

# Postcolonial Theory and Comparative Law: On the Methodological and Epistemological Benefits to Comparative Law through Postcolonial Theory.

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**Abstract:** Working as a comparative lawyer means engaging with foreign law. In the process of comparing, the comparatist creates a relationship between the Self and the Other and tries to identify commonalities and differences. This always goes along with the danger of lapsing into an either-or dichotomy of ethnocentrism and cultural relativism. In comparative law we face the same danger. Either we use our own standards as if they were universal (ethnocentrism) or we abandon them completely to allow the Other the realization of its own world (cultural relativism). Postcolonial theory has shown that both ethnocentrism and cultural relativism impede the understanding of the Other and has suggested various possibilities for overcoming this either-or dichotomy. This article analyzes how comparative law can make use of these ideas, particularly regarding the use of universal standards, the comparative method and understanding, the classification of legal systems and legal transplants. Drawing from postcolonial ideas, the article argues that comparative lawyers should understand the relationship between the Self and the Other in terms of dialectic and hybridity rather than in terms of dichotomies and homogeneity. The comparison should be based on extensive engagement—but not identification—with the Other and self-critical analysis—but not abandonment—of our own standards. The aim is not a situation of perfect commensurability but rather to use the dialectic between the Self and the Other as a source of understanding.

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## *Introduction*

Working as a comparative lawyer means engaging with foreign law. In the process of comparing, the comparatist creates a relationship between the Self and the Other and tries to identify commonalities and differences. Even when not explicitly comparing two legal systems, our understanding of foreign law is always shaped by our own legal system. Hence,

- 1 This article is based on the methodological considerations developed in my previous work: *Judith Schacherreiter*, Das Landeigentum als Legal Transplant in Mexiko. Rechtsvergleichende Analysen unter Einbezug postkolonialer Perspektiven (2014) and *Id.*, Das Verhängnis von Ethnozentrismus und Kulturrelativismus in der Rechtsvergleichung. Ursachen, Ausprägungsformen und Strategien zur Überwindung, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 2013, 272-299. It was translated by Claudia Wittl.

the analysis of foreign law inevitably implies an engagement of the Self (the familiar) with the Other (the foreign) and raises the question of what role one's own legal mindset and parameters play in comparative law.

The relationship between the Self and the Other, however, is not only a theme of comparative law but is also a central motif in postcolonial theory: How can the Other be understood and represented, and what roles do our own preconceptions play in this process? However, even though both disciplines pose similar questions in relation to the Self and the Other, there has apparently been hardly any systematic engagement with postcolonial theory in comparative law.<sup>2</sup> This is surprising.

For the comparatist, examining the Other always goes along with the danger of lapsing into an either-or dichotomy of ethnocentrism and cultural relativism. *Ethnocentrism* describes the fixation on the Self and the universalization of one's own standards and values in order to apply them as seemingly neutral parameters to the evaluation of the Other. One's own culture is the starting point for the examination of other cultures, and determines the evaluation and judgment of them as a seemingly universal standard. By contrast, *cultural relativism* describes an approach that limits standards and values to the culture that brought them forth. A culturally relativist approach rejects the possibility of translating the standards and parameters of one culture to another, or of evaluating a foreign culture from the point of view of one's own culture, and thus questions the act of comparing cultures as such.

At first glance, it might seem as though the possibilities for dealing with the Other are limited to these two alternatives, albeit with a grey zone in between. Yet postcolonial theory has shown that both ethnocentrism and cultural relativism impede the understanding of the Other and has suggested various possibilities for overcoming this either-or dichotomy.

