THE LEGAL LEGACY OF THE COLONIAL ERA

Colonization has become a thing of the past. However, its impact can still be felt today in the form of coloniality – the way in which the world is perceived, understood and governed. One example are European legal concepts that continue to apply as a standard worldwide. Our author demands that this Eurocentric perspective be abandoned, and makes the case for a new, pluriversal understanding of law.

TEXT: RALF MICHAELS

In September 2021, the World Bank announced that one of its most successful projects, the *Doing Business* report, had been terminated. Since 2004, a system of indicators had been used for all countries in the world to evaluate how business-friendly they were, and to rank them accordingly. Its success notwithstanding, the project was terminated after it emerged that the evaluation criteria had been modified specifically for China. The fear had been that if China was moved further down in the rankings, that could jeopardize the World Bank's funding overall. Now, the World Bank plans to develop a follow-up project in two years' time.

The *Doing Business* report was produced by economists, without the involvement of legal experts. However, at its core, it was a legal project. The factors that were monitored, and which were used as a basis to determine how business-friendly a country was, essentially belonged to the legal system. How easy is it to start a business in country X? This references not only corporate law, but also the administrative laws relating to official permits. How quickly can a tenant who is in arrears be evicted from their apartment in country Y? This question references contract laws relating to contracts and civil procedures. How easy is it to give notice to an employee in country Z? This question references individual and collective labor laws.

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VIEW POINT

RALF MICHAELS

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The *Doing Business* report was also a comparative legal study, since it compared the countries. Such comparisons between legal regulations in different countries have always been a core field of comparative law. Traditionally, the main purpose of this area of legal studies was to determine commonalities and differences between the legal orders of different countries, and to explain, evaluate and possibly also overcome them by harmonizing those countries' laws. In addition, comparative law examines what are known as "legal transplants" – the adoption of legal rules and institutions from one legal system by another. These include the continuation of English common law in Commonwealth countries after they gained independence, for example, or the reform of antitrust law in Mexico based on the U.S. model at the end of the 20th century. Legal transplants particularly lend themselves as tools for promoting economic growth in the context of development aid. The hope is that legal rules that have led to a well-functioning economy in wealthy countries will spur economic development in poorer ones. The *Doing Business* report is a prime example of this. It defines "best practices," which are then recommended for the other countries to emulate.

In fact, comparative law scholars are rather proud of all this. In their view, other legal disciplines are simply narrow-minded and nationalistic, regarding their own national law as the only relevant standard, without knowledge of other legal systems beyond their own borders. By contrast, comparative law promotes an awareness of the diverse nature of the law worldwide. One belief held in comparative law is that in light of globalization, law can only be properly understood when different systems are compared with each other. Only those who are familiar with a large number of different legal systems have access to a superior range of potential solutions. Furthermore, it is only possible to improve a legal system when it is compared with others.

RWANDA IS REGARDED AS A SUCCESS STORY: IN THE WORLD BANK REPORT, THE COUNTRY ROSE FROM 139TH PLACE TO 32ND PLACE

However, some people are critical of this approach. For a long time, comparative law focused mainly on European and North American legal systems. When it did take other legal orders into account, it regarded them as being nothing more than inferior versions of their European models, with Nigerian law as a shoddy copy of English law, Japanese law as a poor imitation of German law, and so on. Critics who accuse comparative law experts of Eurocentrism claim that there is an implicit hierarchy in place, with European countries at the top. Seemingly, such accusations do not apply to the *Doing Business* report. While at first, typical OECD countries such as the U.S., Canada, Switzerland and Singapore were ranked at the top, several developing countries soon moved up the list. Rwanda, for example, has been regarded as a success story. From 2009 to 2010, the East African country moved up from 139th to 67th

place, and in 2014, it was ranked 32nd. Georgia, which was ranked 100th for business friendliness in 2006, had reached 6th place in the global rankings by 2019. According to the World Bank, it is precisely because the ratings take neutral indicators into account that they help overcome the prejudices that disfavor non-European legal systems. This is what allegedly makes them emancipatory.

This is the precise claim that decolonial critique addresses. According to decolonial theory, (European) modernity has always been linked to coloniality, its inseparable darker side. Liberty, equality and prosperity in Europe not only went hand in hand with oppression, unequal treatment and the exploitation of the colonies and their subjects; without them, such societal progress would not have been possible. In order to legitimize the oppression and exploitation, it was necessary to assert the claim that Europeans and their way of thinking were superior – a type of historical ranking, as it were. Moreover, the standard used for this ranking was itself based on European values and ideals, which thus became universalized. Therefore, coloniality meant dual domination by Europe over the rest of the world – not just by means of military and economic superiority, but also through the power to determine knowledge and thought.

EUROPE AND THE U.S. CONTINUE TO RULE THE WORLD WHEN IT COMES TO KNOWLEDGE AND THOUGHT STRUCTURES

The colonial era is a thing of the past, and with just a few exceptions, the former European colonies have now formally become independent states. However, this does not mean that coloniality has been overcome. Europe and the U.S. continue to set the standards against which the rest of the world is measured. European values and ideas that were developed on the basis of specific European history, a form of capitalism that originated in Europe and the U.S., continue to be regarded as universal, and are imposed upon the rest of the world. Europe and the U.S. may no longer rule the world politically, but they do still dominate when it comes to knowledge and thought structures.

