmi S. Lyakurwa argues that "ecocentrism, biocentrism, Earth Jurisprudence and postanthropocentrism are all Eurocentric contrivances to evade restoring and restituting ownership of property and resources to (neo-)colonially dispossessed and robbed Africans".[66] As Eve Tuck and K. Wayne Yang emphasized, "decolonization specifically requires the repatriation of Indigenous land and life. Decolonization is not a metonym for social justice."[67] Decoloniality can contribute to pushing international legal scholarship towards modes of restorative justice that address colonialism and neo-colonialism.

b) Decolonial constitutional law

Decolonial approaches to constitutional law have focused on the potential role of constitutions in decolonizing societies. Several scholars have examined constitutional recognition of plurinationality as a strategy for decolonizing the modern nation-state's frequent imposition of national homogene-

[64] *Emile Zitzke*, A Decolonial Critique of Private Law and Human Rights, (2018) 34 SAJHR 492–516, 505.

[65] *Lovemore Chiduza*, Chapter 10: The Jurisprudence of the Zimbabwean Judiciary on the Protection of the Right to Property with Specific Reference to the Fast Track Land "Reform" Programme and Operation Murambatsvina, in: Nhemachena / Warikandwa / Amoo (n. 5) 327–366.

[66] *Felichesmi S. Lyakurwa*, The Environment, Mining and Western Interventionisms: Towards a Pan-Africanist Jurisprudential Model of Justice in Africa, in: Nhemachena / Warikandwa / Amoo (n. 5) 243–262, 245.

[67] *Eve Tuck / K. Wayne Yang*, Decolonization Is Not a Metaphor, 1 Decolonization: Indigeneity, Education & Society 1–40, 21 (2012).

ity.[68] César Augusto Baldi describes plurinationality as one element in "New Latin American Constitutionalism".[69] María Itatí Dolhare and Sol Rojas-Lizana propose that "[the indigenous concept of *vivir bien*] represents a legal and epistemological shift that radically contests the dominant Western paradigm of modernity/coloniality as embodied in Bolivia's previous modern liberal constitutions".[70] However, Roger Merino warns that the Bolivian (and Ecuadorian) Constitutions "maintain racialized and colonial notions of sovereignty and state power on indigenous territories".[71] Similarly, Franziska Englert and Jonathan Schaub-Englert contend that indigenous territorial autonomy in Bolivia occurs within the framework of the liberal state, which is a colonial institution.[72] Englert and Schaub-Englert argue:

> "Consequently, the revolutionary Constitutions in Bolivia and Ecuador might be a step in the right direction. At the same time, they are inherently limited: The Constitutions question the character of the national State through the self-imposed objective of decolonization but fail to modify it. Both Constitutions challenge neither the state-centralized tendencies of their government nor the capitalist system of their society."[73]

In a similar vein, writing about South Africa, Zitzke observes, "[t]he Constitution's text and practice quite simply does not mandate a true political and epistemological decolonisation of dominant SA [South African] law. At most, what it gives us is creole-colonial law."[74]

Zitzke's observation points to a crucial question: can the constitutions of modern nation-states be decolonized? The constitutions of modern nation-states usually enshrine territorial sovereignty, which systematically oppresses indigenous land rights. A significant challenge for decolonial constitutional law may be imagining a decolonial constitution or demonstrating if

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[68] By way of example, see *Catherine Walsh*, Interculturalidad, Plurinacionalidad y Decolonialidad: Las Insurgencias Político-Epistémicas de Refundar El Estado, Tabula Rasa – Revista de Humanidades 9 (2008) 131–152; *idem*, Interculturalidad, Estado, Sociedad: Luchas (De) Coloniales de Nuestra Época (2009).

[69] *César Augusto Baldi*, New Latin American Constitutionalism: Challenging Eurocentrism & Decolonizing History (2012), Critical Legal Thinking, <http://criticallegalthinking.com/2012/02/06/new-latin-american-constitutionalism-challenging-eurocentrism-decolonizing-history/> (8 September 2021); *idem*, From Modern Constitutionalism to New Latin American Decolonial Constitutionalism, The CLR James Journal 23 (2017) 307–322.

