Generating Comparison-in-Law: Embodied Epistemologies, For the Love of Knowledge

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Abstract

This paper introduces the concept of embodied epistemologies in comparative law and reimagines comparative law as a space of unbounded knowledge production without political end. Drawing on feminist, decolonial and undisciplined gestures this paper interrogates the questions of who, where, when and why in relation to comparative law to expose the coloniality and gendered logic of comparison. To move beyond this, the paper proposes philosophies of comparison-in-law as a fecund intermediary generative milieu, building on Eros. The paper explores intergenerational exchange and kaleidoscopic comparison as knowledge generating. Through the everyday object of the chair, the paper interrogates comparative law's relation to power to understand futures of comparative law in relation to the historical contingencies that contour it. Comparative law is thus understood as reflexive, embodied, constituted through numerous plural "projects" and driven by a philosophical and epistemological curiosity to question everything. This reveals comparative law to be much more than a "discipline." Rather it is understood as a doing, an oscillating body of philosophical projects in law that overlap and diverge to enhance knowledge of law and society without seeking to have the last word. Building on embodied philosophies, the paper argues for transformation through embodied epistemologies that expose the fallacy of the separation of knowledge and experience in law and provide a space for reimagining encounters and others in law.

I. Introduction

In the 1998 edition of the "seminal" (meaning ideas are assumed to originate from male bodies[1]) work *An Introduction to Comparative Law*, the authors emphasized that this third edition was "primarily designed for the younger generation."[2] Largely unchanged from the first edition (1971), this positing of functional method as the how of *die Rechtsvergleichung* has been subject to much academic analysis and methodological sparring that has characterized the discipline of comparative law. This agonistic approach, first critiqued by Plato's Socrates in his evaluation of the Sophists' pursuit of politics and their relation to power,[3] defined the

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[1] Sara Ahmed, Living a Feminist Life 16 (2017).

[2] Konrad Zweigert & Hein Kötz, An Introduction to Comparative Law, at v (1998).

[3] Plato, Republic 492a-493d, 499a; Sophist 222a-226b; Theaetetus 167-168c (cited in Wendy Brown, "Supposing Truth Were a Woman . . .": Plato's Subversion of Masculine Discourse, 16 Pol. Theory 594, 595-96 (1988)).

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male ethos of the Athenian polis.[4] It is this agonistic mode that frames the comparative law debate, which has, in its orthodox and disciplined form, largely been reduced to a debate on "convergence" within Europe. Less explored is Susan Millns's observation that the orthodox functional approach subscribes to the "anachronistic fiction that all scholars and practitioners of law are of the male gender."[5] Much less explored is the coloniality embodied in the Eurocentric canon of comparative law, which does not acknowledge the neo-imperialism of a law for Europe and the epistemological, ontological and material exclusions and exploitations that this relies upon. This contribution is a feminist interrogation of comparative law that draws on feminist, decolonial and undisciplined gestures. This paper explores the questions of who, where and when in relation to comparative law, questions that some do not recognize as existing. It is therefore a political and philosophical interjection to insist that what is being described is not just feeling or thinking.[6] The paper argues that the agonistic approach undermines comparative law's potential to generate knowledge and presents a barrier to "philosophies of comparative law," where disciplined gestures seek to have "the last word."[7]

The paper "traces"[8] comparative law to propose intergenerational exchange and kaleidoscopic comparison as knowledge generating. This is done to interrogate comparative law's relation to power. This approach understands that "assumptions, attitudes, aspirations and antipathies"[9] cannot easily be delinked from the moment of comparison. Comparative law is thus understood as reflexive, constituted through numerous "projects" and driven by a philosophical and epistemological curiosity to question everything. This reveals comparative law to be much more than a discipline—rather, it can be understood as an oscillating body of philosophical projects in law that overlap and diverge to enhance knowledge of law and society without seeking to define or posit for power.

This paper locates the comparatist as philosopher, as the intermediary between law and not law, as opposed to assimilator of law and "foreign" law. The comparatist is not a seeker of legal truth and guardian of "law's juridical component,"[10] but rather, "barefoot" "sleeping under the stars . . . very curious."[11] Dialectical method can generate investigation,

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[4] Brown, supra note 3, at 595.

[5] Susan Millns, 48 Int'l & Comp. L.Q. 982 (1999) (reviewing Zweigert & Kötz, supra note 2).

[6] Ahmed, supra note 1, at 6.

[7] Roland Barthes, A Lover's Discourse: Fragments 207 (Richard Howard trans., 2002) (1978).

[8] Pierre Legrand, Negative Comparative Law, 10 J. Comp. L. 405, 419-20 (2015). This is the approach that Legrand describes in relation to his protagonist "Imogen," as she undertakes her comparative endeavor *vis-à-vis* the French headscarf and face-covering laws. In this way his approach is quite Platonic, as Plato describes Socrates who then speaks for Diotima. See Luce Irigaray, Sorcerer Love: A Reading of Plato's Symposium, Diotima's Speech, 3 Hypatia 32 (Eleanor H. Kuykendall trans.) (1989).

[9] Pierre Legrand, European Legal Systems Are Not Converging, 45 Int'l & Comp. L.Q. 52, 60-61 (1996).

[10] Luca Siliquini-Cinelli, Experience vs. Knowledge in Comparative Law: Critical Notes on Pierre Legrand's "Sensitive Epistemology," 16 Int'l J. L. Context 443, 445 (2020).

[11] Irigaray, supra note 8, at 36.

but the in-between space is the "where" of the philosophies of comparative law. This is not pure metaphysics, but an embodied philosophy as pursued by Sara Ahmed.[12] This feminist approach pushes out from the decentered, fluid possibility of the feminine, to recognize the deep connectivity of the material with the philosophical, "locating consciousness and subjectivity in the body itself."[13] This embodied approach extends the possibility of comparison-as-philosophy, recognizing the passions and experience as knowledge generating.

The paper attempts to think outside of the "existential-epistemic prison"[14] of comparative law as method or praxis, to imagine comparative law as an opportunity for unbounded reflection. In order to engage this unbounded approach, which forms a fragment of "the philosophies of comparative law," the reader is encouraged to suspend belief in and a logic of commitment to[15] comparison as law-generating. Instead the reader is encouraged to adopt the feminist "necessity of wavering with our convictions,"[16] and not be so attached[17] to comparative law's juridical end. But rather, to shift focus to the philosophical comparative project in law as knowledge-generating.

Wendy Brown has argued that Plato's philosophy was not as implicated in the distinct separation of mind and body as the story of philosophy would suggest. It was more subversive in terms of gender norms, although not in the name of gender justice.[18] This paper pursues a line of inquiry presented in Luce Irigaray's reading of Plato, where philosophy is imagined as Eros—as the intermediary.[19] In this form of comparison, there is no (political) "end" of comparative law, but rather an approach that is driven by curiosity and a love of knowledge. Eros the intermediary can thus be understood as comparator, where comparison is undertaken for the love of generating knowledge. The philosopher comparatist thus exists in the "intermediary as generative milieu,"[20] which recognizes a plurality of motivations and projects of comparison.

Pierre Legrand recently explained: "The omissions will depend on the comparatist's goals, on his needs, not to mention the various limits with which he must contend, say, physiologically—I have in mind distraction, wariness or exhaustion—or materially—I am

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12 Ahmed, supra note 1, at 6.

13 Iris Marion Young, Pregnant Embodiment: Subjectivity and Alienation, in On Female Bodily Experience: "Throwing Like a Girl" and Other Essays 49 (2005).

14 Gisela Carrasco Miró, Encountering the Colonial: Religion in Feminism and the Coloniality of Secularism, 21 Feminist Theory 91 (2020).

15 Kimberley Brayson, Positivism and the Peace/Power Dialectic: Feminist Reflections in a Transnational Age, in Legal Positivism in a Global and Transnational Age 226 (Luca Siliquini-Cinelli ed., 2019).

16 Ahmed, supra note 1, at 7.

17 Wendy Brown, Wounded Attachments, 21 Pol. Theory 390 (1993).

18 Brown, supra note 3, at 594-95.

19 Irigaray, supra note 8, at 36.

20 Id. at 38.

thinking of finite resources, a deadline or a word limit."[21] I would also add, in an explicitly feminist vein, pregnancy, child care, domestic labor; in a decolonial vein, laboring to have one's knowledge and place recognized as valid. The conditions Legrand describes bear emphasis here; the conditions that colleagues have been laboring under during the COVID-19 pandemic have certainly made my contribution to this special issue more difficult to achieve. I suggest that the "limits with which [one] must contend" are inherently gendered and racialized. This assertion will be woven throughout the text in various forms to show how this gendered and racialized constitution defines comparative law's relation to power. This is a largely unexplored element of comparative law's normative force and project. The "coloniality of comparison" will be articulated to uncover racialized assumptions within the act of comparison. What does the question "who compares?" mean for the ontology of comparative law? This paper explores the definitional power behind the orthodoxy of comparative law through phenomenological investigation and animation of the everyday object of the chair.

The comparatist can never fully present or represent law.[22] An acknowledgment of this is essential to understanding that comparison can take place on many levels, and that an inter-generational, inter-comparative conversation can be established that does not seek to function within the binary of comparative law/not comparative law. My attempt to "trace" comparative law-as-philosophy or do philosophies of comparative law could "continue *ad infinitum* for any trace is at once fissiparous and rhizomatic."[23] Skipping over temporalities with a "movement of temporalization that undermines the very idea of an authoritative origin or end,"[24] this paper questions law's juridical force as an end, a truth. This paper argues for the fractal-like scene of comparison, an infinite complexity of fragments of thought that constitute philosophies of comparative law that are not exclusively oriented towards the end of law's juridical force.[25]

The paper begins by exploring intergenerational exchange and collaboration in comparison. It moves on to explore "undisciplined gestures" and epistemologies of largesse in comparative law by turning to feminist and decolonial literatures. The paper analyzes the project of a European private law through a feminist, decolonial and capital lens. It goes on to interrogate the power of comparative law through a phenomenology that pushes out from the everyday object of the chair. In its final part, the paper elaborates philosophies of comparative law by turning to Eros to imagine the comparatist philosopher as intermediary, in the intermediary generative milieu of knowledge production without political end, enacting embodied epistemologies.

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[21] Legrand, supra note 8, at 424.

[22] Id. at 449.

[23] Id. at 425.

[24] Id.

[25] On fragments in comparative law, see Pierre Legrand, Fragments on Law-as-Culture (1999).

II. Generating Comparison

As Sara Ahmed has observed, "It matters how we arrive at the places that we do."[26] How do comparators-at-law arrive at comparative law? How, where, by whom and when is knowledge generated in comparative law? How do comparative lawyers arrive at the orthodox canon of comparative law?

