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Decentering the Universal: Comparative International Law and Decolonizing Critique

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Decentering the Universal: Comparative International Law and Decolonizing Critique

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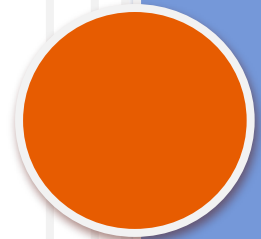
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Decentering the Universal: Comparative International Law and Decolonizing Critique

Miriam Bak McKenna

Abstract:

While a growing body of literature has sought to challenge international law's claim to universality and draw attention to the diversity of non-European systems of international relations and law, the limits of these studies in escaping the conceptual confines of eurocentrism have been evident. As Martti Koskenniemi notes, 'the question remains how to identify and compare autochthonous forms of thinking about international law that would not necessarily be subsumable under European legal categories but would stand on their own'¹.

This article examines the potential for the emerging field of comparative international law to open up the international legal space to a different construction of the 'universal' and the interplay of particularistic, distinct legal cultures in the making and operation of international law. It argues that an emancipated, open-ended, and interdisciplinary comparative international law might play an important role in decolonizing international legal scholarship.

Keywords: Comparative International Law, Decolonization, Comparative Law, Post-Colonial Critique.

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¹See, e.g., Koskenniemi, "The Case for Comparative International Law", 20 *Finnish Yearbook of International Law*, 1 (2009).

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1. Introduction

“We cannot extract ourselves from our traditions but the manner in which we follow them depends on us.”

-Jurgen Habermas²

One of the enduring questions which plagues international law is whether it can be truly universal.

That a body of law could overlay the heterogeneity of the world and its deep cultural, social and religious differences and produce a universal judicial standard was always going to be a difficult prospect. And yet the view that there is a single, universal international law with a homogenous history and fixed normative core continues to hold captive the imagination of international lawyers.

At its core, the classic juridical appeal to universalism in international law is one that depends on and sustains a particular vision of the world, and the role of international law as an aspect of the political ontology of global relations. International law is not merely a body of rules governing inter-state relations but as a lens through which we both order the global plane and make the modern world intelligible - a discourse of ‘worlding’ in the Heideggerian terminology. In this sense, our approach to international law and its universalist aspirations is one that is contingent upon what we consider ‘international law’ is, or ought to be, in the first place.³ More than any other legal order,

² J. Habermas, *De L’Usage Public Des Idees: Ecris Politiques 1990-2000* (2005) at 5.

³ M. Koskenniemi, ‘A History of International Law Histories’, in B. Fassbender and A. Peters, eds., *The Oxford Handbook of the History of International Law* (Oxford: OUP, 2012) at 970.

international law has largely been tied to an idealised image of itself as the standard bearer of a particular kind of international order, unified by an overarching normative commitment amongst states. In international law this has predominantly taken two forms: universalism cast as a corollary of natural law theory based upon shared human values, and later of legal positivism based upon a shared commitment to international peace and order.

Countless pages have been devoted to underlining the historical and geographical contingency of these views as conceptual exports from a European legal tradition, globalised by means of colonialism.⁴ Suffice to say, it is generally now acknowledged that mainstream approaches to international law are largely derived from and sustained by a European, state-centric outlook on the world. As Martti Koskenniemi explains ‘the view that there is a single, universal international law with a homogeneous history and an institutional-political project emerges from a profoundly Eurocentric view of the world.’⁵ Eurocentrism here is not merely an excessive focus on Europe and its New World outposts — ‘the West’ - but refers in the broadest sense to the general habit of attributing authority to only certain forms of knowledge—while disregarding and disparaging others.⁶ On the international legal plane Eurocentrism is pernicious, it is argued, in that it tends to naturalise its authority and insulate itself from counter-claims, subsumed under the aegis of the claim to universality. Unsurprisingly therefore, international law’s insistence upon a particular vision of the universal has increasingly come under pressure by a broadening acknowledgment of the plurality of political and jurisprudential visions that exist within the international legal space.⁷ Critical histories in particular have sought to unsettle celebratory narratives of international law and their insistence upon a monolithic narrative of progress self-evidently working collectively in

⁴ As Antony Anghie and B.S. Chimni argue ‘[i]t was principally through colonial expansion that international law achieved one of its defining characteristics: universality’ and hence that ‘the doctrines used for the purpose of assimilating the non-European world into this “universal” system ... were inevitably shaped by the relationships of power and subordination inherent in the colonial relationship’ Anghie and Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Armed Conflicts’, 2 *Chinese J Int’l L* (2003) at 84. See, also M. Koskenniemi, “Histories of International Law: Dealing with Eurocentrism”, 19 *Rechtsgeschichte: Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte* (2011) 152-176

⁵ M. Koskenniemi, “The Case for Comparative International Law,” 20 *Finnish Yearbook of International Law*, 1 (2009) at 4.

⁶ S. Munshi, ‘Comparative Law and Decolonizing Critique’ 65 *American Journal of Comparative Law* (2017) at 226

⁷ See eg X. Hanqin, *Chinese Contemporary Perspectives on International Law: History, Culture and International Law* (The Hague: Martinus Nijhoff, 2012); L. Malskoo, *Russian Approaches to International Law* (Oxford: OUP, 2015); H. Ruiz Fabri, ‘Reflections on the Necessity of Regional Approaches to International Law Through the Prism of the European Example: Neither Yes nor No, Neither Black nor White’, 1 *Asian Journal of International Law*, (2011); E. Jouannet, ‘French and American Perspectives on International Law: Legal Cultures and International Law,’ 58 *Melbourne Law Review*, 292 (2006); A. Becker Lorca, ‘International Law in Latin America or Latin American International Law? Rise, Fall, and Retrieval of a Tradition of Legal Thinking and Political Imagination’, 47 *Harvard International Law Journal* 283 (2006); L. Obrego, ‘Completing Civilization: Creole Consciousness and International Law in Nineteenth-Century Latin America’, in A. Orford (ed.) *International Law and its Others* (Cambridge: CUP, 2006); Symposium: French and American Perspectives Towards International Law and International Institutions, 58 *Melbourne Law Review* (2006).

the interests of humanity and universal values and unveil not only its colonial past but the parallel and intersecting legal orders that have existed alongside European public law.⁸

The limits of these studies in escaping the conceptual confines of Eurocentrism have been evident, however.⁹ International law's appeal to universality, whilst simultaneously reflecting a particular, western culture presents, a paradox which is strikingly difficult to escape without fundamentally changing the very foundations of the discipline. While many studies have attempted to open the field to a non-European periphery, the problem of *how* to write about international law in a way that avoids the vocabulary, concepts and standards of a European narrative of progress has been a point of contention. As Rose Parfitt has explored, if history is fed into this historiographical machine, then the product that emerges will inevitably be one enmeshed with the sources orthodoxy and its European underpinnings. 'Discard the methodology dictated by the classic approaches to sources' she explains '...and the possibility of 'challenging Eurocentrism' emerges – but at the risk of dissolving the specifically international legal character of the undertaking'.¹⁰ Indeed, irrespective of the many critiques of a 'Westphalian' understanding of international law, a static, uncritical view of universality, still dominates the field. As Martti Koskenniemi notes, only when there is no longer a 'single hegemonic answer' to the question – 'what is international law?' – can we hope to fully embrace the multiple interpretive and normative visions that exist in international law. The challenge, he goes on, 'remains how to identify and compare autochthonous forms of thinking about international law that would not necessarily be subsumable under European legal categories but would stand on their own'¹¹.

This article will explore how the emerging field of comparative international law might contribute to a decolonizing of the discipline by opening up to a different construction of the 'universal' and the interplay of particularistic, distinct legal cultures in the making and operation of international law in a way that decenters its Western focus. Broadly defined as identifying, analysing and explaining local, regional or national approaches to international law, proponents of a comparative international law approach propose that the conceptual confines of law that need to register a sensitivity about the ways in which international law is constructed, contested and applied across different cultural contexts. In place of a totalising vision of international law,¹² comparative international law assumes a fluidity in both the normative structure and material substance of international law given the diverse cultures and practices among legal cultures. It therefore seeks to navigate the contradiction between a formalist, internationalized, even globalized, vision of law, on the one hand, and the inevitable multiplicity of particular national, regional, individual, and institutional visions of international law, on the other.

⁸ See eg A. Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (2015).

⁹ See eg A. Martinneau, 'Overcoming Eurocentrism? Global History and the *Oxford Handbook of the History of International Law*', 25 *EJIL* (2014); Parfitt, 'The Spectre of Sources', 25 *EJIL* (2014).

¹⁰ *Ibid* at 299.

¹¹ Koskenniemi, *supra* note 5 at 4.

¹² The traditional approach is encapsulated by this description of the field by Hersch Lauterpacht: "international law is the only branch of law containing identical rules administered as such by the courts of all nations." H. Lauterpacht, *Decisions of Municipal Courts as a Source of International Law*, 10 *BRIT. Y.B. INT'L L.* (1929).