[70] *María Itatí Dolhare / Sol Rojas-Lizana*, The Indigenous Concept of Vivir Bien in the Bolivian Legal Field: A Decolonial Proposal, The Australian Journal of Indigenous Education 47 (2018) 19–29, 20.

[71] *Roger Merino*, Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America, Leiden Journal of International Law 31 (2018) 773–792, 787.

[72] *Franziska Englert / Jonathan Schaub-Englert*, A Fruitless Attempt towards Plurinationality and Decolonization? – Perplexities in the Creation of Indigenous Territorial Autonomies in Bolivia, Verfassung und Recht in Übersee 52 (2019) 67–89.

[73] *Englert / Schaub-Englert*, A Fruitless Attempt (n. 72) 88.

[74] *Zitzke*, A Decolonial Critique (n. 64) 509.

a decolonial constitution can decolonize a state. Scholars of decolonial comparative constitutional law might reject the idea of a constitution or develop a constitution that creates decolonial alternatives to meet the needs of indigenous and colonized societies.

c) Decolonial philosophy of law

Decolonial approaches to philosophy of law emphasize that law pre-existed colonialism and that law is more than modern state law. Khanya B. Motshabi asserts that "Africa can teach such propositions as the following. Absolute separation between law and morals is a mirage. Law-making needs no political sovereign, that singular obsession of Western positivist legal theory. Law-making requires no parliament, executive, court or police."[75] Likewise, Peter Fitzpatrick suggests that "law is decolonial. Or, in a more restrained vein, in its ability to extend beyond its appropriation by an occidental modernity, law is intrinsically capable of being decolonial."[76] Decolonial legal theory challenges the modern nation-state's rigid claim to legal univocality. Nevertheless, from the perspective of decoloniality, as Boaventura de Sousa observes, "the uncoupling of law from the nation-state is a necessary, not a sufficient condition for the recuperation of the emancipatory potential of law".[77] Recent scholarship in the philosophy of law indicates that law has an important role to play in decoloniality and decolonization.[78]

d) Decolonial law and gender

Decolonial theory is also resonant in the area of "law and gender" because of how coloniality shapes gender. As decolonial feminist María Lugones emphasizes, colonialism fundamentally altered premodern constructions of gender.[79] Consequently, any study of "law and gender" must account for colonialism's role in reshaping gender relations. Xhercis Mendez explains that the category of gender functions as a colonizing force.[80] Breny Mendoza elaborates, "In the process of colonization, women and men in the colony

[75] *Khanya B. Motshabi*, Decolonising the University: A Law Perspective, (2018) 40:1 Strategic Review for Southern Africa 104–115, 110.

[76] *Peter Fitzpatrick*, The Revolutionary Past: Decolonizing Law and Human Rights, Metodo – International Studies in Phenomenology and Philosophy 2:1 (2014) 117–133, 125.

[77] *Boaventura de Sousa Santos*, Toward a New Legal Common Sense: Law, Globalization, and Emancipation[2] (2002) 68.

[78] *Lena Salaymeh*, Decolonial Translation: Destabilizing Coloniality in Secular Translations of Islamic Law, Journal of Islamic Ethics 5 (2021) 1–28.

[79] *María Lugones*, Toward a Decolonial Feminism, 25 Hypatia 742–759 (2010). See also *idem*, Heterosexualism and the Colonial / Modern Gender System, 22 Hypatia 186–209 (2007).