This article argues that comparative law can make use of these ideas from postcolonial theory in various ways. The article proceeds as follows: Firstly, I will introduce the basic ideas and concepts of postcolonial theory and highlight where postcolonial theory overlaps with comparative law (I). Subsequently, I will delineate four areas in which comparative law is in danger of lapsing into the aforementioned either-or dichotomy of ethnocentrism and cultural relativism and where postcolonial theory could thus function as a corrective. These areas concern the presumption of the universal validity of one's own standards and

- 2 Some authors from the critical comparisons movement refer to postcolonial ideas when they criticize the method of functionalism and the construction of legal families as euro-centric; see for example *Gunter Frankenberg*, *Critical Comparisons: Re-thinking Comparative Law*, *Harvard International Law Journal* 26 (1985), p. 411; contributions of the symposium on "New approaches to comparative law: Comparativism and International Governance", *Utah Law Review* (1997), especially the contributions by *Berman*, *Cossmann*, *Esquirol*, *Frankenberg* und *Kennedy*. Some authors who deal with non-occidental legal systems refer to postcolonial approaches as well, see for example *Teemu Ruskola*, *Legal Orientalism*, *Michigan Law Review* 101 (2002) pp. 179 et seq.; *Lama Abu-Odeh*, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia*, *AJCL* 53 (2004) pp. 789 et seq.; *Andrew Harding*, *Global Doctrine and Local Knowledge: Law in South East Asia*, *International Comparative Law Quarterly* 51 (2002), pp. 35 et seq (48 et seq.).

the expression of value judgments (II.1), the comparative method and understanding (II. 2), the classification of legal systems into legal families and spheres, (II.3) and finally legal transplants (IV.4). For the sake of clarity, the positions I will contrast are standardized extreme positions, which are in part really held in this form but are mostly argued in subtler, attenuated ways. However, the fundamental problem stays the same in both cases. In Part III, I will—using postcolonial theory—discuss what epistemological role the relationship of the Self and the Other plays, why it is problematic to conceive of this relationship as a dichotomy of two homogenous units, and how this conception can be disbanded. Based on this, I will develop postcolonial approaches to comparative law that help overcome ethnocentrism and cultural relativism (IV). Finally, Part V summarizes my conclusions.

### *I. Basic Concepts of Postcolonial Theory*

Postcolonial theory is a collective term for certain theoretical approaches and forms of political practice that developed in close relationship to each other after the official end of colonialism. Postcolonial theory studies colonial structures in the broadest sense and the continuing effects of those structures in the present. It is important to note that colonial structures refer not only to political and economic, but especially to cultural and epistemological structures, which are not limited to the historical era of colonialism.<sup>3</sup> The Argentinian theoretician Mignolo calls this “coloniality,” which, despite being related to the historical era and direct colonial military intervention of colonialism, goes beyond this era, forming a mindset, an ideology, and a worldview that not only applies to the great colonial powers.<sup>4</sup> In line with the introductory work of Mar Castro Varela and Dhawan, the starting point of all colonial approaches (differing greatly among themselves), can be summarized as follows: Modern colonialism started in 1492 with the so-called “discovery”<sup>5</sup> of America. It combined different forms of physical, military, epistemological and ideological power, which was legitimized by racial and cultural discourses. Colonialism was legitimized as a mission of civilization, bringing progress to the colonized countries. In the period that followed, despite admitting acts of violence, the notion prevailed that colonialism and imperialism granted the “barbaric world” access to true faith, enlightenment, rationalism, and humanism. This is founded on the basic premise of European superiority in respect of religion, technology, philosophy, science, culture, and language.<sup>6</sup> It is a basic premise of postcolonial theory that colonialism was the precondition for the development of Modernity with regard to both the material-economic and the intellectual-philosophical sphere.

3 As an introduction to postcolonial theory, see *Maria do Mar Castro Varela/Nikita Dhawan*, *Postkoloniale Theorie, Eine kritische Einführung*, Bielefeld 2005, pp. 23 et seq. And for a more practical approach: *Robert J.C. Young*, *Postcolonialism: An historical introduction*. Oxford 2001.

4 *Walter D. Mignolo*, *La Idea de América Latina*, Barcelona 2007, p. 33.