Decolonial theory has, to date, only rarely been applied to the law and comparative law. Yet the *Doing Business report* is a good example of what such application can look like, and what it is able to achieve. For example, it can show that although countries in the Global South may occasionally be ranked higher than those in Europe, the price for this is that these countries are required to fully accept the standards and expectations of the project, which are dominated by Europe and the U.S. In Rwanda, for example, while the changes made to the economic system to meet the requirements of the *Doing Business* report may have improved the country's ranking, they have also led to a high level of dissatisfaction. It is debatable whether the willingness of the Rwandan government to adapt

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to these standards will pay off. Is it really preferable to do business in Georgia rather than the U.S., or in Azerbaijan rather than Israel, simply because Georgia and Azerbaijan are ranked higher?

Ultimately, the *Doing Business* report may not prioritize European countries, but it does implicitly favor European law. Thus, a great deal of importance is given to formal statutory rules that regulate activity in the countries of the Global North, but which are of less importance elsewhere. When comparative law compares different countries, it fails to take non-state law into account. Local customs and mechanisms for resolving disputes which play an important role in the Global South are presumed to weaken the state's monopoly on power, instead of being viewed as alternative, perhaps even superior, norms.

THE RANKING COMPARES OFFICIALLY INDEPENDENT STATES, BUT REMAINS LARGELY COLONIAL

When the *Doing Business* report recommends rules from the Global North as models for the Global South, it assumes a technical, non-cultural understanding of law. In the first *Doing Business* report, the presumption was "one size fits all." This approach underestimated the question of whether such rules are capable of functioning at all in the Global South – and whether former colonies, which today are officially independent, wish to be subject to rules that originate from the former colonial powers.

While a project such as the *Doing Business* report may compare formally independent states, it does in fact remain largely colonial in nature. It promotes the universalization of legal rules from the Global North, not through political recolonization and the enforced implementation of such rules, but by declaring a certain legal rationale to be universally valid and making it a benchmark by means of a ranking process. Countries in the Global South are not forced to adopt this rationale. However, if they refuse to do so, they will be ranked lower down the list.

The result is not simply a hierarchy that places countries from the Global North above those from the Global South. Instead, something more perfidious emerges. Those countries that adopt the rationale of the Global North are ranked higher than those who do not, for this reason alone. This rating system purports to be scientifically neutral and purely descriptive. In reality, however, it transfers a high level of normativity to its subject of study – it normalizes the principles of the Global North.

What might decolonial comparative law that resisted such an approach look like? The universality of western values and laws can be countered by the concept of pluriversality – in other words, the notion of a world within which many worlds are possible. In a pluriverse, European based law would have its place, but merely as one of many systems, without the claim

to general validity that it currently enjoys. Such an approach is therefore not anti-European, but it is anti-colonial and therefore also anti-universalist.

After decoupling from European universalism, options suddenly become available that seemed implausible within the European paradigm. A pluriversal attitude towards the law in the world would also make it possible, for example, to revive indigenous approaches such as ubuntu in South Africa or buen vivir in South America. Often, approaches such as these do not focus foremost on the rights of the individual, as does European and U.S. law; rather, they emphasize harmony with the community and with nature.

Here, pluriversality does not mean that these principles supersede European individualism. After all, that would simply entail replacing one universalism with another. However, pluriversality does mean that European and non-European perceptions and concepts are regarded as being of equal value. This by no means advocates a moral or legal relativism, in which every legal system is regarded as being equally legitimate. The mere fact that many legal systems in the Global South are shaped by coloniality already makes such an approach inappropriate. A situation could be avoided in which only European standards are applied to legal orders throughout the world.

EUROPE'S UNIVERSALISM HAS BLINDED US TO ALL KINDS OF POSSIBILITIES

Further analysis is required to determine what this would mean in detail for a new way of thinking about law. However, there is no doubt that a project such as the *Doing Business* report, even in its reformed version, is incompatible with a pluriversal world. After all, it is not acceptable to measure all legal systems against a single standard from the Global North that is biased specifically toward its legal systems and values. It is indefensible that a ranking of this type should be allowed to perpetuate hierarchies and entrench them even further. It is also inconceivable that legal systems should be prevented from development by being forced into participating in a global competition. Instead of universalist perspectives, there is hope that a truly pluralist understanding of the law in global society is emerging, in which alternative legal models are possible and sustainable laws do not founder in the face of aggressive competition.

Does that sound like a utopian dream? Perhaps. But that's surely also because European universalism has blinded us to all kinds of other possibilities. And we are blind because ultimately, comparative law has remained firmly entrenched in the European paradigm. The hope of those who promote decolonial comparative law is that those laws and rights which until now have seemed unattainable can be made possible. Without being ranked.