



In Search of a Theory: Premises, Possibilities, and Propositions in the Formulation of Another Theory of Legal Comparison

En Busca de una Teoría: Premisas, Posibilidades y Propositiones en la Formulación de otra Teoría de la Comparación Jurídica

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Abstract

The primary objective of this work is to offer scholars of Comparative Law Theory a set of initial reflections for another theorizing proposal in comparative law. In this sense, the hypothesis we address is that it is fundamental to construct theoretical contributions that consider the context of their production, enabling the emergence of unprecedented approaches that, in addition to existing ones, can reinvigorate the debate in the field. To prove this hypothesis, this text is divided into four moments. The first of these seeks to highlight the internal and external epistemological obstacles encountered in developing a theory of legal comparison that does not originate from the Global South. The second part of this text aims to engage in dialogue with various existing contributions, which serve as a starting point (and point of divergence) for formulating new theoretical bases. Finally, the last two moments of the text aim to present two contributions to legal comparison theory: the ideas of “legal grafting” and “internal decomparativism”.

Keywords: Comparative Law Theory; Legal Epistemology; Legal grafting; Internal comparativist.

Resumen

El objetivo principal de este trabajo es ofrecer a los estudiosos de la Teoría del Derecho Comparado un conjunto de reflexiones iniciales para otra propuesta de teorización en el ámbito del derecho comparado. En este sentido, la hipótesis que abordamos es que resulta fundamental construir aportes teóricos que consideren el contexto de su producción, permitiendo el surgimiento de enfoques inéditos que, además de los ya existentes, puedan revitalizar el debate en el campo. Para comprobar esta

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hipótesis, el texto se divide en cuatro momentos. El primero busca resaltar los obstáculos epistemológicos internos y externos encontrados en el desarrollo de una teoría de la comparación jurídica que no se origine en el Sur Global. La segunda parte del texto tiene como objetivo dialogar con las diversas contribuciones existentes que sirven como punto de partida (y de divergencia) en la formulación de nuevas bases teóricas. Finalmente, los dos últimos momentos del texto tienen como propósito presentar dos aportes a la teoría de la comparación jurídica: las ideas de “injerto jurídico” y de “decomparativismo interno”.

Palabras clave: Teoría del Derecho Comparado; Epistemología Jurídica; Injerto jurídico; Decomparativismo interno.

INTRODUCTION

The formulation of a theoretical construction in the field of law, as well as in several other fields of Brazilian human sciences, goes through obstacles that were practically invisible for a long time. The epistemological challenges are perhaps the best known today, yet they require different analysis processes and, why not, a plurality of emancipatory actions.

A theory that considers the complexity of reading comparative law from a Brazilian perspective, that is, from the Global South, encounters interdisciplinary challenges in the field of law, particularly in the epistemology of law and the methodology of legal comparison.

In this sense, it is impossible to construct a genuine Brazilian contribution to legal comparison without seeking critical theories from the human and social sciences to support this ambitious project. Therefore, several theoretical contributions from critical theory, feminist studies, postcolonial theories, and, most of all, decolonial theory must be employed to facilitate dialogue in this process. This way, the proximity and differences between these research fields will be placed in constant dialogue around the same objective.

The straightforward adoption of these contributions, on the other hand, leads us to reflect on an initial and potentially preliminary obstacle, which is easily surmountable: the idea that to succeed in this theoretical challenge, we must necessarily undergo a process of rupture with knowledge originating from the Global North. Nothing is more wrong.

The production of a new look, which overcomes the vices produced by years of colonization of the imagination and rationality of southern intellectuals¹ requires a new behavior a new stance on the researcher's part, and not a departure from intellectual productions from the Global North. It's necessary to have a genuine openness to dialogue, rather than a one-sided discourse. Otherwise, the process that would take place would not be different from what has historically been done, from top to bottom, from “center to periphery.”

In this way, we intend to present some points that we understand to be preliminary and essential so that we can rigorously reflect on the possibilities and challenges of building a genuinely original contribution to the theory of comparative law. Therefore, we question whether it is possible to formulate an approach to comparative law that is essentially formulated from the Global South, more specifically from Brazil. If so, we advance in our

¹ For the concept of colonization of the imaginary, see the classic text: QUIJANO (2007), p. 169.

debate by developing a second inquiry, asking ourselves what the main epistemic challenges would be for its formulation.²

To achieve this, we will focus our efforts on two main objectives. The first involves constructing a diagnosis of what we understand to be the main obstacles in developing a comparative law theory that considers Brazil's complexity.

Initially, we argue that the first obstacle lies in Brazilian legal culture,³ which is intellectually colonized and reproduces ills inherent to the country's social formation, such as inequality and exclusion.⁴ To this end, we intend to mobilize the concept of self-orientalism, coined by Teemu Ruskola, to help us understand how different types of epistemological barriers are erected in constructing our knowledge around legal comparison theory. To this obstacle, we add a second, the legal epistemicide, which is projected onto the Brazilian academic community and prevents it from considering the world, its culture, and reality (II).

As symptoms of the epistemological corrosion that accompanies much of the legal world in Brazil, we highlight the disregard for interdisciplinarity that profoundly affects the jurist's worldview. This disregard, by limiting scientific imagination, prevents the construction of perspectives that account for this neglected reality. By understanding reality and recognizing, accessing, and supporting the contributions of other human and social sciences to the law, we can develop new legal mentalities (III). Finally, in the second part of this study, we will seek to act prescriptively by developing propositions that can contribute to the initial draft of a theoretical key for this comparative law originating in the Global South. We aim to provide fresh perspectives through critical discussions with some significant theoretical frameworks of comparative law. These debates can offer new insights that align with the current demands of Brazilian comparative law and initiate new dialogues with comparativists from both the global south and north. (IV and V)

To produce this research, we will adopt a descriptive and analytical methodological process, prioritizing a qualitative study of a theoretical and bibliographic nature. In this sense, we adopted the hypothetical-deductive method, assuming our hypothesis as a conjecture that aims to address the problem presented here.⁵

This work, as can be seen, adopts a methodological process that is still marked by an intellectual construction primarily influenced by Eurocentric perspectives. This does not prevent us from reflecting on this methodological approach to search, based mainly on these epistemological reflections, to develop future methodological models that more reliably reflect the project presented here.

² We recognize that it is also necessary to think about the methodological challenges surrounding this endeavor. Due to the project's complexity, we left reflections on the methodology for the next research project, which is still in progress. On the other hand, it is important to highlight that this movement has already occurred in the social sciences when analyzing decoloniality. We understand that decoloniality can be an important gateway to future methodological reflections carried out in Brazil.

For more details, see, for example, ZAVALA (2016), p. 6; ERIKSEN (2022); MORGENSEN(2012), p. 805; BORSANI (2021); OCAÑA, LÓPEZ & CONEDO (2018), p. 172; SUÁREZ-KRABBE (2011), p. 183; DULCI & MALHEIROS (2021), p. 174; MOSAKA (2021); p. 761; PIRES (2019), p. 69; PUENTES (2014), p. 1.

³ For the concept of legal culture, see NELKEN (1995), p. 435; NELKEN (2004). We can identify an essential group of authors in various fields of law and at different historical moments who intend to break with this intellectual colonization and construct a genuinely Brazilian doctrine. We are just not sure whether this movement reaches studies in comparative law.

⁴ For a broad overview of the topic, see BARRETO, LIMA, LOPES & SOTERO (2017), p. 113. See also BANDEIRA & AMARAL (2017), p. 48; VIEIRA (2007), p. 28.

⁵ CHAMPEIL-DESPLATS (2014); GIL (1991); LAKATOS & MARCONI (2007), GUSTIN, DIAS & NICÁCIO (2020); ECO (2020); POPPER (1975); GRAWITZ (2001); POUPART *et al.* (2020).

I. INITIAL ASSUMPTIONS: FROM SELF-ORIENTALISM TO LEGAL EPISTEMICIDE

Theorizing cultural diversity and comparative law is perhaps one of the most interesting points being explored today by scholars dedicated to the theory of legal comparison. This movement highlights one of the least carried out debates in this field of legal research: the need to reflect on the centrality of the State as a point of reference for legal comparison work.

Despite the evident benefits of conducting legal comparisons from a state-centered perspective, several scholars question whether the restriction on state law might cause some “myopia” that could compromise, for example, a collection of advantages, analogies, or even limit the potential for greater depth in the legal comparison.⁶

This warning is not new. Authors such as William Twining have already warned about the enormous potential of conducting a legal comparison that incorporates other legal materials, including international and non-state law, alongside state law.⁷

Vivan Curran, in turn, states that legal comparison, as it helps us better understand legal cultures, their practices, and categorizations, should not fail to turn its eyes within state limits. Comparative law, in this sense, can be a powerful ally in enhancing the researcher's understanding of their own legal culture.⁸

The issue becomes more sensitive when we question domestic law scholars' views regarding their legal culture, references, and possibilities. As is widely known, comparative law can be a powerful instrument in constructing a fertile analysis regarding the researcher's internal legal system. This appears to be a point of agreement among scholars. What remains for us to question, especially from the Global South, is the epistemological stance of scholars within this vital process.