5 *Mignolo*, note 4.

6 *Mar Castro Varela/Dhawan*, note 3, pp. 13, 15 et seq.

Marxist approaches identify a close connection between colonialism and the development of capitalism, the former having allowed for an increased circulation of goods, men, and ideas, with the resulting profits going largely to European metropolises. From this perspective, colonial exploitation was a prerequisite for the growth of European industrial capitalism.<sup>7</sup> Marx himself describes colonialism as the “midwife”<sup>8</sup> of the capitalist society.

Latin-American theoreticians describe a similar dialectic regarding the significance of Spanish colonialism for the development of Modernity as a philosophy and worldview, which supposedly developed from Europe’s relationship to its colonial Other. The modern Europe conceived its identity as the centre of the world and the pinnacle of human progress in binary opposition to the colonialized Other, conceptualized as pre-modern and barbaric.<sup>9</sup> Similarly, the Indian historian Dipesh Chakrabarty criticizes Europe’s view of non-western cultures as nothing more than consigning any other cultures to an imaginary waiting room of history.<sup>10</sup>

The opposite position to this ethnocentric worldview, cultural relativism, is to regard all cultures as fundamentally different and thus incomparable. There is neither such thing as a common development trajectory, nor a valid distinction between developing and developed cultures. Rather, different cultures stand, equal and fundamentally different, side by side.<sup>11</sup>

Yet, the critique of postcolonial theory is directed not only against creating hierarchies between different cultures but also against essentialist conceptions of cultures that underlie not only ethnocentrism but also cultural relativism. Hence, it questions strictly binary oppositions of Self and Other, no matter whether this manifests as ethnocentrism or cultural relativism.<sup>12</sup>

## II. Postcolonial Problems in Comparative Law

Comparative law is in danger of lapsing into this either-or dichotomy of ethnocentrism and cultural relativism, particularly regarding the role of universal standards for value judge-

7 *Mar Castro Varela/Dhawan*, note 3, pp. 14 et seq., 16.

8 “Geburtshelfer”, *Karl Marx*, *Das Kapital I*, reprint of the 4th ed., revised and edited by Friedrich Engels, Hamburg 1890, Berlin 1947/62, pp. 779 and 781.

9 Representative for this school of thought: *Enrique Dussel*, 1492. El encubrimiento del otro. Hacia el origen del mito de la modernidad. Madrid, 1992; *Walter Dignolo*, Delinking: The Rhetoric of modernity, the logic of coloniality and the grammar of de-coloniality, *Cultural Studies*, 21 (2007), p.449; *Dignolo*, note 4; *Saurabh Dube, Ishita Banerjee Dube and Walter Dignolo* (eds.), *Modernities coloniales*, Mexico, 2004.

10 *Dipesh Chakrabarty*, *Provincializing Europe. Postcolonial Thought and Historical Difference*, United Kingdom, New Jersey 2000, pp. 249 et seq.

11 Important authors for this approach are *Ruth Benedict, Margaret Mead, Franz Boas, Melville Herskovits*.

12 *Edward Said*, *Orientalism*, London 2003, pp. 102, 297, 301; *Frantz Fanon*, *The Wretched of the Earth*, London 2001, pp. 166 et seq.; *Homi K. Bhabha*, *The Commitment to Theory*, in: Bhabha, *The Location of Culture*, New York 1994, pp. 19-39.

ments (II.1), the comparative method (II. 2), the classification of legal systems (II.3) and finally legal transplants (IV.4).