Generating comparison is not a neutral reflection. Therefore, the project of philosophies of comparative law always conditions its possible answers.[27] This article engages with the special issue theme of "philosophies of comparative law" to locate the conditionality and contingency of the comparative project through recourse to philosophical, phenomenological, feminist, decolonial and critical literatures. This is a refusal to "bracket these questions [to pursue] a more loving digestion of the philosophical canon."[28] This piece is indebted to intergenerational exchanges with former teachers, current colleagues, current teachers, and students. It is shaped by an observation that has been formative in my thinking about, through and *through* law that "aspirations, assumptions, aspirations and antipathies"[29] cannot be delinked from law or from the comparative moment. The phenomenological experience of a feminist encounter in my second year of law education has been undeniably foundational and formative in the path of my thinking and is thus indebted and in an ancestral, cyclical, intergenerational way formed through and remains attached to feminist teachers who embody the feminist and the feminine in law.[30] My official introduction to comparative law and the suggestion to study at the European Academy of Legal Theory is indebted to former teachers. In turn, this introduced me to other comparative lawyers.[31] This infinite web of experience thus determines how "I" arrive at comparative law and at this piece of writing. "I" do not arrive alone (although the process may be solitary). This is a collaborative piece, whether sole-authored or not. The Cartesian *cogito ergo sum* is thus forced into a reframing, away from the sharp separation of rationality and body, which relegates femininity as irrational.[32] Instead, it is reframed as: I am because I and my thought are embedded, indebted and accountable. In this framing, subjectivity and consciousness are situated in the lived body, thereby jeopardizing "dualistic metaphysics altogether."[33] The knowledge that I bring to writing this piece is not solipsistic or indebted to philosophical solitude, but rather is a knowledge informed and generated by others, filtered through body and experience. This method of intergenerational exchange can push beyond reductionist

[26] Sara Ahmed, Queer Phenomenology: Orientations, Objects, Others 2 (2006).

[27] Raimon Panikkar, Is the Notion of Human Rights a Western Concept?, 30 Diogenes 75 (1982).

[28] Ahmed, supra note 1, at 9.

[29] Legrand, supra note 9, at 60-61.

[30] Joanne Conaghan, Susan Millns, Maria Drakopoulou, Anne Bottomley, Simone Wong (Kent 2000-2004).

[31] Geoffrey Samuel, Mark Van Hoecke, Esin Örücü.

[32] Joanne Conaghan, Law and Gender 208-09 (2013).

[33] Young, supra note 13, at 47-48 (discussing Straus and Merleau-Ponty).

agonistic pronunciations, which stifle the exploration of knowledge and function on an epistemology of parsimony.[34] The agonistic approach seeks to have the last word: "The eccentricity of this conversation is systematic: what the guests try to produce are not proved remarks, accounts of experiences, but a doctrine"[35]—a doctrine of comparative law. What a feminist and decolonial approach demands is an acknowledgement that knowledge and doctrine are generated through the experience of the "institution of white men,"[36] and that knowledge and doctrine are thus systematically gendered and racialized. An embodied philosophy can expose how different bodies are systematically located, ordered, and exploited in relation to situated doctrinal knowledge that is presented as objective.

All academic work is collaborative in the sense outlined above, from the orthodox to the critique to the philosophical. Acknowledging this is necessary to locating the inherent pluralities and divergences within "philosophies of comparative law." This collaborative intergenerational exchange is expressed in a decolonial notion of ancestral time as opening up a conversation with our ancestors and memory as resistance, remembering the violence upon which law's legitimacy rests.[37] This is a coming back to, contextualizing and situating in materialities: "The critical thinker of time does not want to conquer time, but rather she seeks to rescue, to salvage our relation to time, to the past, to memory, to history; she must receive, not possess."[38] This is the continuity between past, present and future,[39] which is not linear, but cyclical. This is how we as comparatists take responsibility for the "ontological force"[40] of knowledge, words and thought in everyday materialities. The past of comparative law should not be erased by a "rebirth" of comparative law. Instead, the past of comparative law should be encountered. Comparatists must take responsibility for the agonistic debates, the desire to "have the last word,"[41] the gendered and racialized assumptions and the colonial logic that structure the European project of comparative law. Through proposing intergenerational exchange and kaleidoscopic comparison this paper acknowledges a plurality of approaches within the milieu of comparison and does not posit one disciplined approach as orthodoxy. Rather, this contribution reimagines comparative law as the space for the possibility of the generation of knowledges through the oscillating

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34 Ngaire Naffine, In Praise of Legal Feminism, 22 Legal Stud. 71, 100 (2002).

35 Barthes, supra note 7, at 211.

36 Ahmed, supra note 1, at 152-53.

37 Rolando Vázquez, Modernity, Coloniality and Visibility: The Politics of Time, 14 Soc. Res. Online 109 (2009).

38 Id. § 2.25.

39 Silvia Posocco, (De)Colonizing the Ear of the Other: Subjectivity, Ethics and Politics in Question, in Decolonizing Sexualities: Transnational Perspectives, Critical Interventions 250 (Sandeep Bakshi et al. eds., 2016).

40 Yvette Russell, Towards a Sexuate Jurisprudence and on the "Second Rape" of Law, in What Is Sexual Difference? (Mary Rawlinson & James Sares eds., forthcoming).

41 Barthes, supra note 7, at 207.

movement of comparison beyond the law and non-law distinction and indeed beyond law's juridical force.

Drawing on Deleuze, Pierre Legrand highlights through the imaginary of Imogene, a student of comparative law, how the subject, "the comparatist," dies before it comes to the act of comparison, "the verb":

> This "singular composition," this "idiosyncrasy," consists of "units" such as one's family, one's teachers, one's interlocutors, one's favourite authors, one's preferred speakers, one's cherished words or turns of phrase and so forth . . . that particular assemblage, that exceptional arrangement. Her self, then, is many people, and to talk of Imogene's interpretation as "hers" or as her "own" is, in effect, to speak economically.[42]

As Sara Ahmed insightfully highlights in a decolonial feminist politics of citation: "Citation is feminist memory. Citation is how we acknowledge our debt to those who came before; those who helped us find our way when the way was obscured because we deviated from the paths we were told to follow."[43] This is a way of recognizing intergenerational exchange, of overcoming the "seminal" texts as normative, from which generations of young, "immature" scholars are expected to build, grow and progress on a linear trajectory of inevitable (capitalist) growth of the same orthodox ideas and methods in pursuit of the end of law. Immaturity in this respect can be productive, bringing diverse perspectives and cross-associations to the comparative moment.

Thinking about what might assist comparative law to achieve its much-awaited "maturity,"[44] it is useful to think *through* maturity. Is maturity a temporal process? Does it begin with birth, the 1900 Paris Congress, which is usually considered to be the "mythical" foundational moment of modern comparative law as a discipline,[45] followed by infancy and then a higher state of consciousness, rationality, and civilization? What would the "maturity" of comparative law look like—is it a waiting to reach an ultimate "truth" of comparative law? If so, I would argue that a "maturity" is not desirable as it stifles thought and suggests, as with law itself, a normative state of "Enlightenment" with the associated gendered, racialized and impoverished implications of rationality as relegating gender and femininity to experience, the colonial implications of indigenous stories that are "uncivilized." The idea of "maturity" suggests an end in itself—a final state of being.

However, "full understanding of a text [or of comparative law] is literally unstatable[;] . . . it must always be deferred, because any narrative about a law-text has necessarily to be partial and provisional."[46] As Wendy Brown observes, "[T]he storyteller reaches and

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[42] Legrand, supra note 8, at 428.

[43] Ahmed, supra note 1, at 15-16.

[44] Esin Örücü, Developing Comparative Law, in Comparative Law: A Handbook 44 (Esin Örücü & David Nelken eds., 2007).

[45] Günter Frankenberg, Comparative Law as Critique (2016).

[46] Legrand, supra note 8, at 423.

moves places inside human beings that will forever elude the analytic philosopher."[47] But the storyteller, the feminist, the decolonial theorist are also philosophers. Alongside analytic philosophy, these are but a few of many stories that we tell about comparative law and its origin discourse, law. Intellectual immaturity is what keeps us fascinated and generative.

Testament to the undisciplined nature of philosophies of comparative law as oscillating[48] and changeable, (what unites them is not the defining of a system, method, or *ius commune Europaeum*), is that I have accidentally found myself "doing" comparative law in quite different projects, neither of which I had defined as "comparative law." Nor would these pieces be considered as belonging to the comparative law canon. Rather, I was engaged in the philosophical pursuit of comparison in law as knowledge-generating. One project was identified as a reference point of comparative law,[49] as a "hyper-reading"[50] of law. Another leveraged the comparative purchase of thinking theoretical approaches together by bringing neo-Marxism, feminism and decolonial theory into conversation in an analysis of law that prompted the invitation to write for this special issue.[51] These philosophers and colleagues reflecting on work as comparison enact a fecundity of knowledge and show kindness and a generosity of ideas that is located in the generative milieu of comparative-law-as-philosophies and the pursuit of knowledge, unbounded. This is the unmappable "where" of comparative law. There is no jurisdiction, no "authority" to speak[52] comparative law in this space. Whilst not explicitly setting out "to compare," encounters with former teachers and contributors to this special issue have inevitably shaped my approach that seeks out "otherness-in- . . . -law."[53]

III. Undisciplined Gestures and Epistemologies of Largesse

The notion of the "rebirth" of the discipline of comparative law facilitates a hypomnesis,[54] in comparative law. (Discipline here is understood as a space of practices (noun) that discipline (verb) those who do not follow its orthodoxy whether functional, positivist or deep comparative). This impaired, distorted memory erases the feminist mate-reality that we "have inherited a gendered legal legacy which still struggles fully to erase itself from the topography of modern law,"[55] and by implication, comparative law. Thinking through the

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[47] Brown, supra note 3, at 603.

[48] Davina Cooper, Everyday Utopias: The Conceptual Life of Promising Spaces (2013).

[49] See Kimberley Brayson, Of Bodies and Burkinis: Institutional Islamophobia, Islamic Dress and the Colonial Condition, 46 J. L. & Soc'y 55 (2019).

[50] Legrand, supra note 8, at 427.

[51] See the Introduction to this Special Issue; see also Kimberley Brayson, Law and Islamic Dress: Rights and Fascism in Europe (forthcoming).

[52] Maria Drakopoulou, Of the Founding of Law's Jurisdiction and the Politics of Sexual Difference: The Case of Roman Law, in Jurisprudence of Jurisdiction 33 (Shaun McVeigh ed., 2007) (citing Digest II.i.1).

[53] Legrand, supra note 8, at 448.

[54] Id. at 429.

[55] Conaghan, supra note 32, at 244.

impaired memory of comparative law erases the way in which this memory, and the very legitimacy of law, is built on gendered and racialized structures. The way in which the notion of rebirth erases the gendered and colonial foundations of comparative law is an iteration of how we are "managed through memory"[56] and encouraged towards an active forgetting[57] of the gendered and racialized normative structures of comparative law doctrine, discipline, and the juridical. Without addressing and putting into question these normative foundations of comparative law, rebirth is a nominal "fresh start" that further reiterates and obscures the gendered and racialized assumptions of comparative law.

The gendered metaphor of birthing feminizes the process of regenerating comparative law and as such, locates the feminine outside of the reason of comparative law.[58] Rebirth suggests a temporal rupture, but as decolonial scholars have shown, the past, present, and future are unavoidably and deliberately intertwined.[59] Beyond the rebirthing of the discipline, "old thinking" in comparative law will inevitably continue to structure the epistemological frame through which comparative law is thought and knowledge is produced. Comparative law cannot so easily shed its heritage as a project of law reform for Europe and its disavowal and discrediting of directions in comparative law that put the comparative project in law into question. Despite any ostensible rebirth, the ghosts of gender, coloniality, and capital remain.