[80] *Mendez Xhercis*, Notes Toward a Decolonial Feminist Methodology: Revisiting the Race / Gender Matrix, Trans-Scripts 5 (2015) 41–59, 48.

were both racialized and sexualized as gender was deployed as a powerful tool to destroy the social relations of the colonized by dividing men and women from each other and creating antagonisms between them".[81] Decolonial feminists have established the importance of resisting simplistic explorations of gender and recognizing how framing legal questions through the lens of gender can serve coloniality.[82]

e) Decolonial law and religion

In addition, decolonial theory contributes to "law and religion". Insofar as coloniality promotes secularism, decolonial critique necessitates a critique of secularism as a hegemonic and universalizing paradigm. Decolonial theory should be understood as overlapping with critical secularism studies.[83] Critical secularism studies demonstrates that secularism, despite its local and historical variations, is a fluctuating ideology and array of practices that are neither neutral nor universalist. Secularism's historical beginnings in early modern Western Europe – specifically the Protestant Christian tradition – shaped its approach to "religion", generally, and to "religious law", specifically.[84] Secularism combines Protestant Christian ideas and new, emerging interests of the modern nation-state. Critical secularism studies emphasizes that secularism defines religion, which is not a transhistorical phenomenon, and that secularism is a tool of colonialism.[85] Nineteenth-century colonial governance used secular legality to separate politics from religion in order to discipline and manage colonized groups and institutions.[86] Privileging secular law over non-secular law perpetuates the colonial binary of religion and the secular. Decoloniality highlights the coloniality of implicit comparisons between modern secular law and premodern, non-secular law. By way of example, the contemporary rendering of Islamic law as "religious law" (or "sharia") is a secular translation of the Islamic legal tradition based on the hegemony of secular notions of law. The Islamic legal tradition pre-existed

[81] *Breny Mendoza*, Coloniality of Gender and Power: From Postcoloniality to Decoloniality, in: The Oxford Handbook of Feminist Theory, ed. by Lisa Disch / Mary Hawkesworth (2015) 100–122, 116.

[82] See also *Lena Salaymeh*, Women and Islamic Law: Decolonizing Colonialist Feminism, in: Routledge Handbook of Islam and Gender, ed. by Justine Howe (2020) 310–317.

[83] On critical secularism studies, see especially *Talal Asad*, Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam (1993).

[84] *Michaels*, Religiöse Rechte und postsäkulare Rechtsvergleichung (n. 15); *Lena Salaymeh / Shai Lavi*, Religion Is Secularized Tradition: Jewish and Muslim Circumcisions in Germany, (2021) 41 OJLS 431–458.

[85] *Timothy Fitzgerald*, Religion and the Secular: Historical and Colonial Formations (2007).

[86] On the Eurocentrism and coloniality of secularism, see *Lena Salaymeh*, The Eurocentrism of Secularism, West Windows 26 (2020), <https://www.uni-erfurt.de/philosophische-fakultaet/forschung/forschungsgruppen/was-ist-westlich-am-westen/west-windows/26-the-eurocentrism-of-secularism> (8 September 2021).

the emergence of secularism and religion, and coloniality mistranslates Islamic law as "non-secular law" (i.e., religious law).[87] To remedy the mistranslation of premodern legal traditions into colonial terminology, Lena Salaymeh proposes decolonial translation as a model for decolonial comparative law.

IV. Towards decolonial comparative law

The blind spots of comparative law as well as the internal and external critiques explained above can now be understood as resting on multiple epistemic assumptions that emerge from coloniality. Four such blind spots were identified: prioritization of formalized law, methodological nationalism, assumed homogeneity within legal traditions/systems, and implied superiority of the Global North. Pluriversality, as a decolonial tool, addresses all four of these problems by integrating non-formal law, recognizing and appreciating non-state law, replacing homogeneity with plurality, and giving voice to epistemologies of the Global South.

One point on the latter. It is sometimes suggested that only Global South scholars can be involved in decoloniality, such that scholars from the Global North should yield their privileged speaking positions and listen to others. We believe that it is indeed crucial to integrate, listen to and respect Global South perspectives. Nevertheless, a mere reversal of hierarchies between Global North and Global South will not overcome coloniality by itself. Moreover, decolonizing the discipline of comparative law in the Global North requires the involvement of Global North scholars. Notably, our project is geographically located in the Global North and aspires to decolonize Global North epistemologies; given our institutional locations, we make no claims to decoloniality in the Global South because that is under the purview of scholars there.

