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Engaging Foreign Law: Not So Liberally

Envolvendo-se com o Direito estrangeiro: não tão liberalmente

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Abstract: Taking its cue from a remarkable institutional initiative owing to the Georgetown University Law Center, this essay contests some of the key assumptions that have informed liberalism's cosmopolitan turn. In particular, the argument addresses the way in which liberal legal thought has handled a doctrine widely known as "the rule of law". The text challenges the universalizing drive having informed the dissemination of "the rule of law" and the attendant marginalization of culture in the form of the decredibilization of local knowledge. The paper suggests that "comparative law" can offer a valuable opportunity for the liberal self to revisit its uniformizing ideological commitments – although not "comparative law" of the mainstream brand.

Keywords: globalization; liberalism; "rule of law"; culture; comparative law.

Resumo: Partindo de uma iniciativa institucional notável do Georgetown University Law Center, este ensaio contesta algumas das principais premissas que informaram a virada cosmopolita do liberalismo. Em particular, o trabalho aborda a maneira pela qual o pensamento jurídico liberal lidou com uma doutrina amplamente conhecida como "o Estado de Direito". O texto desafia a iniciativa universalizante que acompanhou a disseminação do "Estado de Direito" e a consequente marginalização da cultura na forma da descredibilização do conhecimento local. O artigo sugere que o "Direito comparado" pode oferecer uma valiosa oportunidade para o "eu" liberal reviver seus compromissos ideológicos uniformizantes – desde que não se trate da corrente dominante ou convencional do "Direito comparado".

Palavras-chave: globalização; liberalismo; "Estado de Direito"; cultura; Direito comparado.

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The Center for Transnational Legal Studies *(CTLS) is an educational institution for the study of transnational, international, and comparative law. Located in London, CTLS was established in October 2008 at the behest of the Georgetown University Law Center in association with eleven other founding universities from all over the world, each having undertaken to contribute students and faculty every semester. Seminars emphasize both theoretical and practical aspects of the law with reference to a wide range of its cross-border instantiations. In the course of its first ten years of institutional existence, CTLS welcomed about 1,200 students from more than twenty countries and approximately 100 teachers. Also, it progressively added some twelve partners to its initial list of participant law schools.*

On 30 November 2018, CTLS hosted an international conference in London to mark its first decade. The text that follows is the keynote speech that I was kindly invited to deliver at the close of the proceedings. It was the fifth time that I had spoken at CTLS. On behalf of the Georgetown University Law Center, Professor Franz Werro generously solicited my intervention. I am very grateful for his meaningful expression of confidence in my work.

I have deliberately retained the words as I delivered them while I held strictly to the thirty minutes that I had been allocated. However, the decision to release the verbatim *version of my address has not deterred me from adding a minimum of complementary references in the form of notes, although I have resisted the inclination to efface the repetitions or emphases that I mobilized for rhetorical effect. On account of its inscribed orality, this record advantageously interrupts – or so I like to think – the habitual forms that scholarly publications assume. I want to register my pre-eminent indebtedness to Wael Hallaq's* Restating Orientalism,[1] *whose critique, whose insights, and indeed whose words I borrow. Hallaq's book stands as one of the most important scholarly texts that I have read.*

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In the crowded field that is French philosophy, Alain Badiou has come to enjoy worldwide fame. Since the death of Jacques Derrida in 2004, Badiou is arguably the most widely translated and the most widely discussed French philosopher. Badiou is well known for his staunch ideological commitment to the far left, and he is just as famous for claiming to base his philosophy on set theory and mathematics and for thus including in his books page upon page of seemingly extraordinarily complicated equations – which, incidentally, have attracted critique from mathematicians taking an interest.[2] Perhaps on account of his unrepentant Maoism, Badiou firmly values universal truths, and he believes at least as decisively in making cultural differences