### 1. Universal Standards and Value Judgements

The first set of problems is concerned with the question of how to deal with one's own standards and how to develop valid value judgments. The scholarly branch that refers to itself as "critical comparative law" or "new approaches to comparative law" has accused traditional comparative law of ethnocentrism.<sup>13</sup> This accusation is directed against those approaches which consider the underlying parameters of comparative law — e.g. certain legal categories and principles, "general" legal understandings, or extra-legal factors, such as the social function of a norm—as neutral and universal. According to the above-mentioned branch, all of these parameters are shaped by the respective legal background of the comparatist.<sup>14</sup> The critique levelled by "critical comparative law" is convincing in principle: the tendency to universalize is based on the assumption that "objective" comparative legal findings can only result from the application of neutral criteria and universal standards. Yet one must be careful that this critique does not transform into cultural relativism.

As discussed above, cultural relativism refers to a "radical relativism" that attributes all standards and values to the particular culture that created them and denies these standards any legitimacy beyond their culture of origin. Cultural relativists reject the very possibility of comparing different cultures, or of forming value judgments regarding a foreign culture. As there are no universal standards, nor can there be any valid value judgments. According to this concept, comparative legal work, especially regarding fundamentally different legal cultures, intrinsically cannot be successful due to cultures' inherent incommensurability. The examination of foreign law can only lead to valid outcomes if one's own (legal) standards are suppressed completely in order to be able to examine the foreign law from an in-

- 13 See the standard work on critical comparative law: *Gunter Frankenberg*, note 2 and the related contributions of the symposium on "New approaches to comparative law: Comparativism and International Governance", *Utah Law Review* (1997), on ethnocentrism see especially the contributions by *Brenda Cossman*, Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project, *Utah Law Review* (1997), p. 526; *Nathanial Berman*, Aftershocks: Exotization, Normalization, and the Hermeneutic compulsion, *Utah Law Review* (1997), p. 281; *Jorge Esquirol*, Te fictions of Latin American Law (Part I), *Utah Law Review* (1997) p. 425; *Gunter Frankenberg*, Stranger than Paradise: Identity & Politics in Comparative Law, *Utah Law Review* (1997) p. 259 and *David Kennedy*, New Approaches to comparative Law: Comparativism and International Governance, *Utah Law Review* (1997), pp. 545-637. On critical comparative law, see: *Ugo Mattei*, Comparative Law and Critical Legal Studies, in: Mathias Reimann/Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford 2006, pp. 815-836 and *Anne Peters/Heiner Schwenke*, Comparative Law beyond Post-Modernism, *International Comparative Law Quarterly* 49 (2000), pp. 800-834.
- 14 *Frankenberg*, note 2, pp. 414 et seq., 423, 425, 439, 442; *Cossman*, note 13, p. 526; *Vivian Grosswald Curran*, Cultural Immersion, Difference and Categories in U.S. Comparative Law, *AJCL* 46 (1998), pp. 83, 86.

ternal perspective. Yet it is questionable whether such a complete change of perspective is possible at all. Even if it were, it could not be the basis for comparison; and especially not a basis for value judgments or critique.<sup>15</sup> An example of where the controversy between ethnocentrism and cultural relativism gains political explosiveness is the debate surrounding the universality of human rights with regard to non-European legal cultures.<sup>16</sup> Prima facie, there seem to be only two alternatives: either demand conformity to western values notwithstanding differences in (legal) culture (ethnocentrism), or consider the differences to be so fundamental and comprehensive that the standard of human rights cannot be applied to the foreign legal system (cultural relativism). This discussion is especially pertinent in the context of women's rights in non-occidental legal systems.

However, neither ethnocentric universalism nor radical (cultural) relativism provide for a satisfying solution, as they polarize rather than foster differentiated discussion, communication, and critique.<sup>17</sup> It seems as though the Foreign can only be met either with claims of assimilation and subordination to the Self or considered as a fundamentally different thing only to be subjected to fundamentally different values.

## 2. Method and Understanding

Similar questions arise on a methodological level, namely, how do we deal with our own preconceptions while engaging with foreign law? How does this background influence our perception of foreign law? Are we capable at all of understanding foreign law "correctly"? And how can we overcome the methodological tension that is created by our cultural bias, on the one hand, and the effort to do justice to the otherness of the Foreign on the other.