Despite the evident differences between the epistemological colonization that occurred in various locations in the Global South, constructing a dialogue between postcolonial theory and decolonial theory can also be helpful for this analysis.

Some essential theoretical constructions elaborated by Teemu Ruskola, in dialogue with postcolonial theory, can help us begin to reflect on this issue. As we know, the author defines self-orientalism as an epistemological condition in which the adoption of the values of the Global West, particularly those of the Global North, is perceived as morally superior to those of the Global South.⁹ Consequently, the legal institutions originating from this part of the Globe are considered “evidently” superior and, therefore, more capable of acting in the legal field than the local culture may have created.

In this way, the individual who adopts self-orientalism assumes postures that are stereotypical representations of their own culture, either to gain recognition and positions in Western-dominated environments or because they do not understand their own behavior.

⁶ GRELLETTE & VALCKE, (2014), p. 559.

⁷ TWINING (1999), p. 226.

⁸ CURRAN (1998), p. 657; CURRAN (1998a), p. 43.

⁹ What RUSKOLA intends to do, as he clearly warns in his book, is an approach that analyzes the legal aspects of the concept created by Edward SAID, *Orientalism*. For Said “I shall be calling Orientalism, a way of coming to terms with the Orient that is based on the Orient's special place in European Western experience.”, SAID (1978), p. 1.

What is perceived is a process of colonialism or “internal” colonization, as both involve the internalization of the tastes, beliefs, and cultures of the West or the colonizers to the detriment of the culture of colonized peoples.¹⁰

This “epistemological condition” engages in a deep dialogue with another well-known concept, also developed by the author, of legal orientalism: the set of interconnected narratives about “what is and what is not law, and who are or are not its subjects proper.”¹¹

In this sense, the decision on what we can or cannot consider a legal item, and therefore a possible object for legal comparison, primarily involves a first and silent authorization, an approval, and an initial test of validity. This validation is carried out by the interpreter himself, who demands the subsumption between the material he analyzed and a series of cultural, political, and legal formulations that are essentially subjective, elaborated in a specific part of the globe, notably the global North. The legal comparison process can continue only after this verification, which is often overlooked.

This construction not only defines the cultural standards on which we should base our reflections on the law —a phenomenon we know to be eminently cultural—but also identifies the elements we should exclude when formulating these reflections. For example, it is interesting to note how several Brazilian comparative legal studies exclude experiences arising from internal legal pluralism and include legal formulations originating from the Global North without considering their suitability for the Brazilian cultural context.

From a comparative law perspective, this epistemologically oriented behavior can be observed in the methodological choices of comparativists. Functionalism, as a methodological expression of comparative orthodoxy, is an example.¹²

Functionalism has become an essential part of the dominant school's comparison project in recent years. It contributes to an uncritical production of legal comparison, supported by a claim to neutrality that declares itself the best way to produce a science of legal comparison.¹³

In the words of Teemu Ruskola, functionalism ends up “leads to a kind of epistemological imperialism: either we find in foreign legal cultures confirmation of the (projected) universality of our legal categories, or, equally troublingly, we find “proof” of the fact that other legal cultures lack some aspects or others of our law.”¹⁴

By shedding light on legal orientalism, we are questioning the “epistemic attitude” adopted by Southern jurists and its inevitable consequences. Here, and following Geoffrey Samuel, it is worth asking whether the notion of Law prevailing in the Global North can be transplanted to all regions of the Globe.¹⁵

Likewise, it seems pertinent to us to question, for example, whether the Brazilian justice system seriously reflects on the culturally plural and economically unequal reality on which it is based, marked by the ethnic, cultural, and economic diversity of its people, and whether it takes them into account in its theoretical propositions.

¹⁰ ARNOLD (1996). For the concept of legal colonization, see: ROULAND (1990).

¹¹ According to the author: “...set of interlocking narratives about what is and is not law, and who is and is not its proper subjects.” RUSKOLA (2013), p. 6

¹²For a vital reflection and reevaluation of the method of functionalism, moving away from dogmatism, see: MICHAELS (2008), pp. 339-382.

¹³For a perspective on functionalism coming from the critical school, see FRANKENBERG (2019). For a perspective from the culturalist school, see LEGRAND (2021).

¹⁴ Supra note 13 at 33.

¹⁵ Samuel, MERCESCU & GLANERT (2021), pp. 1-30.

It is not an exaggeration to say, based on Bonilla's reflections, that the Brazilian jurist is idealizing the colonizers' model as a "modern" law or, worse, more capable or efficient and caricatured as "primitive" original forms of social organization, rendering invisible and disregarding legal models that could be much more useful for Brazilian society.¹⁶

Consequently, and due to the epistemological blocks of a legal community historically intellectually colonized, we can perceive an unreflective silencing on the part of jurists who cannot even enter into certain debates considered excessively sophisticated and, therefore, decorative. We would consequently be imposing a new form of "subjective self-colonization," this time in the field of legal sciences.¹⁷

It is not difficult to identify a clear and silent option for the mobilization, often mistakenly, of a series of theoretical references culturally identified with the Global North to the center of the intellectual board of the main formulation centers of Brazilian legal thought.¹⁸

There is, therefore, the contamination of the entire justice system and, consequently, the interruption of the construction of possibilities for the interpretation of the Federal Constitution that could lead to the production of new regulations that could consider the ethnic and cultural plurality of the country.

By not putting specific questions up for debate, by not formulating certain issues that take into account the ethnic reality, in addition, of course, to the social formation marked by violence, inequality, and exclusion, we are, in the end, establishing an "intellectual horizon" in the study, already precarious in the Brazilian Universities, of Comparative Law in Brazil. We are, consciously or unconsciously, setting a series of "insurmountable limits," and worse still, these limits are invisible to our reflection regarding Brazilian law.¹⁹

Let's look at the case of legal transplants. The enormous adoption of foreign legal items is generally made in Brazil without any previous debate that should aim, above all, at critical points regarding the reception of these items, such as the context of their creation, the legal culture belonging to this item, its epistemological aspects, in addition to a careful debate around the process of its adaptability in Brazilian legal theory.

With honorable exceptions, this entire careful and necessary methodological guide is not part of the work carried out by most Brazilian legal dogmatists, who end up defending processes of incorporating legal items, adopting a stance centered on arguments marked by legal orientalism.²⁰ Similarly, it appears that the jurist's intellectual horizon does not permit the investigator to critically reflect on the validity of the decontextualized interpretation of the item being imported.

Now, let us think about the concept of Law. Scholars of Comparative Law have been asking themselves for some time whether it is necessary to rethink the idea of Law before attempting to produce comparative analysis.²¹

Critical comprehension of legal theory is also essential to the theory of legal comparison. Legal theory, for example, is itself an integral part of a whole tangle of relationships that integrate their object of analysis, the Law itself. From this critical reflection, for example, it is possible to perceive that the same author who reflects on their object recreates or

¹⁶ MALDONADO (2021).

¹⁷ Supra note 18 at 199.

¹⁸ LÓPEZ MEDINA (2004).

¹⁹ LÖWY (1994), pp. 22-23.

²⁰ CAMPOS DUTRA (2018), p.39; CAMPOS DUTRA (2024), pp. 568-586.

²¹ SAMUEL (2014), pp. 121-151.

remodels this same object, now under the argument of merely describing it. In Samuel's expression, the map defines the territory itself.²²

When we discuss law, we have intellectual constructions within the field of legal knowledge that seek consensus, even if temporary, within this community. There is no obligation to correspond with any observable external item, content, or purpose. The result of this process is the recreation of the object itself, of the very link between what we believe we are just describing, but which, after all, we are giving life to through the production of knowledge around this object.

Consequently, we observe the emergence of dogmatic thinking, which manifests through the actions of its agents. This results in a series of principles, theories, and concepts supported by a vast body of texts, thereby shaping the meaning of what we refer to as the science of law.²³ Ultimately, this production is accepted by the justice system that will apply it, restarting the entire process. There is not only an interaction and reciprocal influence, but also a robust joint subjective construction that defines what we can say constitutes the law.²⁴

One of the complications of this process is what has been designated as the “paradigm of authority.” The authority paradigm can be understood as the idea that only legal texts are authorized to serve as sources for producing legal knowledge. This is the paradigm of formalists and serves as the basis, for example, for the functionalist method when practiced orthodoxly in Comparative Law. It subjects the researcher, therefore, to an insurmountable textual authority.