Removing the traditional division between the fields and offering a new perspective on the relationships between distinctive legal orders in international law may promote an emancipatory critical edge by unsettling the hierarchies erected by the separation of the disciplines. As Teemu Ruskola points out, the separation of international and comparative law has formed part of a joint cultural, political and epistemological project that has formalised the elevation of international law (despite its geographical and historical origins) to an ostensibly ‘acultural or supracultural space’, while assigning differences in cultural approaches to law to the domestic sphere of the state (and the comparative sphere).¹³ Within this schema, he explains, ‘comparative law and international law are fully in cooperation in displacing what are often political differences onto the site of culture’.¹⁴

The modern comparative project, however, is not without its criticisms. As recent methodological discussions demonstrate, comparative law often fails to move beyond the hard-worn categories of centre and periphery, universality and particularity, alterity and hegemony; categories that already dominate the international legal field. If we are to plot an escape from the imperial legacies of international law and challenge the embedded hierarchies and epistemic boundaries of current international legal scholarship then it is not enough, as Anthea Roberts suggests, to simply fuse international law (as a matter of substance) with comparative law (as a matter of process), in so much as the latter is also firmly part of the same European legal tradition. Both international law and comparative law emerged in the modern forms in the 19th century, bound up with the project of imperialism¹⁵ and the constitution of a European or Western identity ‘in opposition to an alterity that it has itself constructed.’ This, as Ruskola explains, was also the era of the World Fairs and of the institutionalisation of the modern museum, and despite their differences, as cultural forms they followed a similar logic: ‘they displayed diversity and difference in an objectified, inert form for the visual enjoyment of Western viewers.’¹⁶

Drawing on recent academic interventions into the field of comparative law, particularly Sherally Munshi’s compelling efforts to reorient comparative legal scholarship towards decolonizing critique,¹⁷ I explore how a decolonizing critique might similarly respond to or ground questions of concern to scholars of comparative international law —particularly questions about the object and method of study. I want to draw attention to four particular routes which would be useful for the development of an emancipated, open-ended, and interdisciplinary comparative international law endeavour if we are to register the plurality and fluctuations in how different cultures have different intellectual and institutional means of expressing and operationalising international law, and in this

¹³ *Ibid* at 142.

¹⁴ *Ibid*.

¹⁵ Beginning with Weber, the necessities of colonial administration figure prominently in the rationale for comparative law. Lawson, for example, writes that “[C]olonial governments, particularly in Africa, cannot allow innumerable systems of native law to develop in higgledy-piggledy fashion without guidance... The comparative lawyer may thus be able to lend a helping hand in moulding what may prove to be new national systems of public and private law in what are now our colonial territories.” See, e.g., F. H. Lawson, *The Comparison: Selected Essays* (Amsterdam: North Holland Publishing Co. 1977).

¹⁶ T. Ruskola, ‘China in the Age of the World Picture’, F. Hoffman & A. Orford eds., *Oxford Handbook of the Theory of International Law*, (Oxford: OUP, 2016) at 142.

¹⁷ Munshi, *supra* note 6.

way, resist or challenge the imperialist and totalizing tendencies of the orthodox approach to universality.

In the first Part of this Article, I discuss some of the ways in which comparative international law might play an important role in decentering international legal scholarship by reframing the dialectic between the universal and the particular. The Second part of the Article, considers how a decolonizing critique might respond to or ground questions of concern to scholars of comparative international law. Lastly, I examine four particular methodological and theoretical aspects that must be incorporated into the comparative international law endeavour in order to provide a new emancipatory space for a broadened appreciation of international law in its sociological dimension.

2. Decentering the International

‘When one inhabits the centre, one feels no need to mark out one’s place’. ‘One is ‘there’ and everybody knows it. In the periphery, things look different;’ so writes Martti Koskenniemi in his *Case for Comparative International Law*. The tropes of ‘internationalism’ and ‘universalism’, he argues, begin to look very different if that commitment is localized somewhere other than at Second Avenue, New York, somewhere between 43rd and 49th Streets, or Geneva’s international centre. Koskenniemi is of course no stranger to longstanding critiques of international law’s claims to universality. In 2004 he chose his opening address at the inaugural conference of the European Society of International Law to deliver a provocative rebuke to the seamless integration of a European legal tradition into a generalised representation of universality.¹⁸ The danger, he argued, ‘is that of mistaking one’s preferences and interests for one’s tradition – and then thinking of *these* as universal; a mistake we Europeans have often made’.¹⁹ Fourteen years later and the tension between the universal and the particular continues to occupy a central place in debates about international law. In his opening remarks to the 2018 ESIL conference on the theme of International law and Universality, Jean D’Aspremont, echoed Koskenniemi’s earlier critique, remarking ‘When one inhabits the centre, one does not see the hegemony, the imperialism, the repression of difference, the denial of alterity, and the symbolic violence against the periphery... Inhabiting the centre transforms our cognitive aptitude and make us blind.’²⁰

A ‘de-centering’ of international law has been underway for many years. Among the contributions of TWAIL (Third World Approaches to International Law) scholars in particular have been the provocative unmooring of narratives of universality upon which authoritative sensibilities of international law depend, and the uncovering of the broad array of political, economic and social asymmetries that were inaugurated in the process of colonisation, and which have proliferated

¹⁸ The text is reproduced in M. Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 *EJIL* (2005)

¹⁹ *Ibid* at 115.

²⁰ J D’Aspremont, ‘International Law, Universality, and the Dream of Disrupting from the Centre’ available online http://esil-sedi.eu/?p=14023#_ftn2

across the globe since then.²¹ Perhaps most influential among these contributions has been a fundamental shift in the discipline's understanding of international law and its history based on a revised sense of the plurality of its object. This revised understanding, as Jochen von Bernstorff explains comes with two principal assumptions: first, the idea that international law is perceived and conceptualized very differently in various regions and places and, second, that the application of general international law, behind a unified façade, is, in practice, dependent on the affiliation of legal subjects to a certain category of states or nations, with the result that some nations in practice are less equal than others. Longstanding assumptions about the uniformity of international law have also been challenged by studies showing that the interpretation of international law at the domestic level shows significant divergence and the specificity of different legal regimes within the field of international law, giving life to different varieties of international law.²² 'There is no one global legal order,' argues David Kennedy, international law is 'conceptualized and thought about differently in different places.'²³

In light of this growing understanding of international law as fluid and contingent in its domestic and regional dimensions, and an increased interest in the dialectical relationship between international law as a formal and autonomous system and international law as a field of practice in the Bourdieusian sense,²⁴ a number of scholars have begun to develop the contours of an emerging field which could loosely be termed 'comparative international law'. David Kennedy,²⁵ Mireille Delmas Marty,²⁶ Emmanuelle Jouannet,²⁷ Martti Koskenniemi,²⁸ and Anthea Roberts²⁹ have in various works suggested that the study of the variations of approach, technique, traditions and substance of international law, as well as methods of legal comparison, should be integrated more fully into the study of international law. The need to be attentive to the multiple pluralist and multicultural claims in the face of an increasingly global society, Jouannet argues, is reinforced by both factual and doctrinal considerations prompting the need to see international law in its historical

²¹ A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: CUP, 2005); A. Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, Harv. Int'l L.J. 1 (1999)

²² See, e.g., A. Becker Lorca, *International Law in Latin America or Latin American International Law? Rise, Fall, and Retrieval of a Tradition of Legal Thinking and Political Imagination*, 47 Harv. Int'l L.J. 283 (2006); A. Becker Lorca, *Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation*, 51 Harv. Int'l L.J. 475 (2010); L. Obrégon, *Completing Civilization: Creole Consciousness and International Law in Nineteenth-Century Latin America*, in *International Law and Its Others* 247 (Anne Orford ed., 2006).

²³ D. Kennedy, 'The Disciplines of International Law and Policy', 12 *Leiden Journal of International Law* 9, 17 (1999); B.S. Chimni explains that "location matters" when it comes to international law, "be it in terms of the issues that are addressed or the ways in which these are approached." B.S. Chimni, *The World of TWAIL: Introduction to the Special Issue*, 3 TRADE L. & DEV. 14, 22 (2011).

²⁴ See G. Shaffer and T. Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106 *AJIL* 1.

²⁵ D. Kennedy, 'New Approaches to Comparative Law: David Kennedy, 'New Approaches to Comparative Law: Comparativism and International Governance', *Utah Law Review* 633 (1997).

²⁶ M. Delmas-Marty, 'Comparative Law and International Law: Methods for Ordering Pluralism', 3 *Tyo JLP* 43 (2006).

²⁷ Jouannet, *supra* note 7; E. Jouannet, *Les Visions Française et Américaine du Droit International*, in *Droit International et Diversité des Cultures Juridiques* 43, 88 – 89 (2008).

²⁸ M. Koskenniemi, *supra* note 5.