If this dialectic tension is considered as a cognitive impairment that has to be eliminated, problems arise in one of two ways. The first option is that one's own parameters are universalized, thereby evoking the impression that one's own legal system could be compared to a foreign legal system from some external, neutral standpoint, thus creating a state of perfect commensurability. As there is no such neutral standpoint beyond one's own background, universalization is nothing more than hidden, unexamined dominance of the Self over the Other (ethnocentrism). The other possibility for tackling the tension is to completely reject the Own and wholly identify with the Other in order to understand it from an internal perspective. Even if such a change of perspective is possible, the problem remains

- 15 For a critique of radically relativist approaches, see also: *Frankenberg*, note 2, p. 415; *Kennedy*, note 13, pp. 614 et seq.; *Cossmann*, note 13, pp. 525 et seq.; *Grosswald Curran*, note 14, pp. 65 et seq., 88 et seq.
- 16 *Schacherreiter*, *Propertization as a Civilizing and Modernizing Mission: Land and Human Rights in the Colonial and Postcolonial World*, in: Nikita Dhawan (ed.), *Decolonizing Enlightenment. Transnational Justice, Human Rights and Democracy in a Postcolonial World*, Berlin, Toronto 2014, p. 227.
- 17 Rejecting both approaches: *Kennedy*, note 13, pp. 614 et seq. (regarding human rights) and *Cossmann*, note 13, pp. 525 et seq. (regarding woman's rights in India).

that the Foreign cannot be placed in any relationship with the Own, thus eliminating the basis of comparison. This would result in complete incommensurability.<sup>18</sup>

Frankenberg criticizes the ethnocentric approach using the example of Zweigert/Kötz's functionalism<sup>19</sup>. The function, according to Frankenberg, is presented as a neutral tertium comparationis, whereas in fact it is biased by one's own social, cultural, and legal background. Moreover, as this method tries to identify parallels, it privileges the comparison within occidental Europe and marginalizes other legal systems.<sup>20</sup> Frankenberg's critique and his general rejection of functionalism has been criticized and relativized by various authors, some of whom promoted the adaption of the functionalist method. Nonetheless, his assertion that the social function does not present a neutral measure of value, and that functionalism—at least in its traditional sense—is hardly suited for the legal comparison of fundamentally different societies, has been met with approval.<sup>21</sup>

At first glance, a more promising, non-ethnocentric, way to understand the Other might lie in abandoning the Own and completely embracing the Other. However, this attempt at total identification with the Other risks producing results that are based on an essentialist and homogenizing concept of the Other, and thus obscure its inner divergences, variety, and differences. As Said's critique of orientalism (to be discussed below) shows, comparative methods based on such simplifying conceptions about the Other fail to foster diligent observation and confrontation, but rather reproduce prefabricated doctrines, schematic representations, and stereotypes.<sup>22</sup>

### 3. Systematization of Legal Systems

A third area, where comparative law is in danger of ethnocentrism, simplification, and homogenization is the classification of legal systems into legal families and spheres. This point has been made repeatedly in recent comparative legal literature.<sup>23</sup> The critique mainly

18 These two approaches correspond to the methodical approaches of “going rational” and “going native”, named and critiqued by *Frankenberg*, note 2, pp. 415 et seq. According to him, both result in cognitive deadlock.

19 *Konrad Zweigert/Hein Kötz*, Einführung in die Rechtsvergleichung, Tübingen 1996 (3rd edition), pp. 33 et seq.

20 *Frankenberg*, note 2, pp. 415, 428, 439.

21 *Jaakko Husa*, Farewell to Functionalism or Methodological Tolerance?, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 67 (2003), pp. 419-447 (436 et seq., 443 et seq.); *Julie de Coninck*, The Functional Method of Comparative Law: Quo Vadis?, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 74 (2010), pp. 318-359 (325 et seq., 327 et seq., 334 et seq.); *Ruskola*, note 2, pp. 189 et seq.