In this sense, foundational texts recognized as legal may even be criticized when analyzed within the paradigm of authority. On the other hand, their authority cannot be questioned and becomes the proper limits of investigations. In this sense, the so-called “authority paradigm” can also be considered an insurmountable epistemological obstacle²⁵ for producing legal comparisons beyond sterile dogmatics.²⁶

For Luiz Alberto Warat, disseminated dogmatic thinking forms what can be called “theoretical common sense of jurists,” that is, a series of representations and legal practices that become an actual “arsenal of practical ideologies” that “ideologically discipline the professional work of jurists,” justifying the legal order without, however, explaining it.²⁷

This process, which, after all, is abstract, will certainly not account for all the realities present in the lives of these agents. The jurist, therefore, probably only describes the part of reality that is accessible to its limits, both ontological and epistemological.

These limits often establish some implicit impediment to the construction of other models of experiences of organization and social pacification that the jurist himself would block. Without being accessed, the various forms of existence presented by reality are not

²² *Supra* note 22 at 13.

²³ For the importance and complexity of legal dogmatics, see: STARK (2020).

²⁴ For details, see: note 22.

²⁵ Epistemological obstacles are “resistance” or “inertia” from thought to thought, arising at the moment of the constitution of science as “counter-thought” or at a higher stage of its development as “thought arrest”. In Law, this concept was used by Michel MIAILLE to denounce the positivist epistemological attitude, that is, the study of law restricted to the “experimentally verifiable”. For details, RODRIGUES & GRUBBA (2012), p. 64; BACHELARD (1996).

²⁶ SAMUEL (2008), p. 288.

²⁷ WARAT (1979), p. 19. For more details regarding the concept of Theoretical Common Sense of Jurists and the work of Luiz Alberto WARAT, see: VERAS (2017), p. 266; MENEZES (2021), p. 83; BORGES & JUNIOR (2020).

mobilized, and the jurist can't innovate, reimagine, or reconstruct the process of producing legal knowledge. What we have here is, therefore, an epistemic injustice.²⁸

If we acknowledge, following Viahinger, that all concepts in science are fictional constructions, why not consider minimally contextual social solutions that often play a more effective role in achieving specific goals within certain cultural realities?²⁹

There is, therefore, something like a still misunderstood model of Brazilian legal ideology, whether as a belief, false consciousness, or institution, all of them reflecting the positioning that translates as “although, deformed, elements of reality.” In this sense, Roberto Lyra FILHO warns of the danger of distortion of the law, “an altered image, not an invented one,” leaving us to think about how we can “unturn the mirror” and make it “as much as possible flat and comprehensive.”³⁰

By going against reality, we uncritically adopt a dogma that fuels its cultural phagocytosis, dismissing cultural models and practices that do not conform to the model established in modernity in the global North. Many Brazilian jurists, therefore, experience an enormous epistemic loss, especially when they intend to reflect on the theory of legal comparison.

In this regard, it is interesting to consider how this process leads to a type of epistemicide. According to Boaventura de Sousa Santos, epistemicide is a process characterized by the invisibility of any possible contribution from the South that is not assimilated by dominant knowledge, specifically Western knowledge.³¹

For Sueli Carneiro, when analyzing the issue of race in Brazil and refining Foucault's thought, epistemicide simultaneously acts as a form of denial of the other's rationality as a process of cultural assimilation. In this sense, what is observed is a form of biopower technology that aims to delegitimize the knowledge-producing subject, thus establishing a process of “intellectual inferiorization” that deeply compromises the subject's self-esteem.

Thus, it is intended to “disqualify the forms of knowledge of dominated peoples (...) also disqualify them, individually and collectively, as knowing subjects”. We are faced, therefore, with “a persistent process of producing intellectual inferiority or denying the possibility of realizing intellectual capabilities”.³² Therefore, we have the appearance of what Daniel Bonilla called “legal barbarian,” that is, a subject is only understood as capable of “diffusing, reproducing or applying locally the knowledge created in other geographies.”³³

This movement must be understood as a true “ethnojuridic” since what is presented is the search to “prevent any form of peculiar legal manifestation of the dominated/colonized

²⁸ According to POHLHAUS “the idea of “epistemic injustice” draws together three branches of philosophy – political philosophy, ethics, and epistemology – to consider how epistemic practices and institutions may be deployed and structured in ways that are simultaneously infelicitous toward certain epistemic values (such as truth, aptness, and understanding) and unjust concerning particular knowers” For more details, see: POHLHAUS, (2017) p. 13

²⁹ VAHINGER (2013).

³⁰ LYRA FILHO (1982).

³¹ According to the author, epistemicide “occurred whenever it was intended to subaltern, subordinate, marginalize, or illegalize practices and social groups that could threaten capitalist expansion or, for much of our century, communist expansion (in this domain as modern as capitalist); and also because it occurred both in the peripheral, extra-European and extra-North American space of the world system and in the central European and North American space, against workers, Indians, black people, women and minorities in general (ethnic, religious, sexual), SANTOS (1995), p. 328. For another perspective on the topic, see GROSGOUEL (2013), pp. 73-90.

³² CARNEIRO (2005), p. 96.

³³ MALDONADO (2015) p. 15. See also: MALDONADO (2021).

people.”³⁴ There is, therefore, an “almost complete annulment of possible national legal experiences, or at least of ways of rationing and thinking about society's problems with precise cultural marks and far from European uniformity.”³⁵

Epistemicide, combined with “ethnojuricide,” prevents Brazilian jurists from contributing what is perhaps the researcher's most important characteristic: legal imagination. When we refuse to think from ourselves, we immediately block our memories, insights, and views that, when perceiving the world in all its contradictions, can offer it creative responses arising from experiences that are not adequately linked to the subjectivity of the global north and, therefore, of the legal materials resulting from them.

This process also involves the researcher's self-image, carrying out a movement similar to the cognitive demotion analyzed here. We believe this internal process presents itself in two ways during the execution of this epistemicide. The first movement happens internally, and we have already described it here.

The second moment happens naturally in exchanges between jurists from the Global South. We hypothesize that this movement is replicated in the internal academic environment, characterized by intellectual colonization, where any innovation in legal thought that challenges legal orientalism is perceived as unscientific and is prevented from being discussed among peers.

We perceive a historical process of blocking innovations in the internal legal imaginary by large academic centers that, epistemologically colonized, do not intend to dispose of dominant subjectivity.³⁶

In the same way, Brazilian legal academia's policy establishes a distinction between knowledge produced in the north of the national territory, generally marked by the most recent formulation of study centers, and knowledge produced in the south of the territory, marked by more settled centers of legal knowledge production, typically led by teachers trained in the Global North.

What is observed is an internal process of intellectual imperialism, an inverted mirror, where subjects linked to the Global North, generally by training, and who end up occupying the central spaces of Brazilian academia, not only reproduce their intellectual subservience but also work recurrently through an epistemicide and an ethnojuricide of any new way of thinking about law. In short, the path to producing a theory that is linked to emancipated thought is blocked.

II. POSSIBILITIES: NEW EPISTEMOLOGIES, NEW METHODOLOGIES.

It is necessary to make the law of the Global South concrete.³⁷ To achieve this, several steps need to be taken. Epistemological emancipation is perhaps the first step in this process. It is urgent to unlock the imagination of the southern comparative jurist. This unblocking will

³⁴ BORGES (2023), p. 43.

³⁵ Roman Borges drew from Pierre Clastres and his theoretical formulation regarding ethnocide to develop his legal perspective regarding this process. For more details, see BORGES (2022), p. 16.

³⁶ Paulo Freire recognizes that successful pedagogical practice requires, among other knowledges, the recognition of cultural identity. Building an education with a critical, curious, and non-submissive student profile is essential for the philosopher. We understand that the same applies to researchers and teachers. For more details, see FREIRE (2019).

³⁷ This concrete global South is, thus, a treasure trove of (comparative legal) knowledge, for it reveals the (Legal) world behind the façade, the real live of the law, of the state, of the constitution. See HOFFMANN (2017).

only be possible if we redesign the theoretical assumptions that are the basis for its intellectual construction.

The imagination of the Southern jurist is blocked by premises that prevent him from moving away from thinking created in the Global North.³⁸ These theorizations are, obviously, extremely important for any intellectual production worldwide. On the other hand, they cannot be centripetal matrices for the thought of the Southern jurist. It is necessary to reorganize the correlations of force and bring new intellectual bases to the center of the Southern jurist's subjectivity.

Several authors, aligned with different theoretical matrices, contributed to this debate. Its prepositions are essential because they help us critically reflect on the legal comparison theory. Its proposals offer exit doors that, if well-contextualized, are helpful tools for formulating something even more original; more than that, they are capable of emancipating the global South's jurists.