²⁹ A. Robert, *Is International Law International?* (Oxford: OUP, 2017); A. Roberts, P Stephan, P Verdier and M Versteeg (eds) *Comparative International Law* (Oxford: OUP, 2018).

and cultural contexts.³⁰ Instead of working from the premise that international law exists objectively somewhere out there, comparative international law assumes, as Anthea Roberts notes, that ‘what counts as international law depends in part on how the actors concerned construct their understandings of the field.’³¹ This, argues Jouannet, ‘is because the actors in the international arena are conditioned by their own legal cultures and not by a cosmopolitan legal culture, which at present does not really exist... to be sure, there certainly exists a common language, which is international law itself, and in this sense a common embryonic culture, but this language is expressed through individual voices that are the products of particular, diverse legal cultures.’³²

While the term ‘comparative international law’ is not new,³³ and international lawyers have to some extent instinctively drawn on its central tenants in the identification and formation of customary international rules, as a broader methodological practice it has predominantly been subsumed by the belief that international and comparative law were largely incompatible with the former focusing on the universal and the supranational, and the latter on the similarities and differences between domestic legal systems.³⁴ The reasons for this may be easy to understand, notes Koskenniemi, ‘to emphasize local, regional or national approaches to international law might seem to undermine the internationalist spirit of the profession which is so characteristic to it.’³⁵ These anxieties frequently lead to minimizing rather than highlighting national or regional differences, as David Kennedy explains:

One of the most puzzling aspects of international law is the intense desire within the profession to deny our common experience of professional pluralism—or to discuss it only over cocktails. As a result, there is no strong science of “comparative international law.” We have intuitions, prejudices, impressions about one another, but we resist acknowledging, and studying, let alone embracing, our differences.³⁶

In an important sense, then, the separation of the two fields has been a necessary component of a broader cultural, political, and epistemological project that upholds the conceptual and practical opposition between the ‘universal’ and the ‘particular’ that both enables as well as ultimately limits the field of operation of each.³⁷ Within this schema, as Ruskola expresses, difference and

³⁰ Jouannet, *supra* note 7.

³¹ Roberts, *supra* note 29 at 1.

³² Jouannet *supra* note 7 at 292.

³³ In the late 1960s William E Butler led a study at Harvard Law School in Russian, Chinese, and American approaches to international law, *see, e.g.*, W.E. Butler, *American Research on Soviet Approaches to Public International Law*, 70 *Columbia Law Review* 218, 223–24 (1970), he continued to publish various texts on the topic throughout the 1970s and 80s. *See also* Edward McWhinney, *Operational Methodology and Philosophy for Accommodation of the Contending International Legal Systems*, 50 *Virginia Law Review* 36 (1964).

³⁴ Harold Gutteridge explains that employment of the comparative method with respect to international law “would at first sight appear to be excluded, because rules which are avowedly universal in character do not lend themselves to comparison” H.C. Gutteridge, *Comparative Law and the Law of Nations*, in W.E. Butler ed. *International Law in Comparative Perspective* (New York: Springer, 1980) at 13.

³⁵ *See* Koskenniemi *supra* note 5 at 7.

³⁶ D. Kennedy, ‘One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream’, 3 *N.Y.U. REV. L. & SOC. CHANGE* (2007).

³⁷ As David Kennedy, for example, describes the self-understanding of international lawyers and comparative lawyers, the former seeks to establish a supranational regime of order above states while the latter endeavor

particularity are labeled as culture and consigned to the domestic sphere of the nation state, leaving international law as an ostensibly universal or supracultural space.³⁸ In Kennedy's account, 'culture and cultural difference precede the move to law, exist external to it as a constant challenge or threat, or live below it, beneath the veil of the sovereign state'.³⁹ Comparative law and international law are thus structurally complementary in displacing what are properly political differences onto the site of culture. In this dialectic of universality and particularity, 'there is little, if any, room for radical political or cultural difference—the kind of difference that is not readily recouped within a larger state-based logic.' Ruskola likens the relationship between international law and comparative law to that of museums and their collections. Just as the museum provides the representational and institutional backdrop for constituting objects as art, the global inter-state legal order constitutes certain communities *as states*. Meanwhile comparative lawyers are assigned the task of curating the individual art pieces within these prefabricated national frames. As Ruskola suggests, the conventional opposition between the study of 'universal' international law and the analysis of 'particular' national legal systems is largely untenable:

Universal norms can never be considered only in the abstract: they must always be ultimately translated into and understood in the particular idiom of some local actors somewhere on Earth. Without the mediation of comparative law, international law would be literally unintelligible. At the same time, comparative lawyers' descriptions of the particular and the local are, by definition, exercises of translation, and translatability in turn assumes the possibility of communication across local differences.⁴⁰

To dissolve the conventional opposition between international law and comparative law, therefore, is to begin to unpack the orthodox logic of the distinction between the universal and the particular, and to reframe them as part of a single dialectic. In the context of a broader critique of the imperialist underpinnings of international law this can also be understood as a means to recast the universal beyond the opposition to an alterity that it has itself constructed. In other words, because the formation of the universal depends in large part upon the construction of the particular by reference to which it defines itself, to begin to understand this relationship as a single dialectic opens the door to a more emancipatory critique of this dynamic. In this optic absolute universality *and* absolute particularity are ontologically impossible and, indeed, normatively undesirable, given that, as Ruskola explains 'absolute universality would imply a complete unity of all existence and absence of boundaries, while absolute particularity would entail equally complete existential fragmentation.'⁴¹

to understand cultural diversity among states. D. Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT'L L. 9, 82 (1999). This characterization here applies most of all to a liberal conception of international law and to a "nationalist concept" of comparative law. Although there are in fact multiple approaches to both international law and comparative law, with varying degrees of attention to the universal and the particular, the theoretical point is that it is not *possible* for either tradition to focus solely either on the universal or the particular, even if they so desired.

³⁸ Ruskola *supra* note 16 at 141.

³⁹ See Kennedy *supra* note 25 at 552.

⁴⁰ Ruskola *supra* note 16 at 141.

⁴¹ T. Ruskola Where Is Asia? When Is Asia? Theorizing Comparative Law and International Law, Public Law & Legal Theory Research Paper Series Research Paper No. 11-155, at 112.

Underpinning this approach, therefore, is an acknowledgment that within particular contexts, politics, culture, national interests, religion, economic and geo-strategic considerations, will all undoubtedly impact the legal culture of each legal community, which will in turn impact their appreciation, interpretation and application of international law. As Koskenniemi argues, ‘a serious comparative study of international law would contribute to thinking of the world no longer in terms of what Hegel used to call abstract universals but seeing all players as both universal and particular at the same time, speaking a shared language, but doing that from their own, localizable standpoint’.⁴² The comparative international legal project therefore centres on a reassessment of a range of assumptions upon which we base our understanding of the field by showing that other communities of international lawyers—often in different states or geopolitical regional groupings—approach international law in different ways and asks us to account for these differences. This prompts us in turn to think about the dynamics at play in the international community – both at a macro level at the level of the state and international institutions, and at a micro level – at the level of localised networks, groups and individual actors. This perspective may reveal some important structural biases, privileges and patterns of dominance within the practice of international law. As Koskenniemi argues, comparative international law could help to stress the localizability of the commitment to international law and, thus, contribute to the ‘ideology critique of international law and of the institutions sustained by that professional vocabulary’.⁴³

3. Comparative Law as Decolonising Critique

That these scholars have turned to comparative law to open up the field of international law is not surprising. The adoption of a comparative lens has at its core a responsibility towards and recognition of difference. ‘If international law is the department of global governance’, argues David Kennedy, ‘comparativists serve as a department of diversity’.⁴⁴ Glendon, Gordon and Osakwe describe the comparative project as: ‘in a world where national and cultural “difference” is often seen as posing a formidable challenge, comparatists hold up a view of diversity as an invitation, an opportunity, and a crucible of creativity’.⁴⁵ Comparativism disputes the possibility ‘of one-law-for-all, alleged uniformity’ Pierre Legrand asserts, and becomes a way of suspending ‘self-centric and self-satisfied normality’; by disenchanting our most sacred institutions and disrupting intellectual routines, comparativism becomes a practice of repositioning oneself in the world and history.⁴⁶ That same orientation—an inclination towards difference and defamiliarization — I argue, may provide a home to decolonizing critique, creating a frame of reference beyond a singular model or understanding of international law, and debates between a (truly) universal and a (truly) particular position. The very many forms of comparative study, however, leads us to the question of how a decolonizing critique might respond to or ground the

⁴² Koskenniemi *supra* note 5 at 4.

⁴³ *Ibid* at 4.

⁴⁴ Kennedy *supra* note 25 at 636.

⁴⁵ M. Glendon et al, *Comparative Legal Traditions: Texts, Materials and Cases* (St Paul: West Publishing Co, 1994) at 8.