As Henrik Ibsen explained in relation to his 1881 play, *Ghosts*:

> I almost think we are all of us ghosts. It is not only what we have inherited from our father and mother that "walks" in us. It is all sorts of dead ideas, and lifeless old beliefs, and so forth. They have no vitality, but they cling to us all the same, and we cannot shake them off. Whenever I take up a newspaper, I seem to see ghosts gliding between the lines.

The describing and systematizing frameworks and models[60] and systems of family trees in comparative law method are replete with this "between-the-lines." To reiterate Susan Millns, comparative law has evolved based on "the anachronistic fiction that all scholars and practitioners of law are of the male gender."[61] This *is* a fiction. But as with all law, fiction is the reality that is deliberately and intentionally detached from the materiality of the lived everyday of comparative law. The system of family trees is a shift away from the Eurocentrism of the project of a European civil code.[62] But whereof the roots and routes

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[56] Fatima Mernissi, Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam 10 (1987).

[57] Louise Du Toit, The South African Constitution as Memory and Promise: An Exploration of Its Implications for Sexual Violence, 43 Politikon 31, 33 (2016).

[58] Conaghan, supra note 32, at 243-44.

[59] Posocco, supra note 39; Vázquez, supra note 37.

[60] Mark Van Hoecke & Mark Warrington, Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law, 47 Int'l & Comp. L.Q. 495, 523-28 (1998).

[61] Millns, supra note 5, at 982.

[62] Esin Örücü, What Is a Mixed Legal System: Exclusion or Expansion?, 3 J. Comp. L. 34 (2008).

of these family trees?[63] The coloniality of the European comparative project and "mixed" legal systems is absent from the literature but structures comparative law between the lines. In disciplined comparative law, there is no acknowledgement of how the law came to be, how it arrives at the places that it does. An ambivalence towards the critique of functionalism, which, whilst it may be appealing to a "Western comparative lawyer,"[64] is an ambivalence towards the gendered and racialized violence of apparently neutral functionalist method.

The pertinent questions for the futures of comparative law are, then, how do we get beyond this distorted memory, ghosts, the between-lines, and the urge to claim a rebirth and erase? This paper argues that undisciplined gestures and epistemologies of largesse can move beyond disciplined interpretations of comparative law, which ensure a hierarchy of comparison in method and content in deciding what is worth comparing in the European discipline of comparative law. This is to understand the "discipline" of comparative law in the sense of noun and verb, whereby the language and method of orthodoxy and positivism "discipline" alternative approaches to comparative law. This approach "closes the situation epistemically speaking" whereby positivism and "investment into 'method' must be seen as an obstacle to an intellectually rewarding comparative study."[65] What is required is not an epistemological break or rupture, but rather an epistemological largesse that recognizes multiple theories of knowledge that can produce multiple truths in law. However, as I have highlighted elsewhere, the investment in positivism as a method is also an investment in power,[66] giving the power to speak the law (*Iurisdictio*).[67] Positivist epistemology, a comparative positivism, is a methodological functionalism that "functions" to reimprint the power and specific subjectivity of comparative law.[68] This in turn produces a logocentrism, or what feminist scholars have referred to as "phallogocentrism."[69]

Deviation from the comparative canon is not viewed favorably and might perhaps be referred to as "strong epistemological pessimism."[70] The "strong epistemological pessimism" ascribed to Pierre Legrand,[71] is, in fact I argue, an encounter with the philosophical

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[63] Gurminder K. Bhambra, Roots, Routes and Reconstruction: Travelling Ideas/Theories, 68 Soc. Rev. 455 (2020).

[64] Jaakko Husa, Functional Method in Comparative Law: Much Ado About Nothing?, 2 Eur. Prop. L.J. 4 (2013).

[65] Legrand, supra note 8, at 436.

[66] Brayson, supra note 15, at 230.

[67] Drakopoulou, supra note 52, at 33.

[68] On subjectivity and law, see Margaret Davies, Law Unlimited (2017).

[69] Allison Weir, The Subversion of Identity: Luce Irigaray and the Critique of Phallogocentrism, in French Feminists: Critical Evaluations in Cultural Theory 160 (Ann J. Cahill & Jennifer Hansen eds., 2008).

[70] Mark Van Hoecke, Deep Level Comparative Law, in Epistemology and Methodology of Comparative Law 172 (Mark Van Hoecke ed., 2004).

[71] Id.

in comparative law. Much as Socrates shunned the political agenda of the Sophists in favor of philosophy, Legrand posed problems for the comparative project by arguing that "European Legal Systems are Not Converging"[72] and writing, "Against a European Civil Code,"[73] arguing instead that this positivist approach to comparison represents an "ideologically cloistered," cryptonormative, impoverished view of law.[74] The exchanges that have ensued in comparative law reflect the agonistic method of the sophists, which Socrates rejected as political and representing a relation to power. Barthes has highlighted how such an approach attempts to "have the last word."[75] Against the "negative" connotation of "strong epistemological pessimism," I argue that this "pessimism" about the possibility of the comparative project as a European Civil Code is not a pessimism but rather, an optimism about the limitlessness of knowledge and an attempt to enact the *mentalité* of largesse that can encounter the other.[76]

"Otherness in law" can be located in comparative law in the "foreign law text."[77] However, there are spaces of "otherness" in the comparative law project that are suppressed and suspended by the discipline and disciplining of comparative law, whereby comparative law is "disciplined," closed-off, and bordered as a very specific project of the positivist assimilation of laws in Europe. As with migration within Europe, where migrant populations are required to be both "the same and the different,"[78] to provide at once the differentiation *and* assimilation required by power through law, so too has comparative law relied on this simultaneous moment of differentiation of the "foreign" and exertion of power through assimilation to claim its legitimacy and authority. As Joanne Conaghan has astutely observed, law, and for our purposes, comparative law, "is all about determinations of sameness and difference."[79] In comparative law, this sameness and difference, this otherness, is taken to mean foreign law text and foreign legal culture. But this misses the spaces of "otherness" within the comparative law project, which is a reiteration of the patriarchy and coloniality of the European laws that comparative law seeks to describe and systematize.

Feminist and decolonial movements are able to push beyond discipline as they are inherently undisciplined gestures, and because they are not orientated towards the project of assimilation or of establishing overarching comparative legal truth. In this respect, feminist, decolonial and postcolonial approaches to comparative law, of which there are very

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72 Legrand, supra note 9.

73 Pierre Legrand, Against a European Civil Code, 60 Mod. L. Rev. 44 (1997).

74 Legrand, supra note 8, at 407.

75 Barthes, supra note 7, at 207.

76 Legrand, supra note 9, at 60.

77 Legrand, supra note 8, at 424.

78 Pierre Legrand, The Same and the Different, in Comparative Legal Studies: Traditions and Transitions (Pierre Legrand & Roderick Munday eds., 2003).

79 Conaghan, supra note 32, at 245.

few, exhibit and enact a trans- or para-disciplinarity that "breaks the rule" of the comparative canon. In the words of Gayatri Spivak, "I am not erudite enough to be interdisciplinary, but I can break rules."[80] Para-disciplinarity is often decried as not focused, pseudo work, cross-fertilization, and lacking a "proper" understanding of orthodoxy. This misses the point that epistemological power is held and perpetuated precisely by enforcing the "proper" discipline, and the disciplinary force that this wields epistemologically, ontologically, and materially in claiming the orthodox position as the "true," the correct *point de départ* for comparative law. This means that knowledge continues to flow in existing orthodoxies that insulate themselves well from critique and accountability by actively not listening to "otherness" in comparative law. Not listening is precisely the coloniality that decolonial theorists seek to expose. This creates an orthodox view of the discipline of comparative law, that is the view from the particular perspective of power.[81]

In the words of Legrand, undisciplined gestures arise as a way of *doing* comparative law, of breaking disciplinary rules: "Only an undisciplined comparatist-at-law can therefore purport to do any form of justice to a foreign law-text as he applies his interpretive equipment to the task of elicitation/ascription—that is, invention—of meaning."[82] Feminism and decolonial theory have been enacting this breaking of rules and thinking otherwise to subvert the power in the act of disciplining, naming, and defining the discipline of (comparative) law. Feminism and decolonial theory stand in solidarity with an approach that seeks others-in-law such as Legrand's approach, where foreign law texts and comparatists are culturally constituted.[83] But feminist and decolonial approaches enable a thinking further beyond. In feminism and in decolonial theory, it is not always clear how to assess individuals or information to be a reliable source of knowledge, nor is it desirable. The ethics of these approaches are not in the business of assessment or hierarchization, as decolonial theory explains in relation to human rights: in a decolonial theory of the human, "no one in particular will speak for the human"[84] because everyone speaks for the human. Feminism, decolonial theory, and the comparatist as described by Legrand, are all allied in their awareness (to the point of self-recrimination[85]) of their inability to express confident views on the reliability of sources of knowledge—given the transdisciplinary perspective and national border-transcending approaches (i.e., they exist elsewhere geographically, disciplinarily, epistemologically, phenomenologically, and materially).[86] However, the transparency of the

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[80] Gayatri Chakravorty Spivak, A Critique of Postcolonial Reason: Toward a History of the Vanishing Present xiii (1999).

[81] Catharine MacKinnon, Are Women Human? And Other International Dialogues 46 (2007).

[82] Legrand, supra note 8, at 430.

[83] Id. at 433.

[84] Walter Mignolo, Who Speaks for the "Human" in Human Rights?, 5 Hisp. Issues On Line 7, 23 (2009).

[85] Naffine, supra note 34, at 71.

[86] Legrand, supra note 8, at 425.

process of comparison here is the movement of generating knowledge, the acknowledgment that there is no end or ownership of knowledge. That is *how* comparative law is a philosophy, but one of many. Otherwise, comparative law is policy or law reform, or a facilitation of the capitalist colonial matrix. Indeed, comparative law in its functionalist form is precisely this. But this is but one fragment of comparative law that seeks to have the last word, to speak last, "to conclude," "to master, to possess, to absolve . . . ; in the space of speech, the one who comes last occupies a sovereign position, held, according to an established privilege, by professors."[87]

This privilege in knowledge is mirrored and facilitated by the phenomenology of these positions and the experiences of these bodies. Feminism and decolonial thinking seek to collapse the knowledge-experience antithesis, because this is where the power in (comparative) law is located. The split of knowledge and experience, or the passions cemented by Descartes but traceable back to Plato, resulting in the "mind-body problem" and the sharp divide between human reason and human experience, "expressed itself as solipsism in intellectual life and narcissism in emotional life."[88] Thus ensued, the "epistemological chasm,"[89] between a positivist epistemology, where everything is given and conforms to a traditional correspondence theory of truth, and a constructivist epistemology,[90] where "*rien est donné, tout est construit*,"[91] that relies on a "non-referential, semi-narrative theory of truth."[92]

On my reading, Legrand's "voiding" and "obfuscating"[93] of the knowledge-experience dichotomy is not accidental, it is a deliberate breaking down, deconstruction, of the dualism upon which patriarchal and racialized and capital privilege is predicated. This distinction is indeed important to philosophy in its analytic, authoritarian incarnation. The important "role that such distinction has for the comprehension of what the comparative appreciation of regulative phenomena ultimately entails."[94] What does it ultimately entail? If this distinction plays a formative role in the comparative project, then I would suggest that this is because it is an incomplete and contingent view of what constitutes knowledge and philosophy, which reverberates through antiquity to the renaissance, the moderns and the present. Legrand's approach is only an "ontological oxymoron" proceeding from a place of "knowledge is by definition impersonal."[95] However, the impersonal of knowledge is the basis for the exclusion of the feminine and the racialized from reason and knowledge.