For Florian Hoffmann, if we intend to think from the Global South, we need to eliminate specific categories constructed in the North of the globe. It is essential to dare. The categories created by Max Weber, for example, are interesting to analyze. Its importance is evident in every formulation of thought in the human and social sciences worldwide. Consequently, the law is highly taxing on them. The question is whether they are sufficient to think about the realities that exist in places, times, and cultures different from those that influenced Weber's intellect.

According to Hoffmann, an intellectual and methodological attitude is necessary that accepts the challenge of *de-weberianization* ourselves, that is, of adopting a stance that moves away from dependence on different types of ideas created in the Global North and which, by constituting universalized categories subsequently, have become legal canons that not only dominate the territory but, paradoxically, continuously irrigate southern thought to the point of drying it out.

In this sense, the author continues, it is essential to adopt new sensibilities and open the jurist to a new form of ethnography, thus being able to reformulate configurations that are still understood based on Weberian theoretical formulations that are so deeply rooted in southern legal thought that block the imagination to the point that we cannot even identify new theoretical possibilities.

In this way, concepts such as nation, popular sovereignty, people, citizenship, equality, and law can be rethought no longer from the reflection of the warped mirror of the global North when it intends to be reflected in the South but instead in the light of the pluralities of experiences that make part of the cultural catalog of the most distinct realities existing in the global south.³⁹

Adopting this stance will allow establishing a “dialogue (...) with mutual concessions, reciprocal normative changes, interpenetrations of rationality, acceptance of similarities and differences, pragmatic seams of effectiveness and true ethical respect, not just legal or moral”.⁴⁰

As previously suggested, this movement may begin by rethinking what we understand as law and, consequently, by which legal items we can compare. It is intriguing to see, for example, how different ways of thinking about the concept of life, birth, and what can be

³⁸ For example, related to the transplants of theoretical constructions incorporated into Brazilian doctrine, see CAMPOS DUTRA (2023), pp. 568–586.

³⁹ HOFFMANN (2020), p. 43.

⁴⁰ BORGES & FERRAZ, *supra* note 34, at 136.

considered a human being can be easily found in other people's originating from Brazil, and this fact, even common knowledge among anthropologists, they are unable to penetrate the state's imagination and, consequently, that of Brazilian jurist.⁴¹

Studies involving legal pluralism, especially emancipatory legal pluralism, are essential tools for helping us understand the incompleteness of the legal phenomenon and how new forms of participation can be considered in the process of (re)thinking law, especially the creation of norms, but are close to the cultural realities in which this right is inserted.⁴²

In this sense, the attribute of normative effectiveness serves as the starting point for the jurist's reflection, shifting the focus from validity or legal effectiveness to a second and complementary analysis. In the same way, and supported by legal pluralism, we can think of law as a set of solutions applicable to the same issue arising within the scope of different communities that make up the same state's legal order.

This process of building their forms of dispute resolution is legitimate and represents the results of the history of these people, through their dissent, their deliberations that are often interrupted by the authoritarian irruption of the colonizer, be it the envoy from the European metropolises or the Eurocentric elite that constitutes and administers the national State.⁴³

For example, it is possible to consider replacing the Eurocentric ideal of the State with the Amerindian ideal of nations. Based on this "*desweberian*" option, selecting the legal experiences that comprise this complex territorial space of plural nations is feasible as the object of comparative analysis.

Therefore, it is plausible and justifiable to understand that, for an authentic comparative reflection from Brazil, we should focus on the plural and unofficial concept of legal experiences rather than the official Weberian concept, which is marked by the legal culture linked to the global North.

In the wake of this reflection, we believe it is possible to consider a legal comparison from the Global South. It begins not only with the epistemological rupture, which initially assumes and then breaks with intellectual colonization, but also with the reconfiguration of the comparatist's epistemic attitude.

The comparatist must understand new ways of perceiving law, take on the challenge of recreating categories deeply rooted in the social sciences, and seek intellectual productions that respect their imagination and allow them to benefit directly from their cultural repertoire.

Considering comparative law from Brazil and, why not, from the world's peripheries requires adopting a perspective that privileges what is close to the jurist. In their own culture, new materials can be found that serve the same purposes as those sought in the comparison carried out.

We are talking here about adopting an internal comparative stance. A Comparative Law that frees itself from Weberian-type ideas, from the conceptions founded by modernity, from the limits imposed by blood and death by colonization, and is rooted in intellectual

⁴¹ SEGATO (2014), pp. 76-77.

⁴² Pluralism is "the multiplicity of manifestations or normative practices in the same socio-legal space, integrated by conflicts and consensus, which may or may not be official and have their reason and being in existential, material, and cultural needs." For more details, see: WOLKMER (2001), pp. 15-16.

⁴³ SEGATO (2014), p. 86.

imperialism. After all, adopting a stance and logic is at the root of comparative law. In making a radical Comparative Law.⁴⁴

We speak of a Comparative Law carried out within national borders but wholly aligned with the historical commitment of this field of knowledge. This field of expertise is marked by intellectuals whose personal and professional lives were disrupted by wars of conquest and genocide, leading them to develop works that sought to think about peace, harmony, and the emancipation of people. This theme characterizes the entire history of this field of knowledge.⁴⁵

Internal legal comparison is not new among authors who reflect on Comparative Law. Some authors have already begun this reflection, even if they are pursuing other objectives. Mathias Siems, for example, asks what law can compare to and proposes an approach that goes beyond the classical one, establishing a comparison between foreign legal systems.

For the author, there is a process for incorporating what he calls “new units” to carry out legal comparisons. This insertion will, in the future, make Comparative Law an integral part of the legal education and research process in all fields of legal science.

He continues that it will not be surprising if legal comparison turns its gaze beyond the boundaries that exist today in the discipline, especially given the fact that comparatists are at the forefront of many new current debates, such as the interaction between multiple layers of norms, the dialogue between different legal cultures, and the diversity of legal forms.⁴⁶

Catherine Valcke appears to be heading in the same direction. In this sense, the author proposes identifying specific minimum contents, such as effectiveness, publicity, and coherence, so that we can characterize what can be considered law and, therefore, compare it within the societies investigated. In this way, and the author could not be more correct, the law would be much more identified with an argumentative social practice that constitutes a community's commitment to certain ideals than, for example, how it is presented or represented.⁴⁷

One of the most interesting current contributions to comparative law is its analysis based on the theoretical matrix of decolonial theory. Sherrally Munshi, building on the culturalist reflection developed in Pierre Legrand's work, has approached this relationship in a pioneering manner. From her perspective, the culturalist theory of comparative law has the potential to make a significant contribution to the development of a theory of legal comparison that genuinely originates from the Global South.⁴⁸

According to Michaels and Salaymeh, in the first study that seeks to systematize a decolonial dialogue between the North and South, aiming to decolonize comparative law, we initially need to identify how comparative law continues to be “influenced, trapped, or complicit” in the colonization project.⁴⁹

In this way, the authors continue, the so-called “blind spots” of comparative law — namely, methodological nationalism, the priority given to official law, the idea of homogeneity in legal systems or traditions, and the implicit superiority of the global North — can be

⁴⁴ And here, combined with continental philosophy and in the path of Benjamin, we understand the radical as that which goes to the root, the origin, the foundations, the central problem of the issue the comparatist faces. In comparative law, see LEGRAND (2007), pp. 220-223.

⁴⁵ For more details, see EÖRSI (1979); HUG (1932), p. 1.027; RILES (2001).

⁴⁶ SIEMS (2020), p. 884

⁴⁷ VALCKE (2018).

⁴⁸ MUNSHI (2017).

⁴⁹ MICHAELS & SALAYMEH (2022), p. 186.

understood as a result of colonialism. To overcome this epistemic blindness, the comparatist must employ tools from decolonial theory, such as adopting a shift in the researcher's epistemological stance.

In this sense, understood as an alternative to universalism originating from the Global North, “pluriversality” represents the recognition of the existence of worlds, each with its specific histories, cosmologies, epistemologies, and social organizations, which were marginalized and excluded by the Western cosmology, characterized by its highly universalizing and hierarchical nature. It is, therefore, “not only an epistemology but also an ethical and political position.”

As an alternative to universalism, “pluriversality” allows recognizing that different options for life and knowledge do not demand any superior position because they carry some truth or objectivity. Thus, it breaks with the idea that a new universal consensus is necessary and allows radical differences to be understood as perfectly natural. The consequence of this new epistemic stance is the openness to recognizing non-state rights, “replacing homogeneity with plurality,” and giving voice to Southern epistemologies.⁵⁰

For Salaymeh and Michaels, there are some key elements of comparative decolonial law. The first is the possibility of shedding light on examining power relations between legal systems or legal traditions. The authors' proposal moves towards the idea that decolonial comparative law must transcend the modern paradigms of comparative law, especially “the positivist tendency to measure and rank”, and adopt a critical stance, analyzing power relations.