1 HALLAQ, Wael B. *Restating Orientalism*. New York: Columbia University Press, 2018.

2 *E.g.*: NIRENBERG, Ricardo L.; NIRENBERG, David. Badiou's Number: A Critique of Mathematics As Ontology. *Critical Inquiry,* v. 37, n. 4, p. 583-614, 2011.

indifferent. In his own words (if in my English translation), Badiou maintains that "[p]hilosophically, [...] the other is indifferent",[3] and he holds that "differences have no interest whatsoever for thought".[4] As a comparatist, I could not disagree more, philosophically or otherwise, since it seems so obvious to me that the very *raison d'être* informing comparative studies must be to make sense of difference and to valorize otherness. (To his credit, Badiou proves coherent and expressly registers his scepticism vis-à-vis comparative studies.[5])

Despite my fundamental disagreement with Badiou regarding the intellectual merit of cultural difference and otherness, I recognize that, elsewhere in his argument, he makes an important point with respect to the large bulk of intellectuals who *claim* to be appreciating cultural difference and otherness. In effect, Badiou chastises these thinkers for their ethnocentricity – these thinkers whom he derisively calls "the partisan[s] of ethics".[6] In my English translation, Badiou's indictment stands as follows: "[T]he declared apostles of ethics and of the 'right to difference' are visibly *horrified by any difference a little sustained*. Because for them, African customs are barbaric, Islamists dreadful, the Chinese totalitarian, and so on. In truth, this famous 'other' is presentable only if he is a *good* other [... .] Respect for differences, of course! But on condition that the different be democratic-parliamentarian, a partisan of market economics, a supporter of freedom of opinion, a feminist, an environmentalist...".[7] Denigrating recognition of difference and respect for the right to difference as being "directly inherited from the colonial amazement before the savages",[8] Badiou boldly refers to what he styles "the last word of the civilized conqueror: 'Become like me, and I will respect your difference'".[9] As uncomfortable as I am to find myself concurring with Badiou, I have to say that, in my view, his critique contributes a crucial admonition. Indeed, I want to contend that even we, cosmopolitans that we are, cannot afford to dismiss Badiou's rejoinder so easily.

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[3] BADIOU, Alain. *L'Ethique*. Caen: Nous, 2003. p. 46 ["*(p)hilosophiquement,* (... *l'autre est indifférent*"].

[4] *Id.*, p. 44 ["*(l)es différences n'ont aucun intérêt pour la pensée*"].

[5] *E.g.*: BADIOU, Alain. *Petit manuel d'inesthétique.* Paris: Editions du Seuil, 1998. p. 75: "I do not believe much in comparative literature" ["*Je ne crois pas beaucoup à la littérature comparée*"].

[6] BADIOU, *supra*, note 3, p. 42 ["*(l)es partisans de l'éthique*"].

[7] *Id.*, p. 41 ["*(L)es apôtres affichés de l'éthique et du 'droit à la différence' sont visiblement* horrifiés par toute différence un peu soutenue. *Car pour eux, les coutumes africaines sont barbares, les islamistes affreux, les Chinois totalitaires, et ainsi de suite. En vérité, ce fameux 'autre' n'est présentable que s'il est un* autre (... .) *Respect des différences, bien sûr! Mais sous réserve que le différent soit démocrate-parlementaire, partisan de l'économie de marché, support de la liberté d'opinion, féministe, écologiste...*"] (emphasis original).

[8] *Id.*, p. 45 ["*directement hérité(s) de l'étonnement colonial devant les sauvages*"].

[9] *Id.*, p. 42 ["*le dernier mot du civilisé conquérant: 'Deviens comme moi, et je respecterai ta différence'*"].