22 *Said*, note 12, pp. 177, 193, 239.

23 For example: *Frankenberg*, note 2, pp. 422, 432; *Kennedy*, note 14, pp. 619 et seq.; *Ugo Mattei*, Taxonomy and Change in the World's Legal Systems, *AJCL* 45 (1997), pp. 7 et seq.; *Ugo Mattei/Teemu Ruskola/Antonio Gidi* (eds.), *Schlesinger's Comparative Law. Cases – Texts – Materials*, New York 2009 (7th edition), pp. 260 et seq.; *Patrick Glenn*, *Comparative Legal Families and Comparative Legal Traditions*, in: *Reimann/Zimmermann* (eds.), note 11, pp. 422 et seq.; *Jaakko*



targets David and Zweigert/Kötz, whose classifications still significantly, if decreasingly, influence comparative legal thought.<sup>24</sup> David distinguishes (in that order) the Romano-Germanic legal family, (at the time of the Soviet Union) the socialist legal systems, and the common law. The legal systems of the Far East, India, Islam, Africa and Madagascar are summarized under one category<sup>25</sup>, in later editions referred to as “other systems.”<sup>26</sup> Zweigert/Kötz distinguish (after the end of Soviet Socialism) the Romanic, Germanic, Anglo-American and Nordic legal spheres, followed by Chinese and Japanese law under the category of “Law in the Far East”, and Islamic and Hindu law under the heading of “Religious Legal Systems.”

The accusations of ethnocentrism in past literature can be summarized to the effect that these seemingly neutral categories are applied to all legal systems of the world but are in fact based on western, European law (especially the distinction between civil law and common law).<sup>27</sup> The most recent edition of Schlesinger’s *Comparative Law* recognizes that this reproach may be rooted in the fact that European legal systems have indeed left their mark all over the world. But it points out that the bisection of all law into civil law and common law as a universal standard is nonetheless problematic, as it identifies the historical beginnings of law in the (former) colonies with the beginning of colonization.<sup>28</sup>

Moreover, the European systems of civil law and common law are depicted as seemingly neutral standards of law, marginalizing or denying other legal systems not conforming to those standards (for example autonomous regulatory systems of indigenous peoples).<sup>29</sup>

The strong simplification brought about by the categorization of legal systems, evoking the impression of cohesive, coherent, and static unities presents another problem.<sup>30</sup>

The overall picture created fosters the tendency of European comparative law to identify non-European, occidental law as either similar to and capable of assimilation, or as exotic and impenetrable to our understanding.<sup>31</sup> This creates a binary opposition of the Self towards the Other, as well as an either-or dichotomy between ethnocentrism and cultural relativism. Either foreign law is equated or equalized with European law, or it is identified as something fundamentally different. Naturally, this tendency has in the meantime been miti-

Husa, *Classification of Legal Families Today. Is it Time for a Memorial Hymn?*, *Revue internationale de droit comparé* 56 (2004), pp. 11-38 (17).

24 Husa, note 23, pp. 12 et seq., Glenn, note 23, p. 422.

25 René David, *Einführung in die großen Rechtssysteme der Gegenwart*, München 1988 (2nd edition).

26 For example in René David/Camille Jauffret-Spinozi, *Les grands systèmes de droit comparé*, Paris 2002 (11th edition).

27 Frankenberg, note 2, pp. 422, 432; Kennedy, note 13, pp. 619 et seq., Mattei, note 23, pp. 7 et seq., Mattei/Ruscola/Gidi, note 23, pp. 260 et seq., Glenn, note 23, pp. 434 et seq.