A second element in comparative decolonial law is the break with hierarchization processes that mythologize modern law as superior, civilized, and, therefore, more suitable for societies than legal traditions distinct from it. Thus, the researcher must be wary of methodologies or epistemologies that point towards this hierarchical process, representing yet another face of coloniality. To do this, they continue to say that it is necessary to “delink.”⁵¹

Delinking allows for the creation of a new space where law and marginalized knowledge can intersect, providing an opportunity for the “infiltration” of perspectives constituted by cultures distinct from Eurocentric ones, which can be used as tools for understanding the law. Zitzke cites, for example, the idea originating from African philosophy, specifically Ubuntu, and its potential as an instrument for interpreting the constitution of South Africa.⁵²

The third element would be precisely to expand the concept of law beyond the official one. Expanding the concept's meaning would be fundamental to escaping categories that make up traditional comparative law, such as “great legal systems,” and represent expressions of colonialism.⁵³

⁵⁰ MICHAELS & SALAYMEH (2022), p.180.

⁵¹ The expression delink can be defined as an epistemic attitude where the researcher refuses to accept the Eurocentric options offered to them. Mignolo warns that decoloniality aims to “detach itself from the colonial matrix of power” with the intention of imagining and engaging with decolonial subjects. To achieve this, continues Mignolo, we must follow two routes: decoloniality and de-westernization. The first of them consists of detaching oneself from state forms of governance, and thinking about alternatives to the modern nation-state would be an example. The second, in turn, intends to break with the establishment process, instituted after European colonization in 1500, of a global order with its own set of ideas, such as the invention of America and the subjects who lived there. Thus, by detaching ourselves, we would seek, above all, to change the terms of the conversation (decolonize) and dispute the meaning of the content of these terms (dewesternize). For more details MIGNOLO & WALSH (2018).

⁵² ZITZKE (2022), p. 221.

⁵³ MICHAELS & SALAYMEH (2022), p.180.

Guilherme Borges and Tércio Sampaio Ferraz also rethink decolonial law theory along the same lines. Those researchers believe it is possible to consider a legal comparison concerning actions related to “legal experiences” beyond the so-called official law. For the authors, “Comparist reading from a domestic perspective scientifically allows us to understand another legal perspective to confront the official Eurocentric law and enter into dialogue with the standard model”.⁵⁴

In this way, internal comparative law can be an essential instrument to help Brazilian researchers navigate new legal experiences, opening intellectual doors that establish new theoretical keys in a critical dialogue with official Brazilian law.

It is also necessary to rethink Brazilian legal theory from an internal perspective. As previously mentioned, in countries like Brazil, there is not only an intellectual colonization that replaces local knowledge with the intellectual construction inherited from colonization.

Another form of intellectual imperialism marks the country,⁵⁵ originating from its most traditional academic centers and the justice system, which are direct heirs of the Global North's tradition. Most of its greatest exponents were formed in these centers, historically linked to power, and therefore, they remain profoundly influential.

As Alatas warns us, the danger of intellectual imperialism is intellectual misery. For the author, in addition to encouraging docility, intellectual imperialism stifles creativity. It encourages imitation, producing researchers with captured minds capable of thinking only within Western categories and their thought models. In short, intellectual sterility becomes a standard within that scientific community.⁵⁶

An internal intellectual decolonization is needed to allow new ways of understanding the meaning of legal reflection itself. The answer to this challenge may lie in academic centers outside the principal axes in Brazil, especially in the north and northeast.

It is in these academic spaces, which live the factual reality of the coexistence of ethnic plurality, for example, that we can obtain prosperous and unexplored sources of legal items that can help us, based on an internal comparison, find solutions that have not even been thought of precisely because we do not take taking into account the existing cultural communities in the country.

Furthermore, this movement should provide legitimate and sophisticated support to the actions of various actors in the justice system. These actors can utilize theoretical instruments formulated through this comparative process to enhance their professional practice, often marked by action at the intersection of cultures.⁵⁷

Despite official law recognizing the right of its original peoples to exercise their traditions, language, and social organization, it has never promoted the realization of this right, leading

⁵⁴ BORGES & FERRAZ (2020), p.14.

⁵⁵ According to ALATAS, the classic concept of intellectual imperialism is characterized by the domination of one people by another in their world of thought. This effect generally results from imperialism itself or through forms of indirect domination resulting from domination itself.

⁵⁶ ALATAS (2000). For ALATAS, this emancipation is “the major condition for the development of a creative and autonomous social science tradition in developing societies. Those who hesitate to accept the prevalence of intellectual imperialism are welcome to an intellectual combat. The intellectual imperialism will not protect them but will abandon them the moment they are no longer useful in their scheme of things”.

⁵⁷ For more details, see ANDRADE & ARÉVALO (2022).

to a series of challenges, some of which are incomprehensible to certain legal operators when encountered in their professional practices.⁵⁸

Likewise, and marked by an intellectually colonized formation, those operators understand the distinctions of North American and English common law better than the legal experiences developed by original peoples. This understanding allows cases previously decided in their communities to go through appeal processes, as the Institute of Res Judicata intends to achieve. To think about a genuinely Brazilian comparative law, we need to emancipate the thoughts of its protagonists.

III. PROPOSITIONS: “COMPARATIVE LEGAL GRAFTING” AS THE MATRIX OF “BRAZILIAN ETHNOJURICIDE.”

Seeking to continue this search for new premises to consider a theory of legal comparativism, taking into account this “inferiority” complex of the colonized and the science of law operated by legal “epistemicide”, it is necessary to think in a somewhat audacious way and offer the debate some ideas and some arguments in original terms.⁵⁹

Initially, for the reader's understanding, it is necessary to provide some context. In principle, it is essential to have as a premise that in Brazil, due to the colonization model originally operated by Portuguese colonization, which later came to be reinvigorated in the feeling of submission that any authoritarian project develops in its recipient, be it individual, whether even a people, but also by the institutional mode and without major ruptures, such as the process of national decolonization, that demolition and castration that originated here developed in legal terms (and obviously and many other terms).⁶⁰

The peculiar characteristics of our colonization, compared, for example, to the Spanish colonization of Latin America, which naturally could not be carefully investigated here but perhaps only enumerated from the theoretical common sense of historians, help us to understand why we are here thinking about a comparison based on Brazil and not Latin America itself.⁶¹ However, naturally, many common points exist.

For summary purposes only,⁶² we could here enumerate the similarities and numerous differences to suggest why we need to think from Brazil without necessarily entering into conflict. It is already known that some similarities occurred in colonized America: (i) the exploitative character of the economy; (ii) the valorization of liberal free trade practices; (iii) the rapid internalization of occupation (the foundation of towns and cities); (iv) the intense use of river communication; (v) administrative decentralization; (vi) the absence of political control mechanisms by the metropolis; (vii) the broad military apparatus for protecting invasions; (viii) persistence in the territorial unit among others; (ix) the massiveness of Christianity.

Distances, oppositions and contrasts are very and perhaps most significant: (i) Spanish colonization went to the interior and plateaus (this was an orientation due to fear of corsairs, but also because they believed that the land was not so good, that people on the coast did

⁵⁸ For the enormous challenges encountered in the quest for respect for the cultural traditions of Brazil's indigenous peoples and the exercise of professional practice within the justice system and respect for official law, see: BORGES (2023); RUGGIU (2022), pp. 61-86.

⁵⁹ Some of these ideas have already been outlined in other texts: BORGES (2020); BORGES (2023).

⁶⁰ For the Brazilian colonization process and its independence see, among others: COSTA (2012); COSTA (2010); ALENCASTRO (2000); CARVALHO (2019).

⁶¹ HEMMING & BETHELL (1998); SEED (1995); RÍOS (2010).