⁴⁶ P. Legrand, ‘Jameses At Play: A Tractation on the Comparison of Laws,’ 65 *Am. J. Comp. L.* (Special Issue) (2017) at 1.

methodological terrain for scholars wishing to undertake a comparative approach to international law. For this, I turn to recent strands of scholarship within comparative law, as well developments within comparative politics and philosophy, which has sought to contrast the hegemonic and imperialist modes of theorizing contained within much mainstream comparative scholarship with a regenerative comparative lens.

While the field of comparative law is varied, moving across actors, aims, methods and sensibilities, Pierre Legrand has identified two main streams within the discipline: a traditional mainstream, which Legrand associates with a functionalist approach, scientific positivism and disciplined reporting of legal rules; and a culturalist countercurrent, characterized by contextualized study of legal rules, more active interpretation, and interdisciplinary engagement. Over the past decades, criticisms have grown about the political or ethical posture of mainstream comparative law.⁴⁷ Many scholars concerned with how mainstream comparatists overlook nuances, complexities and multiple voices within their studies, argue that comparative law is afflicted by an excessive and solipsistic positivism, characterized by a narrowed focus on authorized legal texts, treaties and textbooks, represented in as ‘scientific’ a manner as possible, and a committed indifference to almost everything else. These criticisms share a dissatisfaction with field’s appeals to neutrality and objectivity, which tends to foreclose discussion of the ethical and political implications of locating, studying and comparing the foreign. They are thus bound up in broader critiques of Western social science, which has tended to proceed ‘as if it could roam over the object of its investigations at will ... [as] an absolute observer.’ The ‘Cartesian fallacy’ of positivism, it is argued, is prone to covering up the relations between knowledge and power, as well as the violence of definitions and classifications in comparative practice.⁴⁸ Bound up in this critique lies field’s preoccupation with the normative projects comparative law as a discipline might serve.⁴⁹ Comparative studies, Raimundo Panikkar notes, are often integrated into ‘the thrust toward universalization characteristic of Western culture,’ its desire to exert control ‘by striving toward a global picture of the world.’⁵⁰ Many scholars have charged mainstream comparative law with inscribing western legal culture at the top of an ‘implicit normative scale’,⁵¹ judging the world’s

⁴⁷ See especially G. Frankenberg, *Critical comparisons: Re-thinking comparative law*. (1985) *Harv. International Law Journal* 26(2): 411–455; see also, more recently, D. Kennedy, ‘The methods and the politics’ in: Legrand P and Munday R (eds.) *Comparative Legal Studies: Traditions and Transitions*. (Cambridge: CUP, 2003) 345–433.

⁴⁸ G. Frankenberg, ‘The innocence of method unveiled: Comparison as an ethical and political act’, 9(2) *Journal of Comparative Law* (2014) at 222–258.

⁴⁹ As Annelise Riles argues, ‘the comparative lawyer is a person who engages comparison for a purpose, in other words, whether it is to find a model for modernization, or to harmonize legal regimes. Early framers of the discipline did not shy away from an explicit political agenda: namely the idea of the development of a universal jurisprudence, embedded in and informed by European culture. This universalist guise later gave way to the pragmatic turn to functionalism, which takes national laws as solutions to common problems, generating insights founded on, for example, the uses of comparative information about foreign legal systems for legal modernization and reform projects, as well as institution building. See A Riles, ‘Introduction: The projects of comparison’ in: A. Riles (ed.) *Rethinking the Masters of Comparative Law*. (Oxford: Hart, 2001) at 11.

⁵⁰ R. Panikkar, ‘What is comparative philosophy comparing?’ in *Interpreting Across Boundaries: New Essays in Comparative Philosophy*, ed. Gerald J. Larson and Eliot Deutsch. (Princeton: Princeton University Press, 1988) at 116.

⁵¹ Frankenberg *supra* note 47 at 422.

legal systems by ‘a common Euro-American measure’⁵²; on western concepts’ distortion of non-western law.⁵³ Indeed, the sharpest critiques targets comparatists engaged in ‘an invasive political enterprise with considerable practical impact’, imposing ‘a postmodern form of conquest . . . through legal transplants and harmonization’.⁵⁴

To counter these tendencies, and work towards a de-imperialist legacy, critical strands of comparative law scholarship promote an engagement with comparison as a means to detect the plurality and interpenetration of legal cultures and to prompt lawyers to think more expansively and critically about their discipline. Drawing upon theoretical insights from politics, philosophy and literary theory, they advocate for an opening up of the discipline, mainly through a committed practice of contextual reading and interpretation, and a commitment to cross-cultural orientation and reflexivity.⁵⁵ Fred Dallmayr defines such an approach as ‘a mode of theorizing that takes seriously the ongoing process of globalization, a mode which entails, among other things, the growing proximity and interpretation of cultures.’⁵⁶ The approach builds on a longer tradition within philosophy and the social sciences which seek to plot an escape from privileged or hegemonic spectatorship. Truth and insight, from this perspective, cannot be garnered by a retreat into neutral spectatorship, or a ‘view from nowhere,’ but only through concrete existential engagement.⁵⁷

⁵² U. Baxi, ‘The Colonialist Heritage’ in P. Legrand and R. Munday (eds.) *Comparative Legal Studies: Traditions and Transitions*. (Cambridge: CUP, 2003) at 49.

⁵³ JE. Ainsworth, ‘Categories and Culture: On the ‘Rectification of Names’ in Comparative Law’ 82(1) *Cornell Law Review* (1996) at 30-31.

⁵⁴ Günther Frankenberg has criticized mainstream comparativists as ‘Anglo-Eurocentric’ paternalists prone to imposing Western hegemonic approaches on the subject and has characterized comparative law as ‘a postmodern form of conquest executed through legal transplants and harmonization strategies’ G. Frankenberg, ‘Stranger than Paradise: Identity and Politics in Comparative Law’ *Utah Law Review* (1997) at 262–3.

⁵⁵ For examples of critical comparative scholarship within the fields of philosophy and politics *See eg* G. Larson and E. Deutsch, *Interpreting across Boundaries: New Essays in Comparative Philosophy* (Princeton: Princeton University Press, 1988); A. Parel and R.C. Keith, eds., *Comparative Political Philosophy: Studies under the Upas Tree* (New Delhi and Newbury Park: Sage Publications, 1992); R. Euben, "Comparative Political Theory: An Islamic Fundamentalist Critique of Rationalism," *The Journal of Politics* 59, no. 1 (1997); B.A. Ackerly, ‘Is Liberalism the Only Way Toward Democracy? Confucianism and Democracy,’ 33(4) *Political Theory* (2005); Farah Godrej, ‘Nonviolence and Gandhi’s Truth: A Method for Moral and Political Arbitration,’ 68(2) *The Review of Politics* (2006); and L- Jenco, ‘What Does Heaven Ever Say?’ A Methods-Centered Approach to Cross-Cultural Engagement,’ 101(4) *American Political Science Review* (2007).

⁵⁶ F. Dallmayr, ‘Beyond Monologue: For a Comparative Political Theory,’ 2(2) *Perspectives on Politics* (2004) at 249

⁵⁷ Hans-Georg Gadamer famously outlined this approach in *Truth and Method*, which presented interpretation no longer as an optional academic methodology but as a constitutive ingredient of human existence and human inquiry. He subsequently developed the more concrete cross-cultural and multicultural implications of this view in a number of writings, especially in a volume titled *The Legacy of Europe*, which sought to extricate Europe (or the West) from the straitjacket of Eurocentrism, presenting it instead as the symbol of multicultural diversity, ready for new learning experiences in an age of globalization. H-G. Gadamer, *Truth and Method, 2nd rev. ed.*, trans. J. Weinsheimer and D. G. Marshall. (New York: Crossroad, 1989)

What is meant, first and foremost, by ‘comparative’ within this scholarship is a call to expand the research focus beyond the traditional canon, concepts, and concerns to a range of perspectives, and to study these thinkers and traditions in their own terms. Rather than the demand for a ‘scientific’ and orderly depiction of legal rules, Legrand and Gunter Frankenberg among others have called upon comparative scholars to free themselves of the positivist’s demand for certainty and embrace the essential unruliness of legal texts and legal culture. Instead of descriptive reporting, Legrand argues, the comparatist should attempt a more contextualised analysis and active interpretation, restoring the complexity and detail of legal texts instead of making them disappear behind abstract categories and concepts.⁵⁸ The role of culture, and the ‘subversive or rebellious quality’⁵⁹ it brings to the production of legal texts, is of critical concern. As Legrand writes, ‘culture’s exuberance stands as an emancipatory act of remonstrance against the positivist momentum of normalization or regulation (and arguably, manipulation)’.⁶⁰ At the same time, encultured interpretation also pluralizes the position of the legal scholar or, as Legrand puts it, ‘necessarily encultured texts must be read by necessarily encultured interpreters’.⁶¹ In forcing the scholar to acknowledge the ways in which the limits of language, culture, and experience structure her knowing, these scholars prompt a reevaluation of the field’s proclaimed ideological agnosticism and the conventions of knowledge-production that define the discipline. They argue for an honest engagement with the genealogy of the privileged Western tradition, the styles and mentality that shape comparativism, and the field’s ethnocentric and nationalist framework, in order to confront its colonialist legacy and hegemonic services.