Yes, we have been cosmopolitanizing ourselves, and over the last ten years the Center for Transnational Legal Studies (CTLS) has assisted us in what I regard as this necessary process of deterritorialization. I find it key to emphasize that the CTLS initiative that the Georgetown University Law Center and its founding partner institutions launched ten years ago has offered, it seems to me, a significant platform to many jurists hailing from many different countries – law students and law teachers alike – who have been able to come to Central London and engage in meaningful legal/cultural interaction over a number of months. Perhaps because I am based in a country where the closure of the legal mind makes such cosmopolitan vision simply unthinkable, and where it would be simply unthinkable that a law faculty would join in such an enterprise as CTLS, I am especially admirative and can only hope that this endeavour is sustained over the long term. Every additional semester, every supplementary year means more jurists being provided with the opportunity to confirm their intuition that there are law-worlds elsewhere and means more jurists returning home equipped with this life-changing insight. It is no exaggeration to say that every additional semester, every supplementary year during which CTLS manages to *live on* institutionally, makes the planet a better place. Long, then, very long may CTLS continue.

Still, there is Badiou's timely critique! Indeed, even we, legal cosmopolitans, CTLS enthusiasts, remain prey to a profoundly embedded disposition towards epistemic sovereignty and towards its corollary, epistemicide – or so I want to assert.

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What we do as we take the cosmopolitan turn in law is, in effect, to proceed as thoroughly encultured liberal subjects, that is, I contend, we operate as the largely unconscious implementers of liberalism, which stands as an ideological articulation of the world obtaining in the form of an array of local declensions (there are *liberalisms*), from the United States to Germany and from Finland to Australia. In its various guises, liberalism, in fact, presents itself both as the unique epistemic passage through which we transmit our knowledge *to* the non-liberal other and as the unique epistemic passage through which we translate our knowledge *of* the non-liberal other. Indeed, liberalism is a wide-ranging political and moral doctrine informing thought and action at the level of deep structure. Liberalism is a way of life of the mind; moreover, it is a way of life *tout court*. A non-exhaustive list of the epistemic issues on which liberalism harbours strong views must include a particular conception of society, of the state or of government, of the self, of the other, of the subject, of the object, of the good, and, of course, a particular conception of law finding typical expression in the readily recognizable garb of positivism. Two hallmarks of the liberal understanding of law – and here, I deliberately limit myself to two signal illustrations of liberalism's excessive

epistemic assurance only – are the doctrines of the rule of law and of universal human rights.

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The rule of law and universal human rights, to track these exemplifications of the liberal mindset, are doctrines which, from a liberal standpoint, are embedded in thought and action at the level of deep structure. They are doctrines which liberalism champions (and which liberalisms champion). I argue that these doctrines are informed in substantial ways, whether consciously or not, by a mode of sovereign domination, by a colonial logic, which they relentlessly seek to implement. In other words, neither the rule of law nor universal human rights are innocent or neutral ideas, disinterested or impartial constructions. Rather, these two concepts purposefully seek to apply an ascertainable ideological agenda comprising identifiable political and moral values. If you will, the rule of law is *someone's* (criticizable) rule of law, and universal human rights refer to *someone's* (criticizable) universalism. Crucially, the rule of law and universal human rights, as liberal doctrines of governance, appear intrinsically incapable of intellectually recognizing or validating the non-liberal other and even less capable of spiritually sympathizing or condoling with the non-liberal other. "Yes to individuality or autonomy", "yes to rationality or agency" proclaims liberalism – but, it also says, "no to non-liberal individuality", "no to non-liberal rationality". As liberal doctrines of governance, the rule of law and universal human rights ceaselessly pursue dissemination and assimilation *at the expense of the non-liberal other*, an imperial strategy which is effectively intertwined with the practice of epistemic violence. Indeed, the liberal plea for circumscription of institutional power operates jointly with the liberal exercise of fully-fledged institutional power over the non-liberal other.