⁶² BELLOTTO & CORRÊA (1979); BETHELL (1997, 1999, 2001); GERBI (1996); KLEIN (1987); MARTÍNEZ PELÁEZ (1999); MORENO (1988); O'GORMAN (1992); SCHWARTZ & LOCKHART (2002); STEIN & STEIN (1977); TODOROV (1983); TORRÃO FILHO (2003); WASSERMAN (1996).

not know how to farm, while cultural, as they did not have good customs, (the only exception being if there were good ports that facilitated trade), while coastal and tropical Portuguese; (ii) both differed in terms of extractivism and monocultural character (from pau brasil to There was a concentration of sugar cane here, while in Spain, care has always been taken with the extraction of precious stones), as a consequence, the form of spatialization, intersubjective relationship and links with power were different; (iii) employment of the work regime compulsory, because the Spanish, although they significantly promoted an indigenous genocide, will exploit this workforce, unlike the Portuguese who sought to enslave black people, which implies different social characteristics and social hierarchies; (iv) the colonial administration was diverse, as in Spain, there were vice kingdom, which, although reporting to the king, had a certain independence, while in Brazil there was a single vice kingdom in Rio de Janeiro, with a the division into hereditary captaincies and its governors, therefore, without any autonomy; (v) the social hierarchy was being constructed differently, already in Spanish America, there were “criollos,” children of Spaniards responsible for the exploitation of the colony, who maintained greater independence. In contrast, although there were Portuguese leaders, no social hierarchy was established in Brazil. A separate and independent elite; (vi) Spanish decolonization was much earlier and distinct, fragmented and with the construction of independent republican structures, while in Brazil decolonization takes place through the reign itself, and with the maintenance of the monarchical regime; (vii) the extensive territorial unity in Brazil was maintained by the monarchy, while in the vice kingdom, there was complete fragmentation, including because there were very different customs between the colonies (including dealing with the Dutch and French invasions here were different from the Pacific War and the Chaco in Spanish America); (viii) the formation of cities is different, as in Spain there was guidance from the court to, through decrees, ensure that there was an orthogonal guideline, which is why the capitals were always placed in the same type of topography, allowing better geographical movement of citizens, including with better geographical occupation, while in Brazil there were no rules, so much so that it is common sense to say that there was an occupation like a “goat path”, therefore, a chaotic urban project (thus, some are coastal, others, in river mouths, others on hillsides) among others.

These differences become apparent without much reflection. Although it is not possible to draw a firm line showing that today's distinctions logically and coherently derive from colonial origins, as positivist historiography would not be sustained otherwise, the fact remains that they are ignored. They matter precisely in what the Global North has always authoritatively done with its civilizational outlook, which, under the sign of “savagery” typical of the “sad tropics,” sought to plan and homogenize the socio-cultural diversity that exists here.

These differences prompt us to advocate for a distinctive decolonial reading, in the sense of a Brazilian critique, and, therefore, “descolonial” rather than “decolonial”.⁶³ In addition

⁶³ In this sense, see BORGES (2023), pp. 69-80. In summary, it is argued that the loss of “s” has no place in Portuguese. Ana Maria Santos Pinto, thesis presented to the Department of Vernacular Languages at UFRJ in 2008, discusses the allomorphs of negation: a, des, i, in, na. It starts from the Theory of Optimality and analyzes “des” (separation, deprivation, denial, inversion, reinforcement and reiteration) and says that it depends on the “base” to which it is attached. (i) voiceless consonants (p - unprotect, t - unlock, c - peels); (ii) nasals (m - unmask, n - denature); (iii) labial fricatives (f - undo, v - divert); (iv) sibilants (s - desalgar, j - breakfast, g - defrost); (v) laterals (l - slide, r, deratize) and (vi) vowels (a - dispartar, e - desenganar, i - disintegrar, o - disobey), presents very timely conclusions to help clarify whether, in Portuguese, it would be It is reasonable to use “des + colonization” or “de + colonization”. The loss of the “s” would only occur if the so-called “ICP restriction - Mandatory Contour Principle” existed. The two consonants with the same features (de + gelar, de + geminar), as it brings together two sibilant consonants (s with g), now “decolonize”

to this geolocation of *descolonial* thinking, it is possible to try to understand that the peculiarities of Brazilian colonization, exposed above, ended up “shadowing,” at the very least, or even “suppressing” any forms of legal expression here, whether they already exist during the colonization, others maintained silently throughout Brazilian monarchical and imperial history, and many others reinvigorated in recent republican history.

Historians of Brazilian law and critical theorists have a fruitful discussion about this national legal erasure based on the mechanisms operated by colonial foreignism. This is undoubtedly due to the forced imposition of Eurocentric legal rationality, and above all, the Kantian, Weberian, and Kelsenian models of understanding “law” and the “legal order.” As Frantz Fanon said,⁶⁴ an apparatus that promoted the “abolition of reference” on the one hand and the “imposition of the strange” on the other. This phenomenon is what we would like to understand here, albeit briefly.

Various studies have been conducted regarding the phenomenon of a legal system incorporating “legal items” originating from other systems. Legal transplant, legal translation, transfer, migration, legal reception, and legal invention are some of the concepts that help us understand the complexity of this phenomenon.

Authors such as Gunther Teubner, Michele Graziadei, Gunther Frankenberg, and Pierre Legrand have already explored critical perspectives on the possibilities, limits, and even impossibilities of legal transplants. Despite some aspects that bring us closer to the reflections of these authors, none of them, it seems to us, can account for the Brazilian reality.

In Brazil, the so-called legal transplants must be understood as an accurate authoritarian imposition transmuted from a supposedly positive and well-intentioned normative and scientific production and construction. Something that could metaphorically be defined as a “*legal graft*”⁶⁵.

The process of suppressing domestic legal experiences already existing in Brazil, from diverse cultural matrices (indigenous, black, caçara, riverside, etc.), by transposing European theoretical and legal rationality to Brazil, led to a process of “*ethnojuricide*” (a concept mentioned above) of these experiences.

In parallel, the “grafting” is justified based on the defense that the process of legal transplant is characterized by the incorporation of rationality supposedly better developed, illustrated, evolved, and, to that extent, better elaborated to a subordinate people, almost inserted in an inevitable and congenital “savagery.” In the Fanonian line, it is necessary to state that, despite the official discourses, what was imposed was the “abolition of reference” for the “imposition of the strange”.

Metaphorically, we speak here of “*legal graft*” in the terms already quite familiar in agricultural sciences and botany, which here borrow the definitions, purposes, objectives, models, and expected results to understand this “abolition” and this “imposition”.

The “*grafting*” process involves placing a plant, tissue, or gem on top of an already established one, with the intention of forming a single, supposedly improved entity with better genetic characteristics, reduced sensitivity to pathogens, and increased adaptability to local environmental conditions.

is a sibilant and another voiceless consonant, so there is no reason to suppress the s sound. For details, see PINTO (2008), pp. 90-102.

⁶⁴ FANON (2020), p. 88.

⁶⁵ These ideas of “legal grafting” were originally presented in the work: BORGES (2022), pp. 63-68.

Its procedure tends to be quite simple, although with results that are not always safe, consisting of a “wound” created in the recipient plant (rootstock/horse) for another (graft/horse) to be inserted, either in part of it, known as “bubble/shield,” or in its top, known as “*garfagem*.” While the latter annihilates the horse if the graft is not successful, the former maintains it, but with a reduction in its vegetative growth and possibly premature death.

Advantages in natural terms are commonly accepted when the result of grafting is positive: the grafted plant tends to be showier, with more noble characteristics, with the capacity to adapt to greater environmental vicissitudes, forming more sustainable canopies and fruit trees, but also, the ease of the genetic tract of the resulting plant; replacement of uninteresting plants existing on-site; a range of ornamental and exotic characteristics.

The procedure, objective, and results metaphorically suggest how, in colonial countries, the transposition of the “law of the metropolis” occurred and was authoritarily imposed over “local legal experiences”. In sum, there was no “transplant” in Brazil because transplanting involves replacing something (organ/tissue/cell) damaged in the recipient with something useful, alive, and in good metabolic functioning from the donor.⁶⁶

The “legal experiences” existing here, as well as the later marginalized Indigenous people, riverside people, quilombolas, etc., were not and are not deteriorated, compromised, corrupted, or sick (unless the social evolutionary perspective still haunts us today). They were (and still are) experiences recorded by a different worldview, drawn from a different culture, with symbology and abstraction of different understandings of the world. These are neither superior nor inferior, just different from what was intended to be “implanted”.⁶⁷

Furthermore, due to its bioethical constructions, the phenomenon of transplantation has several principles to be followed, especially that of solidarity. That is, there is a good intention on the part of the donor, a particular sacrificial aspect in consideration of humanity, including possible, although unwanted, personal commitment.

This is certainly not what the Global North was in previous formal colonial or contemporary colonial terms. Domination, reformulation, and maintenance of domination through legal interference (among other things) are incompatible with the principle of solidarity.⁶⁸

The “legal experiences” typical of the Brazilian cultural amalgam and its ancestry were not only not sick, but they also were eradicated, or if not wholly, in their magnitude and complexity, by the “ethnojuricide” operated here. The colonialism of the 16th to 18th centuries, neocolonialism at the turn of the 19th and 20th centuries, as well as “late colonialism”,⁶⁹ sought to implement Fanon's “Eurocentric strangeness” and abolish a healthy, wholesome, powerful, and robust cultural reference in its cultural domestic references.

⁶⁶ Here, we use the classic concept developed by Watson. See WATSON (1993).

⁶⁷ Important works that help us understand the plurality of worldviews that exist in Brazil, their origins, and their profound differences. For more details, see VIVEIROS DE CASTRO (1998), p. 469; HOUNTONDJI (2008), p. 80.

⁷⁰ See, among others, PRIETO-RÍOS & RIVAS-RAMÍREZ (2020), pp. 85-108.