Comparative law is not (yet) among the fields that show intense engagement with decolonial theory, but the potential should be obvious. Recent scholarship emphasizes the central role of methods to decolonization of knowledge.[88] Decolonial comparative law, we hope, contributes to decoloniality by demonstrating the key role of the method of *comparison* for decolonizing the study of law. Decolonial comparative law offers two modes of decolonization. First, decolonial comparative law promotes pluriversal law by emphasizing that there are multiple legal options that need not be unified. Second, decolonial comparative law is a tool for discovering new legal options.

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[87] *Lena Salaymeh*, Decolonial Translation (n. 78).

[88] See, by way of example, *de Sousa Santos*, Epistemologies of the South (n. 50).

What might be elements of decolonial comparative law? First, decolonial comparative law examines relationships of power between legal systems or traditions. Mainstream comparative law has long focused on enumerating and assessing similarities and differences between legal systems or legal traditions and identifying legal "transplants". These approaches run the risk of being reductionist and implicitly judgmental. We propose that decolonial comparative law should transcend the modern, positivist tendency to measure and to rank, instead shifting to a focus on relationships of power between legal systems or legal traditions.

Second, decolonial comparative law reveals that modern law cannot be presumed to be superior to precolonial legal traditions.[89] Consequently, we should distrust methodologies and epistemologies that make the superiority of modern law unavoidable. For instance, mainstream comparative law adopts a notion of "modern law" that is predicated on ideas of progress that in turn emerge from coloniality. In order to resist presumptions about modern law that actually reflect coloniality, we must reconsider our basic understanding of how modernity shaped law, both in Europe and elsewhere; we must delink.[90] It is only through comparative legal history, focusing on law prior to modernity and outside the colonial centre (i.e., Europe and more recently the U.S.), that we can begin to uncover law that is an alternative to coloniality.

Third, decolonial comparative law requires a broader definition of law that incorporates non-state law, but not as a mere mirror-image of state law. It is well known that the categorizations involved in the idea of legal families reflect colonial presumptions, but alternatives have not been able to overcome the bias in full. Decolonizing comparative law means transcending conventional "legal families", including the categorical difference of "secular law" and "religious law". Many legal philosophers have proposed "folk definitions" of law that define law according to how societies or groups define law. Folk definitions of law are pluriversal (and populist) definitions of law because they recognize that people – not only states or institutions – demarcate law. When people demarcate laws from other norms, they often engage with legal reasoning, which means that they justify law based on legal sources or legal ideas. Accordingly, legal reasoning is an important category of comparative analysis in decolonial comparative law.[91]

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[89] For a historical take, see *Coel Kirkby*, Law Evolves: The Uses of Primitive Law in Anglo-American Concepts of Modern Law, 1861–1961, 58 American Journal of Legal History 535–563 (2018).

[90] See supra III.1.d).

[91] On the significance of legal reasoning in decolonial comparative law, see *Salaymeh*, Comparing Islamic and International Laws of War (n. 37).

V. Conclusion

We deliberately titled this article a "conceptual beginning". It is not a fully-fledged methodological analysis, nor a how-to guide, nor a manifesto. Such approaches would be premature for what is – at least for us – an early stage of a proposed decolonial rethinking of the discipline. They would also risk reinforcing what decolonial theory argues must be overcome: authoritative speaking rather than pluriversal engagement, implicit prioritization of one (or two) speaker positions over those of others, reducing options instead of allowing them to be revealed. This article is then a starting point, not an endpoint, for decolonial approaches to comparative law. While our project concerns the discipline of comparative law, we believe that decolonizing legal studies must necessarily be through comparative law, albeit not using conventional methods. To understand law from a decolonial perspective, we should identify law that does not contribute to coloniality; that process of identification is decolonial comparative law, including decolonial comparative legal history. The conceptual and methodological objectives of our project are relevant far beyond the field of comparative law. We hope they will interest a wide range of legal scholars.