In her recent article, *Comparative Law and Decolonising Critique*, Sherally Munshi extends these insights in proposing how comparative law ‘might play an important role in decolonizing and democratizing legal thought.’⁶² Drawing on the work of Legrand and others, as well insights from comparative literature, which underwent its own process of self-examination and transformation by turning to critical theory, Munshi proposes four particular exits for comparative legal scholars in devising a decolonizing approach. The first is the adoption of a worldly orientation in place of a strict comparative approach which favours systematic comparison and classification.⁶³ The second focusses on broadening the cultural scope of the discipline, given that comparative legal scholarship offers ‘painfully little discussion about legal cultures outside of Europe’.⁶⁴ The third is the abandonment of the nation-centered model of comparison to instead ‘explore the many relationships that minoritized subjects forge with one another across national boundaries.’⁶⁵ Lastly, she suggests that comparative law could move to a ‘relational’ approach to race and racism so as to uncover the colonial roots of contemporary nation-state and racial forms.⁶⁶ Her vision is one of a ‘broadly expanded comparative law, one that assumes a leading role in addressing an entrenched Eurocentrism in legal discourse while providing hospitable ground for a variety of critical and

⁵⁸ Legrand *supra* note 45 at 61.

⁵⁹ *Ibid* at 18.

⁶⁰ *Ibid* at 18.

⁶¹ *Ibid* at 61.

⁶² Mushni *supra* note 6 at 235.

⁶³ *Ibid* at 223.

⁶⁴ *Ibid* at 224-25.

⁶⁵ *Ibid* at 228.

⁶⁶ *Ibid* at 232.

interdisciplinary projects, especially those that might join in the effort to decolonize higher education and to project alternative, more equitable forms of coexistence.⁶⁷

4. Another Comparative International Law

Adopting many of these insights within the field of comparative international law is necessary, I contend, if are to devise a creative and emancipatory critique, one that avoids the kind of epistemic enclosure that, according to Legrand, now frustrates the development of comparative legal scholarship.

Framing the field in an encultured, incorporative and contextualized manner opens up for the possibility of detecting the many varieties of international legal thought that exist in tension with one another, in a manner that does not assume or privilege a single model and a single understanding of what international law is, but instead analyzes these understandings *in relation* to each other. These might be viewed as different notions of regional organization, overlapping international legal models, indeed competing universalities, rather than debates between a (truly) universal and a (truly) particular position.

In doing so, we can begin to navigate the conspicuous conceptual gaps that have formed in much of the early scholarship which adopts a comparative international law approach yet does so in a way that largely retains the traditional opposition between the universal and the particular. This scholarship for the most part adopts a functionalist approach, imagining its objects of comparison as discrete entities in a manner that does not discard the assumption of a transcendental/universal, international law, nor the belief in international law as a singular category. In the introduction to their recent edited volume, *Comparative International Law*, Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier and Mila Versteeg, propose to ‘identify, analyze, and explain similarities and differences in how international law is understood, interpreted, applied, and approached by different national and international actors’.⁶⁸ However, their project hints at a more instrumental purpose, rather than one what seeks to radically reorder the field. The three key insights they propose their comparative approach may assist in revealing are: (1) *identifying* the substantive content of international law; (2) explaining similarities and differences in the *interpretation and application* of international law; and (3) comparing the *approaches* of national or regional actors to international law.⁶⁹ Accompanying this systematic approach are normative considerations as to whether these differences should ‘celebrated or feared, encouraged or discouraged’.⁷⁰ The rationale which is said to underpin the project seems to indicate a more functional purpose, in reaffirming or even strengthening the substantive core of international law. Indeed, they seem to imply a wariness to interpretive plurality noting ‘on issues from treaty interpretation to the content of customary international law, different states and international bodies may set forth different interpretations of the same rules, sometimes strategically, other times unaware of the differences... In some cases,

⁶⁷ *Ibid* at 222.

⁶⁸ Roberts et al *supra* note 29 at 45.

⁶⁹ *Ibid* at 7-9.

⁷⁰ *Ibid* at 6.

these varying interpretations may subsist with minimal attention, while in others they may change or destabilize the international rules themselves.⁷¹ Comparative international law seems to emerge from this optic as a counterpart to the literature on fragmentation. Indeed, a majority of studies present in their volume focus on the reception and application of international legal norms across various jurisdictions, with a particular focus on national courts.

Similarly, in *Is International Law International?* Roberts holds that: ‘taking an intellectually honest look... means acknowledging in a pluralist – or realist – way that there may not be just one universal way of understanding and applying international law’, but her analysis is ultimately guided by the possibility of deciding ‘[w]hether a given position reflects international law’.⁷² Using the structure and content of various textbooks, as well as routes of legal education, both in the flow of students, as well as in academic profiles, Roberts frames her approach as exploring ‘how international law is constructed in different international law academies and textbooks in the five permanent members of the UN Security Council’.⁷³ In analysing the academic debates over the Crimea, for example, she finds ‘the Western and Russian scholars’ conclusions on the law tended to broadly align with the positions of their states or geopolitical regional groupings’.⁷⁴ Roberts therefore stages the problem as one of international divide along national lines. In narrowing her focus to the ordering imperatives of the state, however, she loses sight of countervailing perspectives, and makes national boundaries equally static and reified. The decision to construct the epistemic or interpretive community along the lines of national identity, conflates the individual with the state, as Andrea Leiter notes, in a manner cannot account for the multiple and overlapping interpretive communities of which individuals form a part, nor the choices they make as individuals.⁷⁵ The risk of reducing identity politics to the site of nationalism also becomes evident in her analysis of the global flow of students. Roberts focusses on what she sees as the centres and peripheries of international legal education, identifying five Western states as key hubs, with a subsequently westernizing effect within the broader field of international law. The assumption arising from her focus on the national place of education alone is a familiar one: ‘bodies travel in one direction, whereas ideas travel the opposite way’.⁷⁶

If comparative international law is to open up to the possibility of multiple international legal understandings, in a manner that decentres international law and places an emphasis on cross cultural encounters and mutual learning, then an alternative approach must ground the object and method of study. Inspired by Munshi’s proposed routes towards a decolonizing critique in comparative law, therefore, there are four particular aspects that I would like to underline. However, these represent only some of the methodological and theoretical considerations that are necessary if comparative international law is to assume a role in decolonizing international legal thought.

⁷¹ *Ibid* at 22.

⁷² Roberts *supra* note 29 at 22.

⁷³ *Ibid* at 8.

⁷⁴ *Ibid* at 237-8

⁷⁵ A. Leiter, Review Essay: *Is International Law International?* by Anthea Roberts, 19 *Melbourne Journal of International Law* (2018) at 420.

⁷⁶ See J M Blaut, *The Colonizer’s Model of the World: Geographical Diffusionism and Eurocentric History* (Guilford Press, 1993).

4.1 A Relational Approach to Comparison

Decentering the European focus within the field of international law requires not only an incorporation of practices amongst non-Western states that received much less attention in international legal scholarship, but the avoidance of the universalising standard that has been one of the major pitfalls of comparative law practice. To this may be added one of the great lessons that can be garnered from comparative literature scholarship, and one that may seem contrary to the eponymous project at hand; that the discipline does not have to forever shackle itself to the need to *compare*. As Legrand has noted, it is not merely the practice of juxtaposition that defines comparative law but a certain intellectual, and ultimately ethical, openness and orientation towards difference and defamiliarization.⁷⁷

Difference - the elaboration of similarities and dissimilarities – has long acted as the *métier* for comparative law. As David Kennedy notes ‘over the course of a lengthy tradition, comparative law has developed an elaborate etiquette of reciprocal differences between “us” and “them”, a centre and a periphery, an east and a west, a “common” and a “civil” law’.⁷⁸ As has often been the case in such studies the western liberal constitutional benchmark has often acted as the standard that has required other legal systems to raise themselves in the scale of comparison. In the international legal field, the prevalence of fixed European categories and perspectives on international law is underlined, Koskeniemi argues, by flawed attempts to engage with the point-of-view of the ‘other’ in studies on East Asian, Chinese, Japanese, Latin American, Ottoman and Islamic systems of international relations and law.⁷⁹

A critical alternative which focusses on a relational rather than comparative approach might lead comparativists to explore not only variance, but entanglements, overlaps in an open and less systematic fashion. For example, writing from within the field of comparative legal history, Thomas Duve promotes a method that emphasizes the ‘ineradicable interconnectedness’ or mutual ‘entanglement’ of seemingly disparate peoples, places, and cultures.⁸⁰ This requires the comparative lawyer to, first of all, relinquish the idea of a unified, coherent ‘other’ from which to compare. It also involves an opening of the dialectic of the universal and the particular in way that avoids a measure of analysis based upon a benchmark and conducted through study of international law’s internal logic tested possible alternatives.