⁶⁹ Here, we suggest the expression “late colonialism” to refer to the colonialism that operated in the 19th century is no longer in formal terms but silent, either due to the memory that still exists of the impressions left by previously institutionalized colonialisms in different parts of the Globe or due to the reformulation in other ways (knowledge, power, and subjectivity) in the relationships established daily. Replacing the Greek prefix with Latin could not be unreasonable, especially if we think there would be no philosophical-ethical content, if not in the old image of the city-state of Rome and its extra-continental expansion.

Nor could one affirm the existence of a “legal reception” as Eurocentric positivist historians have consistently done when describing how glossators and post-glossators in the Middle Ages adopted the Roman law of Latium. When historians from the methodical and historicist schools sought to understand this phenomenon that occurred at the beginning of the Low Middle Ages, they considered the positive nature of this process, mainly due to how it was carried out and the existing objectives.⁷⁰

The idea of reception as something that evolved, with a centripetal and unifying force in memorial times for proto-states in the gestation phase of invasions and at the same time of founding universities, was entirely valid. This expression gained traction among Brazilian positivist historians, who spoke of a “reception of European law” in Brazil, particularly with increasing vigor as the 20th century unfolded.

Talking about “reception” brings us to exact ideas that are important to mention here so that they can be easily contrasted: there is something “festive” about reception on everyone’s part; they have something of a unique “welcome”; implies a particular “deference” on the part of the recipient towards those who approach; implies positive “acceptance”; a well-regarded quality of “welcoming”; leads to a certain restlessness and anxiety in “waiting” for the blessed one; and, above all, it implies “voluntariness” and natural goodwill on the part of those who welcome.

We see undoubtedly a fatal error: no one colonized, celebrated, considered, accepted, waited, welcomed, or was happy. There was and continues to be an authoritarian, enforceable, autocratic, imperative, tyrannical, totalitarian, absolute, oppressive imposition of a legal matrix from the Global North on what existed here and seeks to persist.

Talking about “reception” implies a “sweet and kind passivity” of the Brazilian people when it certainly was not. They have always been in a constant struggle, in an evident attitude of “resistance,” especially by those not identified by this matrix as hegemonic, excluded, marginalized, subordinated, and naturally made invisible.⁷¹

We could not even speak of an attitude of “legal translation” along the lines of Legrand,⁷² Glanert,⁷³ Sacco,⁷⁴ Dullion,⁷⁵ and Gemar,⁷⁶ among others. First, because we are not talking about sovereign legal orders with identical and reciprocal legal respectability, whose sensitivity to cultural differences between “national law” and “foreign law” is present; and two, because they did not want to read in the local “legal experience” the cultural load of a term or expression existing here in comparison with that of the metropolis, whether through various forms of literalization, transfer or equivalence.

There was (and continues to exist), therefore, a “*legal graft*” because what was done, whether in a less destructive way like the “*borbulhia*” but more forcefully and aggressively of “*garfagem*,” nothing more than the “forced imposition of a legal matrix from the Global North” inserted over domestic “legal experiences,” annihilating the horse carrier, and, therefore, eradicating Indigenous, quilombola, traditional legal experiences in favor of the forced assumption of a “strange right” and all sorts of his rationality and his theories.

⁷⁰ To understand in more detail and with your own bibliography, we suggest reading the text: BORGES (2014).

⁷¹ PREZIA (2017); VALENTE (2017); GOMES (2015); REIS & GOMES (2021); NASCIMENTO (2019).

⁷² LEGRAND (2002); GLANERT & LEGRAND (2013); LEGRAND (2014), pp. 208-219.

⁷³ GLANERT (2008), pp. 161-171; GLANERT (2011); GLANERT (2014), p. 20.

⁷⁴ SACCO (2001).

⁷⁵ DULLION (2015), pp. 91-106; DULLION (2007); EME, (2007).

⁷⁶ GÉMAR (2018), p. 26.

This process, in turn, aims to maintain and reaffirm central power over the occupied territories, including particular subjectivities, peculiar cultures, existing institutions, social organizations, and, above all, the knowledge lived and reflected here.

To achieve this objective, the path outlined is clear: it consists of praising the domination of the “metropolis,” maintaining intriguing ties of submission to capitalism, reinvigorating the idea of the ethnic and cultural superiority of the Global North, and, if possible, with the exaltation of its “tops” and its “fruits,” a “docilization” of the horse to facilitate the “genetic” treatment of local law, the replacement of what was and exists here because it is “supposedly of little interest,” and its improvement in adaptability to the new world in the logic of this late colonialism.

A “Brazilian ethnojuricide” provoked by an original and reformulated “*legal graft*” is gone and continues to be quite “positive, useful, necessary” for the Global North. It’s still a colonial legal matrix because it is necessary to understand that, in the same way that no there would be “modernity,” without “capitalism” and “colonialism” in the Dusselian wake⁷⁷, it also cannot be said that there would be “Eurocentric legal science” without the “colonization of peripheral legal knowledge” of the colonized.

The graft does not survive without the horse carrier (the opposite is also true), as it already existed and would continue to exist if the intervention did not occur. “Grafting” is an artificial, external, outside-in, and non-natural procedure, the product of a metamorphosis of the species. This would certainly have, as it does, another name in biological terms.

The “graft” needs the horse to be what it is in its positive qualities. The “*legal graft*,” that is, the “legal order and legal science” of the Global North, needed and still needs “domestic legal experiences” to sustain itself and avoid promoting isolation, the “void” created around itself, as already exposed by Aimé Césaire.⁷⁸

In sum, the “European legal modernity” inaugurated by the Hegelian-Kantian matrix would not exist (at the risk of saying what Dussel would say about the law) without the “annihilation” of Brazilian “domestic legal experiences” (as far as we are concerned here) through “*legal grafting*.”

The consequences of this “*legal graft*” were evident in several orders, and there would certainly be room for many more lines to describe the effects of this process here. Even if there were beneficial effects, the fact is that the “annihilation” of these experiences, initially carried out but reformulated by neocolonialism and maintained by late colonialism, will never fully allow us to understand that the result was beneficial, advantageous, or correct.

The complete elimination of these experiences or at least their productive, creative, original, auspicious weakening by the imposition on us of the “feeling of the colonized” in the wake of Albert Memmi can never be ignored or disregarded.

Changing this process through decolonial readings on its various fronts, particularly in legal terms, does not imply the destruction of the product of this implementation. As mentioned above, such a destruction would not only be impossible but also naive, dangerous, and contrary to what is defended here.

We do not want to carry out a “spatial vector inversion”, changing the length, direction, and direction of domination. We also don’t want “legal anthropophagy” in the form of

⁷⁷ See, among other DUSSEL (1993); DUSSEL (1977); DUSSEL (2008); MORAÑA, DUSSEL & JÁUREGUI (2008).

⁷⁸ CÉSAIRE (1955).

“devouring the foreign”, its legal techniques and rationalities, reworking them and converting them into a national symbol.⁷⁹

What we want and what we support in this essay is to follow Memmi's auguries, seeking in ourselves to suppress the colonized that we have become, reflecting the identities lost in this colonial drama, unmasking the still present charm of the belle époque of foreign legal modernity; learning the lack of love for the metropolis while the weakening of the contempt and hatred of the domestic culture that was implanted.

To consider a theory of legal comparison from Brazil, it is necessary to identify “legal experiences” that are annihilated, silenced, and reinvigorated by submission and the impossibility of speech under the cultural hegemony of the Global North.

Gayatri Spivak,⁸⁰ in his reading of the “*Vertretung*” (he does not have the condition to represent himself) and “*Darstellung*” (dramatic, almost theatrical representation, the representation exists, but the content is false) that colonized peoples have to do, subordinates can safely “speak”, as long as it is in their language, with their explanatory schemes and their culture.

In this sense, it is necessary to give voice to these “legal experiences” that were once silenced and continue to be silenced in national legal thought, whether in academic or even in pragmatic terms (for example, in legal proceedings).

And for subordinates to speak, and, above all, so that domestic legal thought can be “taken seriously,” a theory of legal comparison should perhaps think seriously about producing a “domestic legal decomparativist”.⁸¹

IV. GOING FURTHER: “DOMESTIC LEGAL DECOMPARATIVISM” AS A “THEORY” OF LEGAL COMPARISON.

Domestic legal decomparativism has two main propositions. On the one hand, it aims to construct itself as an initial reflection of a possible alternative theory in terms of “legal comparison theory.” On the other hand, there is also the intention of presenting itself as a descolonial tool to uncover what has been silenced and continues to be silenced internally in domestic legal experiences.

None of these intentions eliminates, but it is essential to highlight, the political-theoretical content that the term naturally brings, such as “denouncement of one process and resistance of another”. “Domestic legal decomparativism” is, therefore, a tool to experience the “agency” of “domestic legal experiences” obliterated or overshadowed by foreign experiences or even made hegemonic by an official law.