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Anyone who researches the rule of law, to confine myself to this instance, does not have to go very far in order to encounter unreserved liberal praise for a doctrine that liberalism regards as cardinal, the resolutely unexamined assumption being that the rule of law is an essential ingredient of developed societies that is lacking in developing societies, the latter being, for their part, readily apprehended as incomplete versions of developed ones, awaiting with barely repressed trepidation enlightenment from abroad. The liberal language at hand can readily prove as grandiloquent as it is delusional. The rule of law is thus envisaged, from a liberal standpoint, as "an unalloyed good, promoting and safeguarding values that are intrinsically desirable, such as economic development and social progress".[10]

[10] RODRIGUEZ, Daniel B.; MCCUBBINS, Mathew D.; WEINGAST, Barry R. The Rule of Law Unplugged. *Emory Law Journal,* v. 59, n. 6, p. 1455-1494, 2010. p. 1456. In this passage, the authors refer to what they regard as the widespread position rather than expressing their own.

While a liberal commentator casts the rule of law as "the common sense of global politics",[11] a leading liberal expert on international law writes that "[t]he concept is [...] everywhere" (no empirical data being offered, however, to justify such sweeping assertion).[12] This international-law specialist also claims that "[t]he degree of apparent international consensus on the value and importance of the rule of law is striking" (again, there is no evidence being adduced to bolster this consensualist claim).[13] Meanwhile, a prominent liberal philosopher of law remarks that the rule of law is "one of the most important political ideals of our time",[14] while another jurisprudent – another prominent liberal philosopher of law – calls it "the most civilized [...] conception of a state yet to be devised".[15] According to a further liberal analyst, "[t]he rule of law is humanity's greatest creation".[16] At the very least, this naive and triumphalist bombast (all of it in English, if you please) reveals a deeply-held conviction to the effect that liberalism's institutions must be equated with good, with very good legal institutions of governance.[17] Within the messianic project that is the rule of law, liberalism readily feels entitled – it *must* indeed feel entitled – to teach the meaning of liberty and of its accoutrements to the non-liberal world. All along – explicit or implicit sense of moral superiority *oblige* – liberalism refuses to acknowledge that it could have anything of significance to learn from the non-liberal world. Self-congratulatory liberalism acts as a learning blockage.

I hold that the accolades that I have quoted are not mere arrogance. Rather, they disclose a psycho-epistemic disorder – a pathology – affecting liberalism as a modern and *driven* form of knowledge. I refer to an epistemological system, a hermeneutics, whose very existence has been grounded in an intellectual European disposition suffused with so-called "Enlightenment" values domineeringly promoting a particular and exclusive conception of humanness, secularism, materialism, emotion, instrumentalism, much else also – a normative and decisive configuration according to which the world must be seen and must be directed. And cosmopolitans like ourselves, CTLS devotees, to the extent that we blithely foster the rule of law or universal human rights as obvious tools of good governance that self-evidently warrant application all over the world irrespective of legal traditions, irrespective

[11] MAY, Christopher. *The Rule of Law*. Cheltenham, UK: Elgar, 2014. p. x.

[12] CAROTHERS, Thomas. The Rule-of-Law Revival. *In*: CAROTHERS Thomas (Ed.). *Promoting the Rule of Law Abroad*. New York: Carnegie Endowment for International Peace, 2006. p. 3.

[13] CAROTHERS, Thomas. Rule of Law Temptations. *In*: HECKMAN, James J.; NELSON, Robert L.; CABATINGAN, Lee. *Global Perspectives on the Rule of Law.* London: Routledge, 2010. p. 19.

[14] WALDRON, Jeremy. The Concept and the Rule of Law. *Georgia Law Review*, v. 43, n. 1, p. 1-61, 2008. p. 3.

[15] OAKESHOTT, Michael. *On History*. Oxford: Blackwell, 1983. p. 164.

[16] SCHUCK, Peter H. *The Limits of Law*. Boulder, CO: Westview, 2000. p. 454.

[17] Critical exceptions deserve mention. *E.g.*: MIÉVILLE, China. The Commodity-Form Theory of International law. In: MARKS, Susan (ed.). *International Law on the Left*. Cambridge: Cambridge University Press, 2008. p. 132: "The chaotic and bloody world around us *is the rule of law*" [emphasis original].

of economic conditions, irrespective of political circumstances, irrespective of social arrangements, irrespective of linguistic manifestations, and irrespective of religious settings, to the extent that we engage in such ethnocentric or juricentric projection, we stand conscripted in the tentacular liberal system of power, in its self-confident deployment of epistemic advantage, and, again, in its implementation of epistemicide, mostly not even realizing that we are being conscripts.