In the approach to detecting national approaches to the application of human rights law for example we see the tendency to approach the question along the line of a universal standard countered by claims of cultural relativism. According to Sally Merry, the domestic reception of international legal norms ‘falls along a continuum depending on how extensively local cultural forms and practices are incorporated into imported institutions.’⁸¹ Using her analytical continuum of what she terms ‘vernacularization’, she compares jurisdictions based on such factors as whether international

⁷⁷ Legrand *supra* note 45.

⁷⁸ Kennedy *supra* note 25 at 546.

⁷⁹ *Ibid*, at 5.

⁸⁰ See T. Duve, ‘Entanglements in Legal History: Introductory Remarks’, in *Entanglements in Legal History* 7 (Frankfurt: Max Planck, 2014)

⁸¹ S. Engle Merry, ‘Transnational Human Rights and Local Activism: Mapping the Middle’, 108 *American Anthropologist*, (2006).

human rights law has been ‘rejected’; whether it has been ‘ignored’; whether it has been ‘subverted’;⁸² whether a process of ‘replication’ is to be found in which “the imported institution remains largely unchanged from its transnational prototype” and any adaptation is ‘superficial and primarily decorative’; or whether ‘hybridization’ can be identified, meaning that there is ‘a process that merges imported institutions and symbols with local ones, sometimes uneasily.’⁸³ This approach focuses on the vertical reception of international human rights treaties by domestic legislation, and is grounded in an underlying comparison of how different domestic legal systems fare in relation to an overall ‘universal’ standard. In opposition to this, a more open ended optic could be employed, in which researchers could shift their focus from a strict analysis of national approaches to formal international legal rules, to a bench mark that encompasses a more open ended construction of international law, legal areas, norms, subjects and subject matter. Leaving aside a preoccupation with formalism’s fixed categories and hierarchies, we may instead approach international legal norms as dynamic, discursive concepts and the maintenance and the international legal field as a complex space made up of a plurality of ideas, values and views and an ongoing interplay of politics, ideology, law, and power. Rather than an approach that focusses primarily on outcome, moreover, a functional approach may better allow an understanding of how the area, norm, rule, subject etc. functions and is approached in different legal systems.

A related issue, in this regard, is the manner in which we identify and classify legal contexts. Traditional models of comparison tend to approach the world as an ‘inherently fragmented space, divided by different colours into diverse national societies, each rooted in its proper place.’⁸⁴ However, these nation-centered models of comparison may conceal as much as they reveal, particularly as regards the relationship between colonialism and the formation of the contemporary nation-state. The risks of generalisation and misunderstanding, of shrinking or magnifying the distances between legal cultures has been frequently criticised.⁸⁵ As Françoise Lionnet and Shu-mei Shih, scholars of comparative literature, observe, too often, ‘it is the Eurocentric unconscious that produces the other for itself’ while the absence of actual others remains ‘unquestioned.’⁸⁶ While Verdier and Versteeg suggest a functional usefulness in adopting such an approach in the comparative international context, there is reason to be wary.⁸⁷ To begin with classifications are ideal-types, which almost always involve simplifications, and are often prefaced upon a belief in the traditions’ ‘inherently static character’.⁸⁸ They have therefore been criticized for ‘overemphasizing the differences between categories, underemphasizing the differences within these categories and ignoring hybrids.’⁸⁹ The danger of employing such a taxonomy, moreover, is that these classifications are not static and exogenous, but dynamic and subject to change. For example, while many countries became members of a legal family through colonial

⁸² *Ibid*, at 40.

⁸³ *Ibid*, at 44.

⁸⁴ See A. Gupta, Beyond ‘Culture’: Space, Identity, and the Politics of Difference, 7 *Cultural Anthropology* (2008).

⁸⁵ See J. Reitz, ‘How to Do Comparative Law’, 46 AM. J. COMP. L. (1998).

⁸⁶ Shu-mei Shih & F. Lionnet, ‘Introduction’, *The Creolization of Theory*, (Durham: Duke University Press, 2011) at 8-9.

⁸⁷ Roberts et al *supra* note 29 at 12.

⁸⁸ HP Glenn, ‘Comparative Legal Families and Comparative Legal Traditions’ in M. Reimann and R. Zimmermann (eds.) *The Oxford Handbook of Comparative Law*. (Oxford: OUP, 2006) at 428.

⁸⁹ See M. Siems, *Comparative Law* (Cambridge: CUP, 2014) at 37.

imposition,⁹⁰ some of the pathways this established continue to have considerable contemporary influence.⁹¹ The limitations of classification, of attributing specific similarities and differences to putative general characteristics of legal traditions, lies in precisely in the reinforcement of existing hegemonic attitudes and practices.

A relational approach, argues David Theo Goldberg, is particularly useful in revealing the circulation of ideas and concepts across place and time, unbounded by the presumptive divides of state boundaries. ‘Terms circulate, practices are shaped, and fail, only to be taken up and refined in environments that prove to be more conducive to their articulation’, he writes, ‘ideas and practices from one place interact with conditions and expressions tried and tested elsewhere.’⁹² Where ‘a comparativist account undertakes to reveal through analogy’ across nations or states, Goldberg suggests, ‘a relational account reveals through indicating how effects are brought about as the result of historical, political or economic, legal or cultural links, the one acting upon another.’⁹³ Where ‘a comparativist account contrasts and compares,’ ‘a relational account connects, materially and affectively, causally and implicatively.’⁹⁴

4.2 Beyond the Spectre of Sources: Blurring the Law/Non-Law Distinction

In the past decades, positivism’s seeming hostility towards cultural edification has become increasingly challenged by scholarship stressing the situatedness of legal texts and practices in their historical and cultural dimension. Within international legal scholarship many authors have in particular pointed to the conceptual and argumentative limitations of the orthodox approach to sources in reflecting the complexity of international relations across contexts,⁹⁵ given their entrenched focus on European vocabularies and traditions.⁹⁶ The distinction between law and what is not law (politics, ethics, and so on) ‘renders non-state forms of political collectivity invisible’⁹⁷ they argue, making it ‘difficult to recognise other laws as lawful’⁹⁸.

Pierre Legrand’s critique of positivism within the field of comparative law prompts us to reconsider the manner in which we approach and construct sources of authority within the international legal field. As Legrand writes, positivists arrive at their account of ‘what the law is’ through a process of subtraction: they ‘evacuat[e] . . . all markers of ambivalence [and] censor the world of culture, that is, they subtract from the law cues that, as they approach the matter, would

⁹⁰ A. Watson, *Legal Transplants: An Approach to Comparative Law* (Atlanta: University of Georgia Press, 1974) at 22; Legrand, ‘The Impossibility of ‘Legal Transplants’, 4 *Maastricht J. Eur. & Comp L.* (1997).

⁹¹ See, e.g., H.S. Spamann, ‘Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law’, *BYU L. REV.* (2009).

⁹² D. Goldberg, Racial comparisons, relational racisms: some thoughts on method, *Ethnic and Racial Studies* Vol. 32 No. 7 September 2009, 1273.

⁹³ D. Goldberg, The Comparative and the Relational: Meditations on Racial Method, in A. Behdad & D. Thomas (eds.) *A Companion to Comparative Literature*, (London: Wiley-Blackwell, 2011)., at 357.

⁹⁴ *Ibid* at 362–63.

⁹⁵ Parfitt, *supra* note 9 at 298-99.

⁹⁶ As Koskenniemi notes ‘The vocabularies of statehood, sovereignty, self-determination and human rights refer back to European thinkers and jurists’, Koskenniemi, *supra* note 5 at 5.

⁹⁷ Parfitt, *supra* note 9 at 302.

⁹⁸ C. Black, S. McVeigh, and R. Johnstone, ‘Of the South’, 16 *Griffith L Rev* (2007) at 303.

interfere with law as law and would detract from its conceptual merit and practical worthiness as law.⁹⁹ The limitations of this approach lie in our epistemological blindness to the conditions that give rise to certain knowledge conventions. Instead, Legrand argues, the comparativist should abandon the notion that law can be purified of its internal deficits (ambiguities, inconsistencies, and indeterminacies) or cleaved of its external contaminations (of history and culture). As China Mieville explains ‘to understand the complex interpenetration of legality and politics – and economics, and all the other supposedly separate arenas of study – we must move beyond formalism, to highlight the underlying political and social conditions affecting the development and transformation of international law’.¹⁰⁰ This is not an appeal to an abandonment of formal international law, but rather an approach that both upholds formal legal discourse but reconsiders the limits of legal ordering and forms of inclusion, exclusion and political contestations that come with it.