We must read the term “agency” here in the wake of Judith Butler and Lélia Gonzalez⁸² as that which is moved as resistance and capacity for political action, as a desire manifested by

⁷⁹ The anthropophagic movement was an avant-garde movement that marked Brazil's first modernist phase and influenced Brazilian literature and visual arts in the first half of the XX century. Its objective was to produce the main lines of an eminently Brazilian culture. Led by the writer Oswald de Andrade, it defends: “Only Anthropophagy unites us. Socially, Economically, Philosophically. It's the only law in the world. Masked expression of all individualism, of all collectivism. Of all religions. Of all peace treaties. Tupi, or not tupi, that is the question. Against all catechesis. And against the mother of the Gracchi. I am only interested in what is not mine. Law of man. Law of the anthropophagist” (translated by the authors). ANDRADE (1975 For details, see: CAMPOS (1992); PERRONE-MOISÉS (2007).

⁸⁰ SPIVAK (1985).

⁸¹ The concept of domestic legal decomparativism has been announced previously. For details, see, BORGES (2023), pp. 97-110.

⁸² BUTLER (2004); BUTLER (2010); SOLEY-BELTRÁN (2009); GONZALEZ (1984), pp. 223-244; GONZALEZ (1988), pp. 69-82.

the innovative force and driver of change, because it suggests to the subject of awareness of the limits that are imposed on them.

Consequently, a product that is born from the “social margins” of historically invisible subjects is considered intelligible by the “official legal order” and also by the “social order.” “Domestic legal decomparativism” praises this perspective of “agency” capable of breaking with the hegemonic legal logic of “official law,” leading to the resignification of social practices, subjectivities, and, above all, “legal experiences” considered subalterns.

In this sense, by “uncomparing” and highlighting these “domestic legal experiences,” new reiterative chains emerge, creating conditions for sociocultural changes and, significantly, for changes coming from legal pluralism to occur within the “hegemonic legal order”.

When these experiences manifest themselves and are experienced, for example, in court, in legal proceedings involving Indigenous people, quilombolas, faxinalenses, ribeirinhos, traditional fishermen, etc., this “agency operates in descolonial terms,” and the jurist must understand how to establish this “decomparison”.

While “comparative law theory” is often read, in orthodox terms,⁸³ as the search for methods and methodologies to compare legal orders, which is usually hijacked by legal formalism, sterile dogmatism, and the culturalist perspective, which denies the possibility of this kind of comparison,⁸⁴ the “domestic decomparative theory” proposes a new path.

The intention here is to internally “agency” “legal experiences already annihilated, as possible “legal archaeologists,” or those “shadowed, inferiorized, not considered institutionally,” such as critical and pluralist theorists. It is an “uncompare” to make the “subaltern” speak, and therefore give him a voice to clash and dialogue with “official law”.

“Domestic legal decomparativism” as a new element to a fresh regard to the theory of comparative law turns its gaze to the domestic order, opening space for silenced legal subjectivity, then shattered within its limits already codified by official law, to operate as a place of resistance, and, consequently, become an “agency”.

Thus, it offers the possibility of considering the opening to law from a perspective beyond that traditionally offered to the comparatist: a new legal item emerges, a new *type of unit* is illuminated, and a new *legal domain* can be identified.

By constituting itself as an agency, this subject (essentially collective, when we consider traditional communities, indigenous peoples, etc.) undergoes changes within the dynamics of power relations, redefining itself and producing new effects.

The marginalized “legal experiences” that come to light through the internal “non-comparative” gaze, although they cannot entirely escape the structures of power and official law, just as the subject cannot concerning the always active socialization processes, in pluralist terms, become a dialogue with the “hegemonic order,” promoting not “liberation,” but a genuine “critical subversion”.

This is why domestic legal decomparativism is provided only by official institutions, but its vector comes from these “marginalized experiences” to official law. It is a form of “radical

⁸³ For the orthodoxy of comparative law, see, among others: An Introduction to Comparative Law, ZWEIGERT & KÖTZ (1998); DAVID (2016).

⁸⁴ LEGRAND (2022).

resignification” of understanding the “normative phenomenon” and its relationship with the comparative law theory⁸⁵.

In this sense, as an “agency,” a power such as “political resistance” creates a form of discontinuity between the power that constitutes these experiences, the possible “representations” formulated (in Spivak’s terms), and the power that these experiences assume. By placing themselves in dialogue with “official law,” this “unofficial law” dissolves and reconstitutes itself as resistance, breaking traditional social, ethical, and legal conventions.

The “domestic legal decomparativism” operated, for example, in a judicial process, which examines symbolic and cultural orders distinct from the hegemonic one, placing them in conflict with traditional law (as in “culturally motivated crimes”), revealing the potentially subversive character of these experiences, and, consequently, descolonial for official law.⁸⁶ When it becomes resistant to hegemony, it breaks with the repetitions of norms involved in various orders, other than the traditional ones: gender, ethnicity, race, sexual orientation, etc.⁸⁷

In this sense, “domestic legal decomparativism” also becomes a political tool because it allows us to deconstruct beyond “official law,” reaching the extracts of the “colonial legal mentality” (colonial juristic mindset).⁸⁸ Like an archaeologist, armed with their “toolbox” in the Foucauldian sense, with its shovels, spatulas, brushes, and compass, the “domestic legal mismatch” excavates the historical substrates, the “theoretical common senses,” and the already consolidated meanings of what rights, institutions, duties, and legal subjectivity are. It also removes these and makes their experiences speak based on their discovered “artifacts”.

With this, the “domestic legal experiences” historically silenced and buried by the passage of time and the agency of power of the “official legal order” and its historical vicissitudes are being spoken by it based on the interpretation of the “law comparison theorist,” of the “theorist of domestic legal decomparativism” and of which the comparison is operating (academic personalities, but also of the law put into practice, such as in legal proceedings).

Concomitantly with this archaeological character, there is also a political moment weakening “official law” in favor of parallel “legal experiences” that still exist but are repeatedly silenced and discouraged in their potential to produce legal resignifications. There is then a rupture of this methodological “holism” of law, resulting in subversion of the existing political, social, cultural, religious, and legal order. It is an “uncomparing” to finally know what should already be learned.

It is, therefore, a form of light cast on what has been and continues to be forcibly erased in the colonized legal mentality. However, it also means “uncompare” to modify the official legal order itself, re-signify it through dialogical pluralism, destroy it, and deconstruct it in hegemonic terms. “Domestic legal decomparativism” allows us to deconstruct the “preserved memory” (in the wake of Albert Memmi) of foreign law regarding a possible “Brazilian law”.

“Descomparing” allows the opposite process of “colonialism” as described by Memmi. As we know, he said that the steps were: first, to discover and highlight the differences between

⁸⁵ As previously mentioned, this debate has already been carried out, albeit within the Eurocentric perspective of law, in a very sophisticated way by authors such as Geoffrey Samuel. For details, SAMUEL (2008); SAMUEL (2014).

⁸⁶ The Comparative Law, as we know it, is characterized by its subversive potential. See MUIR-WATT (2000).

⁸⁷ BRAYSON (2021), pp. 52-86.

⁸⁸ BAXI (2003), p. 46.

the colonizer and the colonized; second, to value these differences for the colonizer's benefit; and third, to take these differences to the extreme and assume them as definitive.

Thus, “decomparativism” removes the “definitiveness” of these differences thought out, established, and valued in favor of a supposed superiority of official law, and, consequently, of the “colonial law” here “*grafted*” for the benefit of the resignification of “legal experiences domestic”. Therefore, paradoxically, “decompare” means to reactivate the legal comparison at its root.

CONCLUSION

Theories developed in the field of legal comparison have made an essential contribution to the development and sophistication of this field of legal knowledge. Some of those theories, each in its historical moment, represented paradigm shifts that provided substantial qualitative leaps in the debate surrounding the enormous challenge of constructing a comparative legal analysis that embodies the alliance between theory and methodological rigor.

However, we can observe that all these contributions were developed in the Global North and represent particular historical and social contexts of their formulators. On the one hand, this fact does not prevent a deep and constructive dialogue around the researched topics; on the other hand, they appear to need to be completed.

It is necessary to start theorizing legal comparison beyond the Global North. This theorization will not only better reflect the diverse cultural and social realities that exist in the world, which have a profound impact on law and cannot be disregarded in the comparative debate; nonetheless, an original perspective from the Global South can reinvigorate the entire theory of legal comparison, offering new epistemological and methodological approaches previously unidentified.

The challenge of beginning to theorize comparative law based on social, cultural, political, and legal realities, particularly those of Brazil, represents an initial effort in this direction. We hope that it will serve as an impetus not only for new academic debates but, above all, as a stimulus for other researchers in the Global South.

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