87 Barthes, supra note 7, at 208.

88 Stephen Toulmin, Cosmopolis: The Hidden Agenda of Modernity 42 (1990).

89 Legrand, supra note 9, at 79.

90 See André-Jean Arnaud, Critique de la raison juridique 2: Gouvernants sans frontières: Entre mondialisation et post-mondialisation (2003).

91 Id.

92 Eric Landowski, Towards a Semiotic and Narrative Approach to Law, 1 Int'l J. Semiotics L. 79 (1988).

93 Siliquini-Cinelli, supra note 10, at 451.

94 Id. at 455.

95 Id. at 445.

Knowledge is always personal to someone—to that someone who is empowered to speak knowledge and to speak truth. Objective knowledge has thus been defined by the "institution of white men,"[96] and this is to whom knowledge is always already personal. What Legrand is arguing for is that knowledge can be personal not only to the institution of white men, but to the other in law.

From a feminist and decolonial perspective, the analysis can be pushed further. The suggestion that Legrand's "sensitive epistemology" is an iteration of Western thinking's desire to combine the universal and the particular,[97] misses the feminist point that the universal has always been particular from the perspective of power. Western thinking's desire to amalgamate the universal and the particular has failed precisely because the universal is always already particular from the point of view of male, colonial power. Attempts to combine the vast particularities of rich, everyday complex interactions and intersubjectivities are bound to fail when tied to such a particular view of the universal. Hence "knowledge's structuralizing properties are incompatible with Legrand's call for a personal (self-defining) and culturally orientated (other-regarding) act of comparison."[98] But this does not mean that such an act of comparison is not worthwhile. Indeed, a personal and culturally oriented act, and feminist and decolonial acts of comparison are deliberately incompatible with knowledge's structuralizing properties.

Knowledge's "structuralizing properties" are patriarchy and coloniality. "Knowledge is by definition impersonal and a-cultural" only because it has been culturally, patriarchally, and colonially embedded as such. I argue that this epistemological solipsism insulates knowledge from question to protect the way that knowledge is understood objectively as produced through male reason. Legrand and more radically, feminism and decolonial theory, force knowledge to address its subjectivity and show its structuralizing properties of knowledge as patriarchy and coloniality. Legrand's open-ended comparative moment does not reiterate Western philosophy's desire to embed particular male, colonial reason as universal. It is different because it does not seek to be a normative knowledge, but rather a potentiality of open-ended knowledge. In this way I agree with Siliquini-Cinelli that Legrand, feminism and decolonial claims to plural knowledge, i.e., that "everyone" speaks for the human, are "ontological oxymoron." But this is only the case when viewed from the perspective of power and orthodoxy; a power and orthodoxy that Legrand, feminism, and decolonial theory all intentionally challenge from different embodied perspectives.

Western modern thought has been successful in inferring universals from the particular experiences of white, Christian, European men. As such, this form of philosophy is not a philosophy that creates space for the ideas pursued herein. The cost of such a philosophy cannot be the relegation of experience in a neo-Enlightenment move, as experience

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[96] Ahmed, supra note 1, at 15 & 135-62.

[97] Siliquini-Cinelli, supra note 10, at 445.

[98] Id.

is where gendered, racialized, impoverished other bodies reside, who are in turn ostracized from knowledge, which is the domain of the academic proper, *homo academicus*: the white, Euro-Christian, man, on the quest for doctrine. Knowledge should not be posited as "against" experience, but rather the embodied philosophy pursued in this paper acknowledges that experience is generative of knowledge. "Official" knowledge has an epistemological and ontological force that can only be accessed through a transparency of thought and openness to epistemological justice, "cognitive justice,"[99] in the form of pluralities of meanings in law and non-law. This approach does not seek to protect the juridical as a virtuous instance of reason, but instead seeks to expose how "law's juridical component" derives its juridicality as "special" precisely and only because of its phenomenological relation to power. In this sense Legrand's context and cultures approach is about exposing the power that resides in the juridical moment that is reiterated and further obfuscated in a comparative law that doubles down on law out-of-context, where context is not merely circumstance but is the determinative "scene,"[100] the web of complex iterations of power, denial, and disavowal that structure legal doctrine:

> What orthodox "comparative law" has classically understood as other-than law (history, politics, society, philosophy, language, economics, epistemology and so forth . . . culture!) is, through the law-text's structuring spectral principle, revealed to be very much present as the law-text: the selfness of the law-text exists as an assemblage of "othernesses" (history, politics and so forth . . . culture!)—a situation that implies, in Derrida's more challenging philosophical language, that the same is the same only in affecting itself of the other, by becoming the other of the same. Once again, Derrida's claim is that the foreign law-text exists as the foreign law-text that it exists as on account of its being imbued or infused by otherness.[101]

Beyond and before Legrand's exegesis of the foreign-law-text, I argue that comparative law is imbued and infused by otherness from within, that otherness of the feminine and the otherness of those non-white, non-European, non-Christian others. Joanne Conaghan explains how women's otherness-in-law locates the "sheer historical out-of-placeness of women in the world of law,"[102] and by extension, comparative law. The gendered imagery of Justice as a Lady creates Justice as the "exotic Other of law, a muse and source of inspiration to the legal mind . . . fir[ing] . . . the desires of the men of law, [and] setting them off on a perpetual quest in her pursuit."[103]

This positions feminization as a way to "set justice apart from—beyond—the law." This is a way of positioning the feminine and women as not of the law, not of the day-to-day definitional and material power of the law but rather as the imaginary desire driving

[99] Boaventura de Sousa Santos, Cognitive Justice in a Global World (2007); more recently, Boaventura de Sousa Santos, The End of the Cognitive Empire (2018).

[100] Barthes, supra note 7, at 208.

[101] Legrand, supra note 8, at 430 (drawing on Jacques Derrida, Politique et amitié 106 (2011) (1993)); Jacques Derrida, Papier Machine 248 (1990); Jean-Luc Nancy, Être singulier pluriel (2013).

[102] Conaghan, supra note 32, at 243.

[103] Id. (citing Frederick Pollock, The Genius of the Common Law (1912)).

law, to be tamed. As Wendy Brown recognizes, Plato also employed this tactic in the personification of truth and philosophy as female.[104] Brown recognizes a subversion of male gender roles in Plato but she also notes how Plato was not in pursuit of gender justice as pursued by the feminist project, which in bell hooks's definition is the movement to end sexism.[105] Aristotle and Hegel both considered women's reason to be below that of men's.[106] As decolonial scholars have shown, the human reason behind law is unavoidably racialized, with the white European Christian man speaking for the human of law and "civilized" legal reason.[107]

As Legrand argues, comparative law *is* an undisciplined gesture, it is "contrarian."[108] This is not "against" comparative law as such. This is arguing for a more thoroughgoing, plural, and unbounded understanding of what comes together to create the field of comparative law and its potentiality. Legrand continues:

> I claim that the comparative legal mind cannot supply concepts or categories—that it cannot draw a map . . . . [T]he comparatist's reading of foreign law, even as it differs from the foreign law in existence, even as it articulates knowledge of foreign law into its next iteration rather than simply record it, can guide the jurist in search of understanding.[109]

It is not that comparative law cannot be done, but rather that the comparative moment is an opening up of the generative milieu of the comparative space. The comparative project is more than the orthodox, positivist view would suggest. This has been mistaken for a pessimistic view of comparative law when it is in fact an optimism as to the potentiality of comparative law to contribute to knowledge and understanding. This is negative comparative law.[110] Negative comparative law is a variation of negative dialectics whereby "negativity," far from suggesting a "mood," (one does not have to be a negative person to engage in negative dialectics), is a de-position, dis-position, or a disruption of the orthodox position that effects a politics of resistance.[111]

I argue that comparative law is the intermediary, medium-like space, where the potentiality of knowledge is pursued for the love of knowledge: a realm of imagination and possibility. As Barthes explains referring to Nietzsche, the *atopos* or *atopia* of Socrates, which was linked to Eros, was that of the unclassifiable, of ceaselessly unforeseen originality. In this sense otherness-in-law is *atopos*, "I cannot classify the Other for the other is, precisely,

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[104] Brown, supra note 3, at 595.

[105] bell hooks, Feminist Theory: From Margin to Center (2000).

[106] Conaghan, supra note 32, at 206.

[107] Mignolo, supra note 84, at 13.

[108] Legrand, supra note 8, at 450.

[109] Id. at 418.

[110] Id.

[111] Legrand, supra note 78, at 242.

Unique."[112] This is how the comparatist "invents" foreign law,[113] this philosophical moment with no end is the originality[114] of the comparatist, which entails many choices and contingencies, which in turn are permeated by the between lines of logocentrism, phallogocentrism, and Christian Eurocentrism. An understanding of feminist time aids in understanding the unending moment of comparison-as-philosophy, whereby it embodies a duality of knowledge and experience, an embodied time of a cyclical nature that disrupts by insisting on a coming back to the bodies who produce knowledge, an interrogation of the subjectivity and subject of (comparative) legal knowledge. Feminist time grounds linear temporal progression and *atopos* by necessitating a coming back to oneself it is a reflexive and reflective connectedness in and out of time.[115]

Iris Marion Young has articulated how our projects extend not merely in definition and scope but phenomenologically, materially through our bodies,[116] encounters and the acts that we undertake as comparison; an awareness of the body doing comparison, does not cut one off from the project and act of comparing. I argue that it is possible to do both, and this form of reflective reflexive thinking is that pursued in this article. This may be dismissed, in a play on Young's words, as doing theory or comparison "like a girl," or not theory, philosophy, or comparison at all.[117] This brings back old intergenerational anxieties and neuroses of legal education, where "legal training demands nothing less than 'the eclipse of the self'"[118] and that thinking like a lawyer required and still requires a "constant state of alert to prevent my femininity from slipping undetected to contaminate my otherwise smoothly functioning intellectual processes."[119]

To borrow further from the words of Joanne Conaghan, "[T]he purpose of this . . . [paper] is to take these old anxieties and neuroses of mine and reformulate them as an object of intellectual enquiry."[120] This may very well lead to the critique, "Darling, you're not thinking like a lawyer."[121] This is, I would suggest, a false critique. I am, deliberately so, trying not to think like a lawyer, but rather as a feminist decolonial comparatist-in-law. This is a

112 Barthes, supra note 7, at 35.

113 Legrand, supra note 8, at 423-29.

114 Understood apart from the definition under REF criteria.

115 Akin to tree networks, see Suzanne Simard, Finding the Mothertree (2021); see also Latour's "network": "'a good account [i]s one that *traces a network*,' one key question being 'how much energy, movement, and specificity our . . . reports are able to capture' as they enunciate, in performative manner rather than by means of direct indication, *what a foreign law exists as*." Legrand, supra note 8, at 422 (quoting Bruno Latour, Reassembling the Social 128, 131 (2005)) (emphasis in original).