28 Mattei/Ruscola/Gidi, note 23, pp. 260 et seq.

29 Mattei, note 23, pp. 7 et seq.; Glenn, note 23, p. 435.

30 Mattei/Ruscola/Gidi, note 23, p. 262; Glenn, note 23, pp. 426 et seq.

31 Kennedy, note 13, pp. 619 et seq.



gated; today the categories of Zweigert/Kötz are generally referred to from a more critical perspective. Frankenberg considers that such categorizations do not promote understanding, but impose cognitive control. This is accompanied by the creation of dichotomies, for example, Occident/Orient, developed/developing, modern/primitive, which implicitly place western legal systems at the top of a normative hierarchy, idealizing western law as developed, pure, and rational in contrast to other legal systems. Ambiguities, discontinuities, and the coexistence of similarities and differences are ignored.<sup>32</sup>

These problems manifest in the categorization by David and Zweigert/Kötz of Latin America, on the one hand, and Arabic and "Far East" countries on the other hand. Latin-American law is classified with western legal families<sup>33</sup> and identified as equal. The laws of Arabic and "Far East" countries, on the other hand, are categorized as separate and autonomous from western systems.<sup>34</sup> These classifications either Europeanize or exoticize, thus reinforcing approaches that either try to assimilate the Foreign (ethnocentrism) or that abandon all attempts at understanding it due to its fundamental otherness (cultural relativism).

David bases this differing treatment of Islamic and Latin American countries on the fact that European influences have had a more lasting and profound effect on the legal culture of Latin America. Unlike in Asia and Africa, in Latin America, Europe invaded virtually uninhabited territories or destroyed the civilizations they found. Thus, European law did not encounter any obstacles: the indigenous civilizations had neither the power nor the capability to oppose Europeanization.<sup>35</sup>

This depiction Europeanizes Latin America and includes it as a "child" in the European legal families: inclusion through assimilation. By this means, Latin America is considered a part of the "Self," but on a lower level than the European legal systems.<sup>36</sup>

The classification of Latin-American law within the European legal families may not be wholly unreasonable,<sup>37</sup> at least in private law, but it ignores innumerable legal specificities,

32 Frankenberg, note 2, pp. 421 et seq.

33 Zweigert/Kötz, note 19, p. 112; David, note 25, para. 62, 427; David/Jauffret-Spinozi, para. 26, 376.

34 Zweigert/Kötz, note 19, pp. 280 et seq.; David, note 25, para. 428 et seq.; David/Jauffret-Spinozi, note 26, para. 376 et seq.

35 David, note 25, para. 62, 427; David/Jauffret-Spinozi, note 26, para. 55, 376.

36 Diego Eduardo López Medina, *Teoría impura del derecho. La transformación de la cultura jurídica latinoamericana*, Bogotá 2008, pp. 12 et seq.; Ugo Mattei, *Comparative Law and Critical Legal Studies*, in: Reimann/ Zimmermann, note 13, pp. 815-836 (820): Latin America as a "European appendix".

37 On the European, especially French and Spanish, influences on Latin American civil codifications, see Juan Baró Pazos, *La codificación del derecho civil en España 1808-1889*, Santander 1992, pp. 152 et seq. and Óscar Cruz Barney, *La Codificación en México*, Mexico 2010, pp. 13 et seq.; extensively on Mexico: Rodolfo Batiza, *Las fuentes de la codificación civil en la evolución jurídica de México*, in: Soberanes Fernández, José Luis (ed.), *Memoria del III Congreso de Historia del Derecho Mexicano 1983, Mexico 1984*, pp. 155-162 (155 et seq.).

especially those that can be traced back to the decolonization movement, as well as the diverse cultures of the indigenous peoples and their autonomous legal regimes.<sup>38</sup> Hence, it ignores large parts of the population, the specific history of Latin America, and local cultures.<sup>39</sup>

The Arabic region on the other hand, according to David, differs so completely from western, European society that, in spite of positivist European influences, it cannot be classified in the European legal family.<sup>40</sup> Not only are the socio-cultural differences more profound, they also have a greater effect on the legal realm than in Latin America. David describes the law of Islamic states as coherently religious with a claim to totality. The philosophical regime underlying this law differs fundamentally from the philosophical background of western legal systems,<sup>41</sup> which are based on "Christian morality" or "the doctrine of salvation of the medieval church," principles of individualism and liberalism, and subjective rights.<sup>42</sup> David thus constructs the picture of a fundamentally different and strange law that shares no common traits with western law.