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Now, I argue that any structure of power, no matter how seemingly all-embracing and all-authoritarian, inevitably allows for fractures or fissures, for cracks or openings, which can be harnessed non-paradigmatically to promote a discourse antithetical to the paradigmatic structure. A regenerative or redemptory critique according silences and ejections an active presence – making the marginalized relevant and the ostracized meaningful – is thus possible. Comparative law, as the misnomer goes, is one such critique, one such fissure or crack in the solid and stolid liberal fortress which, from a legal perspective, takes the familiar form of positivism. Indeed, comparative law occupies an epistemic position allowing it to provide an oppositional discourse to liberalism-at-law. I am not saying that it has done so. In fact, most extant comparative law can easily be shown to have been conniving with liberalism. But I maintain that comparative law *can* generate ammunition for the subversive discursivity that I argue is necessary to qualify liberalism's misguided profession of faith in its understanding of progress, which effectively operates as an epistemological obstacle blinding the liberal mind to cultural complexity's entitlements and to the specific cognitive or moral limitations it abides because of its self-ascribed privilege. Indeed, comparative law is the most obvious (in)discipline in law whose declared purpose is specifically the study of otherness — the otherness that can potentially instruct in the art of forming the self otherwise, a self which would be wiser to the other (and to oneself) than has been the case. The comparatist, who pursues and marshals direct access to the archives and texts of other laws – to the other's ideological expression of itself in writing – is best placed to understand, appreciate, and valorize otherness-in-the-law provided, that is, that there takes place, within the comparative enterprise, a willingness to develop a theoretical tool-box allowing the enabling programme that I address to muster the requisite epistemic credibility.

I argue that comparative law, more than any other discipline in the law, is able to get the liberal jurist to change who she is, to change who he is, and to assume a state of mind, a way of existing in the world and of seeing the world which, instead of being characterized by seemingly insatiable self-centeredness and partiality, can be informed by understanding, appreciation, and valorization and perhaps by sympathy, by solidarity, and – who knows? – by love. In their respective works on

law and the rule of law in China, comparatists like Teemu Ruskola and Samuli Seppänen,[18] as I read them, thus invite the liberal self to question its place *in* the world and its approach *to* the world. Indeed, this audacious brand of comparative scholarship forcefully suggests that the liberal self ought to change its conception of itself and curb its imperialist drive. For his part, in his *Comparative Law as Critique*, Günter Frankenberg earnestly questions the liberal understanding of the 2004 French statute on religious attire at school, which would hide this legislative text's profoundly Islamophobic (or Islamopsychotic) character.[19]

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Ever since Herder and as recently as Alasdair MacIntyre, intellectuals who have dissented from Enlightenment doctrines have been confined to the margins of liberal discourse while thinkers like Kant or John Rawls have graced the mainstream. But glocalization – please note "glocalization" because in every case, everywhere, local knowledge remains so very significant[20] – glocalization, then, signals, perhaps as never before, how liberalism, understood as a technology of the self, fails adequately to address pluralism in the many guises that diversity is inevitably seen to assume contemporaneously, not the least of which is, of course, *legal* pluralism. Indeed, liberalism, being closely associated with colonialism, neo-colonialism, and the civilizing mission, which it has historically regarded as *progressive*, has long been unable meaningfully to engage legal pluralism. To be sure, the challenge facing the liberal self – to shed the cognitive decay and moral stagnation that translate as a desire for overbearing sovereignty-over-all-that-exists – must ultimately be met within the smithy of liberal selfhood. But if comparative-law-as-institutional-fissure manages to hearken to the non-liberal other rather than intervene against it, comparatists can help. And so can CTLS.

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