116 Young, supra note 13, at 51.

117 Ahmed, supra note 1, at 8.

118 Conaghan, supra note 32, at 200 (citing Pierre Schlag, The Enchantment of Reason 126 & ch. 6 (1998)).

119 Conaghan, supra note 32, at 199.

120 Id. at 200.

121 Id. at 199.

comparativism that is distinct from the comparative project that seeks an outcome, it is "a comparativism that thinks, a comparativism that reveals itself to be susceptible to qualitative enrichment also."[122] This contribution argues for qualitative enrichment in the embedded material sense but also in the epistemological ontological sense brought to bear by the feminist and decolonial perspectives.

In acknowledging the comparatist as legal philosopher or philosopher of law, this can push beyond the tautology of "comparative lawyers are generally lawyers of some kind."[123] Indeed, it is unclear why when we consider the comparatist-as-philosopher of law, the legal must always dominate. In certain projects of comparative law, the legal is the primary concern, without depth or detail in relation to comparison-as-philosophy. This very project is explored in the next section. Other projects in comparative law, such as comparator-as-philosopher, take a different path and build a different project, which seeks to articulate the philosophical dimension and knowledge potential of the act of comparison, which in the feminist and decolonial approach involves an important pre-normative dimension to knowledge to understand how knowledge arrives as objective; this is not about the interpretation of knowledge but rather the construction of it. Comparative law is thus an oscillating generative milieu of different projects, bringing different insights towards knowledge to bare. I argue for an embodied philosophy in comparative law which is first and foremost philosophy. It is driven by the desire to explore the potentiality of knowledge of comparative law beyond the knowledge experience dichotomy and is not bound by the juridical or legal doctrine. Indeed, a feminist, decolonial embodied philosophy of (comparative) law is driven to question the legitimacy of the juridical and of doctrine, not to prove it as a special case of knowledge and truth.

IV. The Project of Comparison: *Europäisches Privatrecht, aber was ist es?*[124]

The disciplined orthodox project of comparison has come to be characterized largely by the debate around the harmonization of the private law of obligations in Europe, based on the assumption of a "*praesumptio similitudinis*,"[125] that legal rules in their functional form are more or less the same in terms of what they aim to do. Indeed, Geoffrey Samuel has eloquently highlighted the short-sightedness of this view in a vast literature that demonstrates the particularities of the "common law" of the UK *vis-à-vis* the "civil" law system, exploring how the institutes of Gaius and Justinian's schema of *personae, res, actiones* form the basis of the civilian legal mind, but that the common law legal mind evolved quite distinctly. Legrand

[122] Legrand, supra note 8, at 429.

[123] Zweigert & Kötz, supra note 2, at 11.

[124] Wilhelm Brauneder, Europäisches Privatrecht: Aber was ist es?, 15 Zeitschrift für Neuere Rechtsgeschichte 225 (1993).

[125] Zweigert & Kötz, supra note 2, at 40.

has termed this "*summa differentia*"[126] a "primordial cleavage"[127] between the epistemologies of the common law and the epistemology of the civilian legal mind. These systems accord to what Geoffrey Samuel has termed different "schemes of intelligibility" aided by a merging of the *intellectus* and the *res*.[128] As Van Hoecke has highlighted, the project of harmonization "has been almost exclusively a one-way influence from a doctrinally more sophisticated continental law on a scholarly less developed common law."[129] Systems of law for Europe based upon the model of civilian European codification prefer a *scientia iuris* functioning on the structure of *personae, res, actiones*, which adheres to a non-contradiction theory of truth and recognizes a linear legal reality. This civilian "*mentalité*" is based on the *mos geometricus* of Domat as developed by German natural lawyers such as Leibniz, Wolff, and Nettelbladt, who promoted the application of mathematical logic to legal reasoning, deductive logic, and legal syllogism. To have knowledge of law is thus attached to "*wertfrei*" rules in a positivist epistemology. The common law on the other hand evolved upon the basis of "*non ex regula ius sumatur, sed ex iure quod est regula fiat*,"[130] where knowledge of law was achieved with a methodology that pushes out from the facts, *ex facto ius oritor,* employing a constructivist epistemology, which recognizes subjects as sources of knowledge rather than mere objects of knowledge. Legrand thus identifies an epistemological chasm between a civilian positivist epistemology and a common law constructivist epistemology. The civil law has taken an axiomatic approach whereas the common law is more axiological, a "logic of attitudes," "in the sense of a pervasive concern with the values which underpin legal phenomena."[131] As Samuel argues: "[T]he difference between the 'logic' of the civil law and the empiricism of the common law might be a matter of the permissible dimensions in which the institutional model is allowed to function."[132]

Within the harmonization project for Europe there exists already what Legrand has termed "a variation on the theme of cultural imperialism,"[133] where the civilian approach has sought to subsume and assimilate the common law towards a *ius commune Europaeum*,

[126] Legrand, supra note 9, at 63.

[127] Id.

[128] See Geoffrey Samuel, Epistemology and Method in Law (2016).

[129] Mark Van Hoecke, Law as Communication 179 (2002).

[130] D.50.17.1 (cited in Geoffrey Samuel, Course Materials, Theory of Comparative Law, European Academy of Legal Theory (2005/2006)).

[131] Kevin Gray & Susan Gray, The Rhetoric of Realty, in Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn 204, 232 (Joshua Getzler ed., 2003).

[132] Geoffrey Samuel, Can Gaius Really be Compared to Darwin?, 49 Int'l & Comp. L.Q. 297, 307 (2000).

[133] Pierre Legrand, Are Civilians Educable?, 18 Legal Stud. 216, 226 n.58 (1998) (citing Iris Marion Young, Justice and the Politics of Difference 59 (1990)).

without regard for the "two foundational mythologies"[134] of law in Europe,[135] which function on different schemes of intelligibility.[136]

To seek to prove foreign law as either rationally valid or invalid is to call its existence into question on the basis that law and "foreign law" should be reducible to a pure object of knowledge, or some kind of *scientia iuris* which adheres to a non-contradiction theory of truth and recognizes a linear legal reality which finds ultimate expression in the nineteenth century movement of codification. Such an interpretation of law holds law as analogous to natural science in seeking observable objects.[137] The problem that this presents is that the objects of the legal science which are to be proved or disproved merge with the science itself. Legal science is characterized by atypical objects which "escape the observability criteria established for all empirical phenomena and thus the objects of legal science cannot be seen without the aid of concepts and theoretical categories."[138] Hence the objects of legal science are not as concrete as the objects of natural science. Law is then better considered as a social science.[139] Such a consideration results in the object of the "science" of law taking on a weak character as we move beyond mere pronouncements. The range of objects is expanded, such that the objects become a range of concepts all harboring different epistemological assumptions. The difficulty with this in terms of validating a legal object is highlighted by Karl Popper, who states that epistemological theses are not open to being falsified, whereas scientific theses are.[140] Consequently, epistemological concepts become a matter of degree, resulting not in knowledge of an absolute true or false nature, but rather the knowledge generated is of a relative kind. Such relative knowledge can be considered as knowledge functioning at different levels of abstraction.[141] Thus, comparison of such relative ontologies, and the epistemologies that they presuppose, becomes a matter of continual movement between levels in order to achieve the most comprehensive understanding of what it means to have knowledge of law in comparison. Within the notion of philosophies of comparative law as generative milieu, a number of different projects in comparative law are present each with their own particular commitments.[142]

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134 Pierre Legrand, How to Compare Now, 16 Legal Stud. 232, 232 n.35 (1996) (citing Bernard Rudden, Torticles, 6 Tul. Civ. L.F. 105 (1992)).

135 Brexit warrants a footnote here as to the effect that this will have on the comparative debate.

136 Geoffrey Samuel, Sourcebook on Obligations and Legal Remedies 176 (1999).

137 This reiterates Hobbes's translation of human experience into a science. See Thomas Hobbes, Leviathan chs. I-VI (2008) (1651).

138 Vittorio Villa, La science du droit 84 (1990) (cited in Samuel, supra note 132, at 312 n.81).

139 See Samuel, supra note 128, ch. 2.

140 Karl Popper, Conjectures and Refutations: The Growth of Scientific Knowledge (1972) (cited in Samuel, supra note 128, at 296).

141 Robert Blanché, L'induction scientifique et les lois naturelles 152 (1975) (cited in Samuel, supra note 128, at 60).

142 Brayson, supra note 15, at 226-27.

Indeed, we might ask, what is comparative law orientated towards?[143] Does comparative law compare? The agonistic scene of comparative law, which Socrates would have described as not philosophical, but political, has focused on the political project of a common law of Europe, based on a functional method and a presumption of sameness. In seeking to describe and systematize from a particular point of view the project of convergence is essentially a project of assimilation, from a civilian European mind. This Eurocentric vision has concentrated on a project of European private law of obligations. As Brauneder explains, European private law does not make sense, so what is the reasoning behind it?

I argue that in being focused mainly on the project of a private law for Europe, the comparative enterprise as praxis and assimilation has been a project that is rooted in and routed by the capitalist project of an internal market for Europe. The material power of the project of comparative law as a code for Europe lies in its genesis as private law, the law of the market, property relations, in the re-building of Europe in the post-war era. The power of this rebuilding spreads through politics, the market, and academia. Constitutional questions have been attempted but have failed amongst calls of "political excess." [144] This failure has intentionally left comparative legal reason focused on the "functional" law of obligations as opposed to the substantive rights of constitutional law. The comparative project has equated itself with a call for scientism—i.e., a "continuing belief in the science of law as both a method for unbiased analysis and the discovery of the classifiable nature of all legal systems."[145]

The absence of rights discussions in comparative law is but one marker of this belief in "unbiased analysis." The presumption of sameness that underpins the leading text on comparative law is a distinctly anti-feminist assumption. Public and private is old thinking in law that feminist inquiry has sought to overcome. The Eurocentric project of private law for Europe undermines this,[146] reinforces gendered divisions of public and private and is unavoidably the facilitator of the neoliberal European market. Comparative legal reason is thus orientated towards the project of the European capital market. As Joanne Conaghan has suggested, "Could it be that the post-modernist disenchantment with Enlightenment values is prompting the articulation of a new kind of legal reason?"[147] If so, what does this mean for comparative legal reason? Legrand's legal cultures approach and the epistemological variance presented therein represents this disenchantment within comparative law in its Enlightenment form. As Conaghan notes, the "siren call of legal reason" and the comparative *scientia iuris* is appealing in its systematicity. But disenchantment with the comparative

[143] Ahmed, supra note 26, at 2-5.

[144] J.H.H. Weiler, A Constitution for Europe? Some Hard Choices, 40 J. Common Mkt. Stud. 563 (2002).

[145] Laurence Rosen, Beyond Compare in Comparative Legal Studies: Traditions and Transitions 493 (Pierre Legrand & Roderick Munday eds., 2003).

[146] Örücü, supra note 62, at 3.