An approach to international law that begins to venture outside of the rigid dialectic of the sources doctrine and blurs the boundaries of law and non-law has been adopted by a number of scholars. In Fleur Johns’ *Non-Legality in International Law: Unruly Law*,¹⁰¹ the central message is not that law unavoidably has boundaries, limits and fault lines. Instead, its main concern is to lay bare, destabilize, and reconfigure the boundaries of international legal discourse. Johns seeks to articulate what international lawyers do when they craft events or phenomena as non-law; how they draw boundaries between the providence of international legal rule and that which stands against it, outside it, before or after it; that which transcends it or is too marginal to be grasped by legal knowledge. However, the point of Johns study is not just to analyze what lawyers do; the point is to open up new frames on the workings of international law and to draw attention to what is suppressed and marginalized in traditional scholarship. As Johns puts it, her approach challenges ‘international legal studies that seek to apply international law to a world cast in some sense as beyond that law (or vice versa), worry incessantly that international law is not enough for the task of application (or absorption), and hence neglect to scrutinize and tactically engage with those aspects of international legal work that are constitutive of at least some dimensions of that beyond’.¹⁰²

Moving towards a more open ended optic regarding the use and interpretation of international law, and away from the strict separation of ‘law’ and ‘non-law’, as sustained by the determinacy of the sources doctrine, may also allow us, as Parfitt notes, to ‘render inescapably immediate and visible *all* communities which continue to find themselves on the receiving end of the discipline’s historical violence – communities which sources doctrine renders distant and obscure.’¹⁰³ In the field of indigenous legal studies, for example, a number of scholars have sought to reconcile indigenous, national, and international law, by switching from the language of doctrine to that of jurisdiction, emphasizing the need to pay more attention to the ‘meeting of laws’ and to ‘framing’

⁹⁹ *Ibid* at 8.

¹⁰⁰ C. Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Boston: Brill, 2005) at 23.

¹⁰¹ F. Johns, *Non-Legality in International Law: Unruly Law* (Cambridge: CUP, 2013).

¹⁰² *Ibid* at 24.

¹⁰³ Parfitt, *supra* note 9 at 306.

that meeting ‘in terms of conduct’, and less to the doctrinal legitimacy of specific legal sources.¹⁰⁴ The purpose of these scholars is to focus attention on the simultaneous authority of many coexisting legal orders, and their interaction across jurisdictions, space and time.

The rendering of accounts of imperial and post-colonial occupation and the critique of the global North are not the only forms of law that pattern the South. Even the Australian High Court has now recognised what others have long known: that Australia and the South were not, and are not, without law. These laws [the laws of the South] shape the South according to different cosmologies, laws of relationship, rights and responsibilities, and protocols of engagement. Respond to these laws ... and a different patterning of legal relations emerges.

Other reformist schools of thought remove the barriers between law and non-law by insisting on a fluid definition of law, one which shifts the emphasis from norm-maker to that of norm-user.¹⁰⁵ What matters of these scholars is ‘whether and how the subjects of norms, rules, and standards come to accept these norms, rules and standards. If they treat them as authoritative, these norms can be treated as...’ law’.¹⁰⁶ The focus on different kinds of normative efforts which seek to influence international actors’ behaviour means that law may take many different forms – thus altering the yardstick of what can be considered ‘international law’.

An interrelated element in this regard is the necessity of an openness to plurality in legal concepts. If we are to retain the grammar of international law then there must be an approach to legal ideas and concepts that permits, indeed, invites, deep, sharp and pervasive reasonable disagreement among interpreters over their meaning and scope, without adopting a totalizing approach or assuming a linguistic or normative uniform standard. An openness to the existence of certain concepts and principles in a non-standardised formulation is also essential. The dignity of the person, the experience of freedom, the ideal of cooperation are common across all cultures, as many of the major historians of cultures and civilizations have remarked. For example, Masaharu Yanagihara’s history of the Ryukyu Kingdom from the 1600s to the 1800s reveals the existence of a number of unique international law concepts that were commonly used in East Asia during the relevant period, “shioki” (control) and “fuyo” (dependency).¹⁰⁷ Yanagihara argues that international law should not be retroactively universalized by applying ideas developed in one region (Europe) at one time to another region (East Asia) at a different time. Similarly, in her history of the Haitian Revolution, Adom Getachew cautions against scholarly attempts to recover the universalism of the Haitian Revolution through the language of human rights. In illustrating how Haitian revolutionaries realized human rights, historians and political theorists have created a

¹⁰⁴ See eg .C. Black, S. McVeigh, and R. Johnstone, ‘Of the South’, 16 *Griffith L Rev* (2007) 303; Dorsett and McVeigh, ‘Conduct of Laws: Native Title, Responsibility, and Some Limits of Jurisdictional Thinking’, 36 *Melbourne U L Rev* (2012) 473. See further S. Dorsett and S. McVeigh, *Jurisdiction* (2012); C.F. Black, *The Land is the Source of the Law: A Dialogic Encounter with an Indigenous Jurisprudence* (2010); S. Pahuja, ‘Laws of Encounter: a Jurisdictional Account of International Law’, 1 *London Rev Int’l L* (2013).

¹⁰⁵ For an overview of these trends see J. D’Aspremont, ‘Towards a New Theory of Sources in International Law’ in F. Hoffman & A. Orford eds., *Oxford Handbook of the Theory of International Law*, (Oxford: OUP, 2016) 545-563.

¹⁰⁶ J. Klabbbers, ‘Law-Making and Constitutionalism’ in J Klabbbers, A Peters, and G Ulfstein, *The Constitutionalisation of International Law* (2009) at 98.

¹⁰⁷ Yanagihara, “‘Shioki’ (control) and “Fuyo” (dependency) and Sovereignty: The Status of the Ryukyu Kingdom in Modern and Early Modern Times’ in Roberts et al *supra* note 29.

narrative focused on the implementation of existing, and European ideals, she argues, but at the expense of engaging with their distinctive political struggles and the practices and ideals that emerged in response. In offering an alternative interpretation, Getachew reconstructs the specific terrain of political action and depicts how Haitian revolutionaries inaugurated another universalism linked to individual and collective autonomy; illustrating how ideals are remade in diverse contexts.¹⁰⁸

Refuting closed interpretative categories and reassessing normative and theoretical parallels is important to resist a universalizing standard of law. Different cultures simply have different intellectual or institutional means of expressing and operationalizing them: there exist, for example, many different ways of living the dignity of the person, or of guaranteeing the enjoyment of freedom or equality. A more fluid interpretive approach will ensure a comparative approach is not hemmed in by the conceptual constraints which discipline the interpretative process.

4.3 ‘Encultural’ Interpretation

To move away from an excessive positivism in international legal study requires us to recognize the law as ‘a massively incorporative cultural formation’¹⁰⁹ both at the site of the text and at the site of the interpreter. Just as ‘law *is* culture-specific’ in George Fletcher’s formulation, so too is legal analysis. However, most western epistemic traditions, to which positivism belongs, rest on ‘a division between mind and the world, or between reason and nature as an ontological a priori.’¹¹⁰ The contemporary philosopher, Achille Mbembe explains that these ‘are traditions in which the knowing subject is enclosed in itself and peeks out at the world of objects and produces supposedly objective knowledge of those objects. The knowing subject is thus able, we are told, to know the world without being part of that world.’¹¹¹ The problem with this tradition, Mbembe argues, is that ‘it has become hegemonic.’ On the one hand, ‘it has generated discursive scientific practices and has set up interpretive frames that make it difficult to think outside of these frames’; on the other hand, ‘it actively represses anything that actually is articulated, thought and envisioned from outside of these frames.’¹¹²

While comparative lawyers’ descriptions of the particular and local are, by definition, exercises of translation, and translatability in turn assumes the possibility of communication across local differences, consciously assuming a comparative international law approach does not automatically mean that as scholars we are able to transcend the conceptual confines of traditional mainstream approaches to law.

¹⁰⁸ A Getachew, ‘Universalism After the Post-colonial Turn: Interpreting the Haitian Revolution’, 44(6) *Political Theory*, (2016).

¹⁰⁹ Legrand *supra* note 45 at 51.

¹¹⁰ A. Mbembe, WISER Public Lecture: Decolonizing Knowledge and the Question of the Archive (2015).