[147] Conaghan, supra note 32, at 204.

project is located elsewhere within the European comparative project in all iterations and what is assumed not just in the functional method but in the comparative debate tout court. There is a broader assumption of "sameness" in the comparative project, which extends to the characterization of comparative legal reason as male. Knowledge about comparative law flows from male bodies; in a leading collection on comparative law the overwhelming majority of the fifty-three entries are authored by men.[148] This sameness presents not only on a gendered level but on a racialized level too. The Eurocentrism of the comparative project defines comparative method and perpetuates into futures of comparative law, through the frame of what Grosfoguel terms "coloniality," the continuity of colonial domination after the end of colonial administrations where subordinate racialized groups are oppressed by the dominant groups.[149] Coloniality is the "darker side" of modernity.[150] It is the epistemic lens and condition of modernity.[151] One might usefully refer to the coloniality of comparative law, whereby comparison is assimilation and imposition not only of laws and "brittle rules," but of "culture," "families," aspiration, antipathies from the point of view of the European, Christian, and male lens. Scholars existing outside of the male Eurocentrism of the comparative project must repress or deny their femininity or not-whiteness in order to think like a comparative lawyer. In a play on the words of Conaghan, they traverse the Empire of Comparative Legal Reason.[152] This coloniality is reiterated in approaches that explore the notion of mixed and transplanted legal systems absent an explanation of the colonial violence by which laws came to "arrive" and be legitimized, mixed, and imposed over pre-existing laws.[153] As Esin Örücü explains:

> First there was the native law of the Indigenous inhabitants, which is still regarded as positive law by courts today. Then came layers of transplanted law: adat law (a number of Malay customs), Hindu and Buddhist laws, Islamic, Chinese, Thai laws, the English common law tradition colored by Anglo-Indian Codes, and the USA model. There are further influences in Southeast Asia: French, Dutch, German, Swiss, Portuguese, and Spanish Civilian traditions, American, Japanese and Soviet laws. The region, says Harding, has an abundance of legal traditions, practically all of them having been "received" or "transplanted" in one sense or another, and encompassing all of the world's major legal world views and systems . . . except perhaps for African law and Eskimo law. What kind of a mixed system is this? I have considered elsewhere four kinds of encounters between legal systems, legal cultures and socio-cultures: those between systems of socio-cultural and legal cultural similarity, those between systems of socio-cultural similarity but legal cultural difference, those between systems of socio-cultural difference but legal cultural similarity, and

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148 Maurice Adams et al., Comparative Law Methodology (2017).

149 Ramon Grosfoguel, Decolonizing Post-Colonial Studies and Paradigms of Political-Economy: Transmodernity, Decolonial Thinking, and Global Coloniality, 1 Transmodernity: J. Peripheral Cultural Production of the Luso-Hispanic World 14-15 (2011).

150 Walter Mignolo, The Darker Side of Western Modernity: Global Futures, Decolonial Options (2011).

151 Posocco, supra note 39, at 250.

152 Conaghan, supra note 32, at 216.

153 For an exception to this approach, see the Decolonial Comparative Law Project, Max Planck Institute (https://www.mpipriv.de/decolonial); Lena Salaymeh, Decolonial Translation: Destabilizing Coloniality in Secular Translations of Islamic Law, 5 J. Islamic Ethics 1 (2021).

> those between systems of both socio-cultural and legal cultural difference. These encounters lead to overlaps, interrelationships, mixed and mixing systems, and systems in transition. Law can always be approached as the product of a process of transposition. When legal systems are considered as overlaps, combinations, marriages, and offspring, terminology such as fertilization, pollination, grafting, intertwining, osmosis and pruning can illuminate the processes of the birth of mixed systems.[154]

"Mixedness" is usually a result of historical accident.[155] This historical determinism belies the reality that colonialism was not a historical accident and was instead the deliberate setting of the world into a hierarchy of the human, achieved through law. Mixed legal systems are thus the movement of linear capitalist expansion in tandem with deliberate colonial exclusion. Örücü's analysis of "mixedness" does cite "colonial imposition," as part of the project of mixing legal systems. However, this is taken as historical fact rather than interrogating and questioning the arrival of European law and the concomitant economy of colonial and imperial violence visited by a Eurocentric West on colonies. The project of a private law for Europe does not remember or take responsibility for the reality that "Europe was establishing itself precisely in relation to the rest of the world being colonized."[156] The logic of a private law for Europe does not put into question how Indigenous peoples did and do not think in terms of a Eurocentric law or legal reason—in particular, property and rights. The logic of a private law for Europe does not see that this "transplanted" law arrived in the colonies only through violent imposition that did not recognize pre-existing social orders and ranked Indigenous peoples as sub-human, uncivilized, and outside the purview of European legal reason as a method to justify the exploitation of colonial land and bodies. As Vázquez has argued, "[T]he violence of modernity and coloniality has constantly been justified in the name of these rational utopias."[157] The pursuit of the rational utopia of a private law for Europe in the present is only possible because of the historical material and epistemological violence of colonialism. This violence extends into the present project of a private law for Europe, which reiterates and is predicated upon that very colonial violence. This is not merely about context but about the contingency of law, the material violence and force visited upon colonial bodies that was legitimized by legal reason and in turn, used to legitimize Eurocentric legal reason. Comparative law fails to challenge the legitimacy of violently-imposed Eurocentric colonial laws that pervade its doctrine and its very existence. In failing to challenge colonial laws, comparative law perpetuates the colonial lens into the futures of comparative law itself. Comparative law does not acknowledge the pervasiveness of colonial logic in its DNA and the moment of the reassertion of the European project as a necessary iteration of the colonial impulse. This is the coloniality of comparison.

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154 Örücü, supra, note 62, at 6.

155 Id. at 12.

156 Aníbal Quijano, Coloniality and Modernity/Rationality, 21 Cult. Stud. 168, 173 (2007).

157 Vázquez, supra note 37, § 2.16.

The gendered manifestation of this "colonial impulse"[158] presents not only how the feminine has been violently excluded from the public sphere and law since Athens, medieval to modern,[159] through the Enlightenment to the present day.[160] This process is eloquently interrogated by Yvette Russell in relation to the private law of rape as women's voice, law's logos.[161] This gendered violence is a moment that is reiterated and refined in the logic of the comparative law project. In *Deep Level Comparative Law* (2002), Mark Van Hoecke identifies the epistemological problem of approaching facts as "neutral data" and the "objectivity of facts," explaining that facts are socially and legally constructed. In developing this analysis, he describes facts as looked at through legal glasses. Van Hoecke draws on the example of "sexual intercourse" to demonstrate how it can be interpreted in different ways according to context:

> Sexual intercourse may be considered a positive fact and even a duty (marriage) or even a negative situation or even a crime (rape). What in one country, or period of history, may be considered as the quite normal use of a right that results from marriage, may in another place and time be punished as rape within a marriage. Offering sexual services in exchange of money may be called prostitution, but this will mostly not be called so when this is done in the frame of a marriage (even if the reality may be the same).[162]

This call to context, however, takes an entirely functional view of the act of "sexual intercourse," which is neatly placed into different contexts, through patriarchal legal glasses and masculine legal reason. This demonstrates an approach that undermines the gendered materiality of sexual intercourse as the right to a woman as property in marriage, a violent sexual crime as rape and prostitution as a crime or not, absent the socio-economic conditions that necessitate this or the choice associated with it. "Context" is employed here as a sufficient marker of embeddedness of method without exploring the gendered and racialized power dynamics of that context. Gendered power dynamics are at play in the "between-lines" here that enable an exposition of sexual intercourse as unrelated to the material violence visited on female bodies.

Calls to context in comparative law such as this are about placing rules and definitions in situations, rather than exploring the situatedness and power dynamics of the materiality of everyday lives. I argue that engaging sexual intercourse in this way in the comparative debate enacts a foundational functionalism in comparative law that relegates

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158 Maria Lugones, Toward a Decolonial Feminism, 25 Hypatia 742 (2010).

159 Silvia Federici, Caliban and the Witch: Women, the Body and Primitive Accumulation (2014) (2004).

160 For example, the murder of Jo Cox MP. Jo Cox Killed in "Brutal, Cowardly" and Politically Motivated Murder, Trial Hears, Guardian, Nov. 14, 2016 (https://www.theguardian.com/uk-news/2016/nov/14/jo-cox-killed-in-politically-motivated-murder-trial-thomas-mair-hears).

161 Yvette Russell, Woman's Voice/Law's *Logos*: The Rape Trial and the Limits of Liberal Reform, 42 Austl. Fem. L.J. 273 (2017).

162 Mark Van Hoecke, Deep Level Comparative Law in Epistemology and Methodology of Comparative Law 169 (2004).

and erases femininity and coloniality from comparative legal reason.[163] Invoking sexual intercourse and "mixed legal systems" as objects of comparison, absent an account of gendered and colonial power and violence, reiterates patriarchy and coloniality through the act of comparison, be it purely positivist or deep-level. Therefore, the functional method is not "much ado about nothing."[164] The choices made by the comparatist in terms of what and how to compare are imbued on a more fundamental level with gendered and racialized assumptions that need to be interrogated. This is not to perpetuate agonistic method, but to expose the structural bias in the project of comparison in law to open comparative law to plural futures that acknowledge the "between lines" of the moment of comparison. The gendered assumptions and aspirations of law are phenomenologically embedded in the rules, institutions, philosophies, cases, or cultures that one is comparing, as white male bodies cohere around the discipline of comparative law to phenomenologically imbue the discipline with the characteristics of whiteness and maleness.[165] This is the fundamental substratum of functionalism in the discipline of comparative law, understood at the level at which the logos and reason of comparative law functions. From a feminist and decolonial perspective, the critique of functionalism is indeed much ado about something. It is about exposing the structural biases, violence, and ontological force in the logos of the moment of comparison-at-law.

V. The Chair of Comparative Law: Power, Attention, Attachments

To reiterate Sara Ahmed, it matters how we arrive at the places that we do. In this section, I want to think with comparative law through "using the everyday as animation."[166] I do this by turning to the everyday object of the chair to arrive at otherness in comparative law. I attempt to enact an embodied philosophy of comparative law to explore how experience is brought to knowledge in the discipline of comparative law; whose bodies generate knowledge of comparative law? This is done to interrogate how comparative law's logos and knowledge production is gendered and racialized. I argue that this embeddedness can be interrogated through the everyday object of the chair. Who sits in the c/Chair of comparative law and how do they arrive at the c/Chair? What does it take to get to the chair of comparative law and how is this gendered and racialized? What is the phenomenology of comparative law?

In academia, Chair takes on a specific meaning to hold the professorial seat, to be the source of knowledge and authority in a particular discipline. The professorial chair is thus a normative epistemological chair, from which the authority to speak a discipline flows. The object of the chair becomes the symbol that legitimizes knowledge in academia. This knowledge becomes orthodoxy and discipline. This normative power resides not in the

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[163] Id.

[164] Husa, supra note 64.

[165] Ahmed, supra note 26, at 132.

[166] Ahmed, supra note 1, at 10.

knowledge itself, but in the object of the chair and the power that this gives to the seated body. Invoking the chair is not merely metaphorical but is material. There is an embodied power that gives authority to the knowledge that flows from the chair. This knowledge has ontological force[167] in excluding others from the discipline or orthodoxy, as the chair and the knowledge that flows from it take on the properties and physical force of the bodies that sit in the chair:

> "Tables and chairs, things nearest to hand for the sedentary philosopher, who comes to occupy chairs of philosophy, are the furniture of that 'room of one's own' from which the real world is observed" . . . . Tables are "near to hand," along with chairs, as the furniture that secures the very "place" of philosophy. The use of tables, chairs shows us the very orientation of philosophy in part by showing us what is proximate to the body of the philosopher.[168]

Certain bodies are then "at home" in this chair, and certain bodies are not meant to occupy the chair. Sara Ahmed suggests that "one response might be to aim to reside as well as we can in the spaces that are not intended for us."[169] To take the example of Legrand's negative comparative law in the comparative debate, feminist legal theory and decolonial theory, these approaches "are assumed to be interrupting a happy occasion with a sense of (your own) negation,"[170] thus having the effect in the institution of comparative law of "another meeting ruined."[171] The sense that any doubt towards the possibility of the comparative law project as politics, that is a European Civil Code and assimilation of laws, is a barrier to the project of comparative law, that it negates it, that it "ruins" it.

(The) Chair is power—not merely figuratively, but materially, epistemologically, ontologically, phenomenologically. Plato's chair is an ideal type, form,[172] eternal,[173] unchanging, out of time and space.[174] Plato distinguishes between "that which always is" and "that which becomes" the becoming.[175] The former is "changeless and is grasped by a rational account, that is, by wisdom."[176] The latter is "unreasoning sense perception."[177] This is where Plato prefers the ideal form of justice over everyday instances of justice. Only study of the ideal form is capable of producing knowledge. The chair is thus a normative

[167] Russell, supra note 40.

[168] Ahmed, supra note 26, at 3 (quoting Ann Banfield, The Phantom Table 66 (2000)).

[169] Ahmed, supra note 1, at 9.

[170] Id.

[171] Id. at 99.

[172] Plato, Republic bks. III & V. All Plato references are taken from Plato, The Complete Works (John M. Cooper ed., 1997).

[173] Plato, Timaeus 29a.

[174] Id. at 28a.

[175] Id. at 29a.

[176] Id.

[177] Id. at 28a.

chair, universal, purified from matter and the lived everyday.[178] The senses, the feminine, are antithetical to reason and knowledge and have no place in this chair. This reasoning can be extrapolated to describe the professorial chair. The professorial chair is thus understood as a normative chair that sets the standard, the normative ideal for knowledge in comparative law. The chair of comparative law thus embeds comparison to the "ideal" form of knowledge in comparative law that sets a hierarchy of knowledge, rather than acknowledging various potential fields of knowledge. The chair of comparative law relies on this ideal-type knowledge for its authority where the object of the chair becomes the symbol of legitimate knowledge in comparative law. The chair of comparative law takes the property of universal and static, but also the properties of whiteness and male, of those who most frequently arrive at the chair. The discipline of comparative law flows from this chair and sets a hierarchy of knowledge and epistemology. Interventions in the comparative debate that promote encountering "otherness" in comparative law are disciplined through this hierarchy of knowledge as pessimistic and ruinous, rather than as a valid knowledge and essential critique in comparative law. The ties to capital power are sometimes more explicit; the Oxford Chair of Comparative Law was funded by Linklaters for some years, tying it to praxis and the political pursuits of the sophists. So, this ideal form chair of comparative law becomes propertied in the property of someone, most notably the institution of white men. The prestige and priority afforded to the Chair of comparative law brings with it not only the power of knowledge definition, but also the power of material privilege.

The process of knowledge becoming normative through the chair disembodies knowledge and claims it as objective. However, the "where" of knowledge production is imperative here. Where your body is, how proximate you are to the chair, your experience, determines how valid your knowledge is and whose knowledge becomes normative. Who is in the chair and what frames their intellectual labor?

As Diana Fuss has observed, "The theatre of composition is not an empty space but a place animated by artifacts, mementos, machines, books, and furniture that frame any intellectual labour."[179] Who is at the table?[180] How do we arrive at the table of comparative law and who holds the chair? Who faces the writing table? Who sits in the chair of comparative law and how is it contoured by the animated space and artifacts of the theater of composition? To take these questions to their epistemological conclusion, what does this mean for the production of knowledge in comparative law?

> Does the writing table have a face that points towards some bodies and not others? If such acts of facing depend on relegating the children or other dependents to the background, then the answer to this question would not simply involve biographical approach, but

[178] Plato, Republic 399e.

[179] Diana Fuss, The Sense of An Interior: Four Writers and the Rooms that Shaped Them 1 (2004).

[180] How does one even get to the table? Paying for childcare or travelling for the unpaid labor of grandparents. By enduring comments as a woman student from male Profs such as "our numbers will go up if your picture is in the prospectus."

> would consider how other forms of social orientation affect how bodies arrive at the table.[181]

Importantly, it is imperative to interrogate how those "forms of social orientation" are structured by patriarchy and coloniality to create a scene structured through a "lack of spare time."[182] Adrienne Rich's account of writing as a mother is invoked by Ahmed by way of example to highlight the political economy of attention:

> We can see from the point of view of this mother, who is also a writer, a poet, and a philosopher, that giving attention to the objects of writing, facing those objects, becomes impossible: the children, even if they are behind you, literally pull you away. This loss of time for writing feels like a loss of your own time, as you are returned to your work of giving your attention to the children . . . . Attention involves a political economy, or an uneven distribution of attention time between those who arrive at the writing table [and as a result, at the chair of comparative law], which affects what they can do when they arrive (and of course, many do not even make it).[183]

Attention determines how close you get phenomenologically and literally to the chair—to the seat of knowledge production. The more proximate your body to the chair, the more valid the knowledge produced by your body. Women's bodies and colonial bodies exist further from the seat of knowledge production, as attention is split between challenging institutional hierarchies, systemic oppression, care giving (in a capitalist model that devalues caregiving but privatizes care to extortion) and knowledge production. Knowledge is often assumed to be less valid when it flows from women's and colonial bodies, as these bodies, in "taking up"[184] institutional space that was not intended for them, challenge orthodoxy, discipline and power; "And yet, she arrives."[185] She enacts a different type of comparative law, where she has not put relational attachments behind her, but rather pushes out from these relational attachments and brings them to her own writing chair. She does this to challenge the status, prestige and power of the white, male propertied chair. This is done through embodied methods, embodied philosophies, that speak from places of experience in knowledge production—that push out from the everyday realities and structural hierarchies, which create a lack of attention and take bodies away from knowledge production. This may be interpreted by the academy as a lack of "commitment" to the pursuit of knowledge production for strategic ends. This embodied approach is "attuned to the place of otherness-in-the-law, to the epistemic challenges and opportunities arising from the insistent presence of the other's law."[186] More than this, the approach is attuned to one's own otherness-in-law, the otherness of women's, queer, and colonial bodies in the institution of

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181 Ahmed, supra note 26, at 31-32.

182 Karen Davies, Responsibilities and Daily Life: Reflections over Timespace, in Timespace: Geographies of Temporality 141 (Jon May & Nigel Thrift eds., 2001) (cited in Ahmed, supra note 26, at 31).

183 Adrienne Rich, Of Woman Born 23 (1991) (cited in Ahmed, supra note 26, at 32).

184 Sara Ahmed, A Phenomenology of Whiteness, 8 Feminist Theory 149 (2007).

185 Ahmed, supra note 26, at 61.

186 Legrand, supra note 8, at 405.

(comparative) law. The political economy of attention keeps certain bodies away from the chair of knowledge production and reiterates normative knowledge as white and male. The embodied philosophy pursued herein challenges the apotheosis of knowledge as abstract and the strict separation of epistemology and ontology. For example, the assertion that "experience is not knowledge"[187] and that the concern for the experiential, simultaneously with the epistemological, "turns ontological issues into epistemological ones" and "forgets that knowledge's authority derives in it being neither incomplete nor imperfect (reality as *certitudo*)":[188]

> [K]nowledge is a metaphysical end result of intellectual processes of ontological abstraction that transcend life's finitude by objectifying beings as phenomena (and thus human existence and relations). To put it differently, knowledge phenomenologically equalizes the targets of its reach for regulative and structuralising purposes thus emptying their constituting properties as well as the unpredictability of their interactions. This also explains why despite being "organised and articulated," experience is unique and imperfect, while knowledge looks for certainty and truth through a logic that prompts objectification, and thus nullification.[189]

Knowledge (of/like law) does not do anything; the bodies in the chair of normative knowledge produce this knowledge and use it as an imaginary to engage.[190] Objectification and nullification take place, not through a phenomenological equalizing, but through a phenomenological hierarchization that regulates and structures knowledge, as knowledge takes on the properties of the bodies that produce Western philosophy, law and comparative law. This relegates and phenomenologically distances all of those others: women, queer, colonial bodies who do not make it to the chair to define knowledge as outside the realm of knowledge and in the realm of experience. "Knowledge is power" is thus understood as "knowledge is knowledge" because it is articulated from the point of view of power. It only achieves certainty and truth through a logic that is deeply embedded in its own experience as certain and true. This experience is produced by male bodies within a Western epistemological frame. This knowledge nullifies the experiences of others, women, and colonial bodies as outside of logic and reason, but simultaneously reinforces certainty and truth as specific to male, colonial power.

On the embodied approach pursued herein, knowledge cannot be defined as "not experience," as this definition of knowledge keeps others, feminists, queer scholars, and colonial bodies outside of the comparative debate. The embodied approach that understands experience as generative of knowledge provides a route for these bodies to navigate comparative thinking. This is an alternative route: one that is not subsumed by discipline but one that generates distinct, divergent conversations in comparison-at-law. These conversations function on different levels of abstraction and allow for plural understandings of

[187] Siliquini-Cinelli, supra note 10, at 449.

[188] Id. at 451.

[189] Id.

[190] Davies, supra note 68, at 30.

knowledge, law, and method. This richness in knowledge and understanding can only be achieved in a non-agonistic approach. Instead of using comparison as a means of understanding what something is or is not (for this binary logic eschews complexity) I argue for comparison-at-law as philosophy understood as the intermediary generative milieu of knowledge exploration. In this sense, comparison has much more to offer than its self-delimited discipline. By invoking the chair of comparative law, knowledge is experience, but it is the experience of a male colonial lens that appears as objective knowledge to itself, because that objective knowledge mirrors its own subjective experience of the world. This claim to objectivity is an effective tactic for keeping "other" experiences from the sphere of knowledge production. This paper argues for the acknowledgement that all knowledge is experiential and embodied, and that bodies in power define epistemologies and knowledge by presenting them as objective intermediaries for a subjective engagement with the world. Chair exists not only as a noun, but also as a verb—to chair. This paper prefers to think of the professorial seat as a doing—an opportunity to enact the power of the chair for transformation and to open the debate on comparative law to welcome different frames and fragments of knowledge, including knowledge as experience.

VI. Towards Philosophies of Comparative Law: Embodied Epistemologies, for the Love of Knowledge

To understand comparative law as philosophies of comparative law, I turn to Eros as the intermediary that provides the space for unbounded intergenerational exchange and kaleidoscopic comparison. This space is absent of hierarchy and the will to define the boundaries of the comparative law project, which has been comparative law's relation to power and has characterized comparative law throughout the last century. In this section, I engage feminist readings of Plato, Eros and love to emphasize the philosophical fragments of "philosophies of comparative law," to develop a non-agonistic approach that does not seek to "have the last word" but rather presents oscillating fragments of comparison-at-law. I challenge the maintenance of the knowledge-experience dichotomy of comparative law by imagining futures of comparative law through Eros, love, as the comparative intermediary generative milieu of embodied philosophy away from a politically motivated agonism in comparative law.