¹¹¹ *Ibid.*

¹¹² *Ibid.*

As Brenda Cossman notes, ‘within the context of comparative law, the geopolitical location of the author becomes the unstated norm against which the exotic other’ is viewed.’¹¹³ The supreme difficulty in escaping the legal traditions and biases we carry with us as scholars - despite our best efforts – is ever present. The difficulty, Carty notes ‘is that ‘participation’ in a tradition will probably be decisively shaped by a peculiarly Western concept of law which is naturally unsympathetic to such diversity. It is this concept of law which permeates liberal theory and gives it a peculiar universalising pretension.’¹¹⁴

To counter this tendency, critical comparative law encourages reflexive epistemology in the comparative enterprise in order to inquire into the conditions in which knowledge is produced.¹¹⁵ Such an approach underlines the importance of studying practices as practices, and the social conditions of the production of knowledge. Rather than viewing legal science as a transcendent truth in line with the positivist position, it forces the comparative researcher to recognize that rational scientific criteria are themselves the product of an intellectual history, rather than a primordial essence.¹¹⁶ This understanding lies not only in exposition of legal rules but also of normative sources of those rules; and not only in appreciation of legal concerns and consequences but also of non-legal concerns and consequences. The scholar is promoted to look beyond the texts and the reproduction of legal ideas, to engage with both the subjectiveness of the meanings produced, and also the embeddedness of shared ideas that exist. It draws our attention to the historically constructed nature of international legal rules and practices and the normativity that animates them.¹¹⁷ This approach enables us to explore how various actors engage with the field of international law, allowing us to disrupt the manner in which politics is historically ingrained – even concealed - in the discipline of international law.¹¹⁸

Embracing a form of ‘encultural interpretation’ forces the legal scholar to acknowledge the ways in which the confinements of language, culture, and experience structure her knowing. Turning the gaze back onto the comparatist themselves can assist in what Gunter Frankenberg has described as the challenge of seeing ourselves as exotically as we see the ‘other’.¹¹⁹ While the objective knower is imagined to look out upon the world, as if from an enclosed and transcending perspective, encultured reading reminds us that ‘individuals are part of a community’—and a particular community.¹²⁰ At the same time, by acknowledging that scholarship is always situated, an encultured approach to law authorizes a wider plurality of scholarly positions. If the legal text contains multiplicities of meaning that await discovery and interpretation, then different readers bring to legal texts different capacities for revealing new meaning. This, as Anne Peters suggests,

¹¹³ B. Cossman, *Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project*, *Utah L. Rev.* 526 (1997).

¹¹⁴ A. Carty ‘Critical Legal Law: Recent Trends in the Theory of International Law’ 1(2) *EJIL* (1991).

¹¹⁵ Poullo and Merand “Bourdieu Concepts” in R. Adler-Nissen *Bourdieu in International Relations: Rethinking Key Concepts in IR*. (London: Routledge, 2012) at 27.

¹¹⁶ *Ibid* at 28.

¹¹⁷ A. Hurrell, *On Global Order: Power, Values and the Constitution of International Society* (Oxford: OUP, 2007) at 17.

¹¹⁸ See Anghie *supra* note 21 at 268.

¹¹⁹ Frankenberg, *supra* note 54 at 259.

¹²⁰ *Ibid* at 22.

does not require scholars to completely detach themselves from their education and cultural context but demands that they make a conscious effort to internalise the ‘others’ perspectives.¹²¹

4.4 Dissolving the Hierarchy and Opening the Field

In recent decades, a number of scholars working across national, linguistic, and disciplinary boundaries have begun to explore the dynamic relationships— collaborations as well as contestations—between minoritized groups, in settings that scale from the intimate to the global.¹²² Using these insights within comparative international legal scholarship we can begin to recognize the partial, multilayered and fragmented nature of international society, and the many relationships that minoritized subjects forge with one another beyond the traditional nation-state hierarchy and across national boundaries. In turn, this allows us to detect not only the broader patterns of transnational hegemony and dominance, but the more nuanced, minoritised patterns of difference which affect the operation of law that lies both within and beyond a nation’s borders.¹²³

‘If one really wishes to know how justice is administered in a country’, James Baldwin once wrote, ‘one does not question the policemen, the lawyers, the judges, or the protected members of the middle class. One goes to the unprotected— those, precisely, who need the law’s protection most—and listens to their testimony.’¹²⁴ Our ability to know the law and its effects, Baldwin suggests, may appear more fully in the counter-archive of culture than in the legal text. Stepping outside the conventional hierarchies and frameworks of international law to explore the many relationships that subjects forge with one another within and across national boundaries, we may challenge and expand the understandings of these legal cultures.

Drawing on sub-streams of comparative law that seek to dismantle and dislodge traditional understandings of ‘vertical’ legal orders, we may devise a model of comparison that blurs these hierarchies and situates actors in relation with one another. For example, in their study of minority communities, Lionnet and Shih advocate a model of comparativism that situates minority communities in horizontal relation with one another, rather than the favoured approach of their “vertical” relationship to a national majority. A similar approach could be employed to observe the multiple and overlapping epistemic and interpretative communities that exist in the international legal sphere beyond the fixed category of the state and relate these to one another.

A comparative study in international law that is able to register the character and elements of national and regional approaches to international law should seek to understand law in its multiple and complex social dimensions, across cultures and regions. Drawing on the insight of sociology, for example, leads us to approach law as a social and historical construction generated by a variety of legal actors across socio-political and legal structures which themselves are changing over time,

¹²¹ A. Peters, ‘International Legal Scholarship Under Challenge’ in J. d’Aspremont, T. Gazzini, A. Nollkaemper, W. Werner, *International Law as a Profession* (Cambridge: CUP, 2017) at 126.

¹²² Lionnet & Shih, ‘Introduction: Thinking Through the Minor, Transnationally’, in F. Lionnet & Shu-mei Shih eds., *Minor Transnationalism* (Durham: Duke University Press, 2005).

¹²³ Mushni, *supra* note 6 at 229.

¹²⁴ J. Baldwin, *No Name in the Street* (London: Michael Joseph, 1972) at 149.

and one which is not necessarily contained within the orthodox approach to international law.¹²⁵ The application of Bourdieu's sociology, for example, offers a number of possibilities for engaging with the complexities of national and regional legal contexts, notably through its 'de-institutionalisation' of the state and its impact on the structural dimension of law and legal practices, the manner in which law as a historical construction is produced by an interplay between legal agents, as well as law as a discourse of power which is part of the construction of the State and international fields.¹²⁶ Leaving aside formalism's fixed categories and hierarchies – that is leaving the fixed categories of the sources orthodoxy as used in doctrinal accounts – Bourdieu's account of international society is one of a complex space made up of a plurality of ideas, values and views and an ongoing interplay of politics, ideology, law, and power, involving an ever-changing group of actors and settings. The 'field' of international law becomes a loose ensemble of social processes rather than a neat and stylized succession of structural orders, involving a wider range of actors than sovereign states alone. This approach – the belief that international law operates as a diverse network of objective relations – provides us with a broad conceptual ground for analyzing the wide range of actors, both state and non-state, institutions, interests, social and political movements and relations surrounding the production and maintenance of international law.

5. Decentering Europe/Decolonizing International Law

'Colonialism has always stimulated comparisons' notes Sherraly Munshi, 'so has resistance to colonialism and its racial legacies'.¹²⁷ Adopting a comparative approach within the field of international law, I have argued, may lead to the creation of a new and emancipated perspective – one that might provide a home to a decolonizing critique by disrupting the mostly singular temporal, geographic and epistemological vision of 'universality'. The call for diversity should not be read as a call for relativism or provincialism but instead as an effort to carve out space for legal innovations and the articulation of alternative universalisms. Nor is it about 'discovering some Archimedean point between its various localities'¹²⁸ – the 'international' point – but rather initiates a move towards a more heterogenous and porous understanding of the international field, and the discovery of a language and approach that may express the kinds of local differences that undermine a monolithic universalism. It is a call to study non-Western traditions seriously, to broaden the texts and themes that international lawyers study and teach, and a reminder about the extent to which Eurocentric categories, questions, and concerns shape the existing practice of legal theory. Our starting point must be an acceptance that 'international law remains, simultaneously and indissociably, the legal form in which both the promise of the political unification of humanity

¹²⁵ See P. Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field", *The Hastings Law Journal* 38 (1987) at 805-853.

¹²⁶ Bourdieu analysed the historical formation of the state in Europe in ways that parallel Foucault's genealogy and Elias' work with civilization. Examining legal treatises and official state documents, he produced a detailed account of state building in Europe – a story of how the collective illusion referred to as the state was constructed.

¹²⁷ Munshi, *supra* note 6 at 235.

¹²⁸ Koskenniemi *supra* note 5 at 8.

and that of the most infinite and violent conquest are contained, as it takes as its object the very terms in which the identity of the conquered expresses itself'.¹²⁹

But this is not simply a case of add comparative law and stir – indeed comparative international law does not in of itself assume or lend itself to an emancipatory potential. If we are to devise a different outlook on the field of international law, it is essential that we avoid falling into the trap of excessive positivism which has afflicted comparative law more generally and instead promote a relational approach which does not assume or privilege a single model and a single understanding of what international law is. The conceptual and methodological considerations I have explored here, seek to reorient comparative international towards decolonizing critique, by framing the field in a manner that allows for the discovery of sites and opportunities of what Carty calls ‘inter-state/inter-cultural dialogue’ about the past and future construction of the international legal field, and about how to construct visions of the ‘local’, ‘national’ and ‘global’¹³⁰. In doing so we might begin to find and inhabit, in the words of Homi Bhabha, ‘the in-between space’ between West and non-West, an in-between space ‘through which the meanings of cultural and political authority can be negotiated.’¹³¹

¹²⁹ Jouannet, *supra* note 26 at 406.

¹³⁰ Carty *supra* note 114 at 2.

¹³¹ H.K. Bhabha, ‘Introduction: Narrating the Nation’, in Homi K Bhabha (ed) *Nation and Narration* (New York: Routledge, 1990) at 4.