Love is not unproblematic; it is not utopian. Like law, love is also violent.[191] Indeed, there may be what is perceived as an epistemological violence in positing comparative law as Eros, the intermediary with no "end," and putting the very discipline of comparative law into question. But as Patricia Tuitt has argued, a decolonial approach necessitates violence of some kind.[192] I propose here a space for exposing law, reflecting on law but not reinforcing laws juridical force. "Love opens his eyes wide, love produces clear-sightedness;"[193]

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[191] bell hooks, All About Love 17 (2001).

[192] See Patricia Tuitt, Decolonial Violence and the "Native Intellectual," in Leading Works in Law and Social Justice 18 (Faith Gordon & Daniel Newman eds., 2021).

[193] Barthes, supra note 7, at 229.

however, "the lover's discourse is today of an extreme solitude . . . it is completely forsaken by the surrounding languages—ignored, disparaged, or derided by them, severed not only from authority (sciences, techniques, arts). Once a discourse is thus driven by its own momentum into the backwater of the 'unreal,' exiled from all gregarity, it has no recourse but to become the site, however exiguous, of an *affirmation*."[194]

Thought in this way, such an approach to comparative law is the affirmation of the assertion that the "other's law," and more fundamentally, "otherness in law," exists. The other is accessed through the experiential. As Brown tells us: "[T]he storyteller reaches and moves places inside human beings that will forever elude the analytic philosopher."[195] As Socrates's companion Adeimantus opined, genuine philosophers if not "queer or vicious" are "useless to cities."[196] This approach is both epistemologically violent in subverting comparative law's orthodoxy and queer in the sense that it seeks to expose and affirm otherness and the violence caused by the denial of experience in comparative law. It may indeed be useless to cities in achieving the political project of assimilation and the impact of a European civil code, and it may well present obstacles to this project. In the words of Arlene Saxonhouse, "[T]he philosopher and the female share a common alienation from the city,"[197] a shared irrelevance to the world of political power.[198] The philosopher or philosophy as comparison is thus well placed to locate the "between lines" and otherness in law.

Philosophy comes after the event—an after-the-fact reflection on and rationalization of the facticity of material relations. However, it is also a way to imagine knowledge and material relations differently, to "invent" knowledge. It is an inspired, speechless, incommunicable experience in which the philosopher or poet is literally "possessed" by the truth and is rebuked by others as being "out of his wits" (Phaedrus 249d). Dialectic leads the way but "at last in a flash, understanding . . . blazes up, and the mind, as it exerts all its powers to the limit of human capacity, is flooded with light" (Seventh Letter 344b).[199]

It is in these moments of undisciplined gestures that the material is often dismissed as mental.[200] Irigaray argues that "love is a philosopher, love is philosophy. Philosophy is not formal knowledge, fixed, abstracted from all feeling. It is the search for love . . . love of wisdom, which is one of the most beautiful things": love is philosophy. Philosophy as love thus possesses a medium-like, demonic fecundity.[201] The philosopher is not the person that we understand them to be "learned, correctly dressed, with good manners, understanding

[194] Id. at 1.

[195] Brown, supra note 3, at 603.

[196] Plato, Republic 487d.

[197] Arlene Saxonhouse, Women in the History of Political Thought: Ancient Greece to Machiavelli 38 (1985).

[198] Brown, supra note 3, at 596.

[199] Id. at 605.

[200] Ahmed, supra note 1, at 6.

[201] Irigaray, supra note 8, at 37.

everything, pedantically instructing us in a corpus of already codified doctrine."[202] But rather, the philosopher is always an "outsider," "curious," "reflective," "sometimes flourishing, sometimes expiring": "barefoot, going out under the stars in search of an encounter with reality, seeking the embrace, the acquaintance [*connaissance*] (co-birthing) [(*co-naissance*)] of whatever gentleness of soul, beauty, wisdom might be found there."[203]

Philosophy as comparison is thus aware that there is permanent renewal in us. The same is true for knowledge, which is acquired and forgotten—thus constantly renewed.[204] Beyond attachment to a specific form or definition of knowledge, an embodied philosophy learns that knowledge "is in many bodies."[205] Philosophies as comparison-at-law are thus liberatory discourses and knowledges, which function beyond attachment to one corpus or structure of knowledge:

> Love thus passes insensibly into love of works [oeuvres]. The passion for beautiful bodies is transmuted into the discovery of beauty in knowledges. That which liberates from the attachment to only one master opens onto the immense ocean of the beautiful and leads to the birth of numerous and sublime discourses, as well as to thoughts inspired by a boundless love of wisdom.[206]

Eros as mediator is the intermediary of a becoming with no objective that should not be subjected to a telos, otherwise it risks losing its irreducible character and being replaced by a metaphysics.[207] I argue that this is the role of the philosopher comparatist-at-law. As founder of Western philosophy and Rationalism, Plato binds "philosophy to abstract mathematical reasoning, assert[s] the supremacy of mind, call[s] the senses deceivers, and declare[s] the body a sickness or tomb of the soul" (Phaedo 65, 81; Cratylus 400c).[208] But as Brown explains, in Plato there is another dimension—"Plato the poet, the celebrant of eros, the dreamer, the maker of myths and allegories."[209] Brown locates this "sensitive" side of Plato not external to rationalism, but as the inherent tensions embedded in the effort to found rationalism. She continues:

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202 Id. at 36.

203 Id.

204 Id. at 39 (citing Diotima 208). In this article quotations from the *Symposium* are rendered in English from Plato, Phaedrus, Ion, Gorgias, and Symposium, with Passages from the Republic and Laws 252-63 (Lane Cooper trans., 1938). References in French are Irigaray's citations from the French translation of Léon Robin in Platon, Oeuvres complètes (Léon Robin trans., 1950).

205 Irigaray, supra note 8, at 42, 210.

206 Id.

207 Id. at 44.

208 Brown, supra note 3, at 600.

209 Id.

> If, instead, we locate the poet, the mythmaker, and the erotic inside the supposed rationalism, as I . . . argue Plato himself does, we will see a rather different Plato-less formally rational, less "logocentric," and more subversive of a masculine mode of discourse.[210]

Indeed, myth and allegory here are not supplementary to reason, but a whole mode of political thought and "philosophical conversation."[211] Plato recognizes the importance of dialectic reasoning as a trustworthy assistant on the journey of a soul toward truth it "has the power to release" (Republic 532c). It "both liberates and directs the mind," but there are also "dangers inherent in the use of dialectic," which can be "vulgarized into mere debate, eristic, or pointless games of contradiction" (Republic 454a). Dialectic can be used to politically corrupt and contradict for the sake of it (Republic 539b-c). Even in the hand of Socrates, dialectical inquiry can restrict imagination, deter hunches, arrest intuition, bring premature conclusions, and fix the boundaries of an argument in ways that lead not toward but away from wisdom (Theaetetus 166a-b). It can intimidate and hush the human experience, the human being taking part in the discourse. Socrates is aware of limitations and how "dialectical or dialogical method forgets the most elementary truths."[212] Indeed, Diotima reimagines dialectical inquiry, not as a Hegelian opposition to transform and synthesize, but rather to expose a "third way" that is always already there and that allows alternatives.[213] Irigaray explains that "[i]t is love that leads to knowledge-both practical and metaphysical." The philosopher comparatist adopting this approach can be "both the guide and the way, above all a mediator."[214]

As Brown explains, in Socrates, when listeners are no longer orientated towards truth, but rather are "herded or dragged" through dialectics, Socrates turns to imagery, myth, and allegory. In an invocation of feminine time he brings listeners "back to themselves" to open up the argument in its human dimensions and political characteristics. Listeners are thus co-producers, allies in the pursuit of truths as more than just reasoning machines: "Our mental universe is shaped by logic, causal relations, and immediate necessity but also by imagination, dream, and desire."[215] Brown argues for a philosophy that is not strictly bound by the divide between knowledge and experience, and she further argues that this is already there in Plato:

> And for all of Plato's railing against the appetitive or desirous, the fanciful or poetic, he does not and cannot jettison these parts of our being. Socrates and Plato must awaken and inspire precisely these dimensions of us because they are involved in a political struggle to loosen our engagement with the immediate world of necessity and move our minds into a

[210] Id.

[211] Id. at 600 n.16.

[212] Irigaray, supra note 8, at 38.

[213] Id. at 32.

[214] Id. at 33.

[215] Brown, supra note 3, at 603.

> radically different, imaginative domain. They must break the conservative hold of the present and incite us to envision an order of existence and values utterly unlike our own yet identifiably human and livable.[216]

Plato could not push beyond the duality of gender and negation to what Brown terms a "sensuous rationality."[217] However, the philosopher-as-comparatist envisaged here is guided by embodied knowledge and "sensuous rationality" to imagine, to rearrange, to remake. To imagine anew, to imagine and "trace" law, to assert feminist and decolonial imaginaries of law that have been hereto eclipsed by the European endeavor of comparative law. To transform and reconstitute the logic of comparative law. This is a call for embodied epistemologies, a more loving digestion of embodied knowledge for transformation—transformation of what it means to have knowledge of law. As Brown notes, this imagining is also a political act, but not one that is tied to a telos or an objective. Rather, it is an opening up of the comparative domain as the fecund intermediary generative milieu of Eros with no necessity for conclusion.

VII. Conclusion

In exploring and confronting the past histories, present manifestations and possible futures of the philosophies of comparative law, this paper has advocated for a non-agonistic approach to comparative law that, as part of "philosophies of comparative law," understands comparison as the intermediary generative milieu for unbounded knowledge production, a fecund space, building on Eros. I have argued for an approach that entails no political end to the comparative project, an exposing of the coloniality of comparison and the gendered logic of the comparative project to date. In so doing, I have articulated an accountability through feminist and decolonial time which necessitates a coming-back-to-oneself in reflection that does not adhere to the idea of an authoritative end and linear progression to comparative law. The intermediary generative milieu of comparison is a space for unbounded reflection for the love of embedded and embodied knowledge. The paper has acknowledged that all comparative attempts in law are collaborative, and it has exposed the power in comparative orthodoxy through turning to the everyday object of the chair and the Chair of Comparative Law. I have phenomenologically interrogated who makes it to the chair, the political economy of attention and how bodies proximate to or in the chair produce normative knowledge. I have argued the apotheosis of knowledge is not abstract and that femininity, race and embodied material experiences constitute knowledge in the comparative project. The comparatist-as-philosopher located in the intermediary generative milieu of Eros dares to ask questions, act out-of-time, to be undisciplined, to embody and take up space not meant for them.[218] Even more radically, the comparatist-as-philosopher dares to listen, create space and cede power to those who exist outside of the orthodox canon. Importantly, the comparatist-as-philosopher does not "discipline" or hierarchize

[216] Id. at 601-03.

[217] Id. at 613.

[218] Ahmed, supra note 1, at 9.

these bodies for their outsider status. The intermediary generative milieu of comparison is therefore a space for the pursuit of the love of knowledge, where power is not domination.[219] This is a space of imagination, of generating comparison, the "ephemeral, mad, speechless, erotic, procreative" moment beyond reason, beyond maleness.[220] This is done through an embodied philosophy: intergenerational, kaleidoscopic comparison and oscillation, comparatist to comparatist, comparatist to feminist, comparatist to coloniality, comparatist to theory, comparatist to capital. "Nobody said it was going to be easy,"[221] but it does not have to be agonistic.

[219] Brown, supra note 3, at 613.

[220] Id. at 608.

[221] Conaghan, supra note 32, at 240.