Comparatists studying the legal systems concerned criticize the simplification and distortion this picture produces. According to Abu-Odeh, this presents a gross simplification,<sup>43</sup> one that also dominates US American depictions of Islamic states. Even if elements of Islamic law are dominant in Islamic states, the constitutions and codifications of these countries that can be traced back to European models are ignored completely. The legal identity of these states is primarily linked to Islamic law, which is often explained according to medieval sources, thus suggesting that it has remained unchanged throughout history. This reinforces the stereotypes that the law of Islamic states is radically different from western law. This conception, according to Abu-Odeh, has little in common with what law students in these countries are actually taught and ignores the complexity of the multi-layered, contradictory, and contested identity of Muslims, thus producing the image of an ahistorical and homogenous legal body based on uniform and historically immutable religious rules of Islamic law.<sup>44</sup> The critique of the Occident's simplified depiction of foreign law applies similarly to its depiction of "Far Eastern" law and the "Oriental Other".<sup>45</sup>

38 For example the Mexican land management influenced by colonial history and brought forth by the Mexican revolution, or the new constitutions of Colombia, Venezuela, Bolivia and Ecuador, which take into account the interests and autonomies of indigenous peoples, see the special edition on "nuevo constitucionalismo", *Juridikum* 4/2009.

39 Criticized with reference to European Conceptions of Latin American law by *Jorge Esquirol*, note 13, pp. 425-470 (467, 469).

40 *David*, note 25, para. 482 et seq.; *David/Jauffret-Spinosi*, note 26, para. 376 et seq.

41 *David*, note 25, para 482 et seq.; *David/ Jauffret-Spinosi*, note 26, para. 377.

42 *David*, note 25, para. 23; *David/Jauffret-Spinosi*, note 26, para. 19.

43 *Abu-Odeh*, note 2, pp. 790 et seq, pp. 817 et seq.

44 *Abu-Odeh*, note 2, pp. 790 et seq., 810 et seq.

45 *Ruskola*, note 2, regarding Chinese law; *Id.*, *Legal Orientalism*, Cambridge (Mass.) 2013; and *Andrew Harding*, note 2, pp. 35 et seq (48 et seq.) on South East Asia.

It can therefore be concluded by comparing the representations of Latin America and the Orient that the specific classification of non-European/occidental legal systems oscillates between assimilation (Latin America) and exoticization (Orient), and thus fosters stereotypes.

#### 4. Legal Transplants

As suggested above, transnational legal influences, including so-called legal transplants<sup>46</sup>, play an integral part in the classification of legal systems into legal families. First, it must be determined whether the European legal transplants have in fact influenced the law of Latin-American states so profoundly that this legal system as a whole can be classified as belonging to Western/European legal families, and whether, in spite of European legal transplants, the law of Arabic states is so fundamentally different that it constitutes its own legal family.

However, it would be more expedient to question whether, considering the interdependencies, intermixtures, and influences between legal systems through legal transplants or “legal migration”,<sup>47</sup> such a generalizing classification is at all adequate. The phenomenon of legal transplants demonstrates the permeability of legal systems, their mutual influences, and the resulting similarities and differences. Thus, the study of legal transplants can help break up homogenizations and rigid dichotomies, thereby<sup>48</sup> contributing an integral part to overcoming ethnocentrism and cultural relativism.<sup>49</sup>

On the other hand, the analysis of legal transplants is itself in danger of getting lost between ethnocentric universalism and cultural relativism. This becomes apparent in the Watson-Légrand-Dispute: an example of an especially heated discussion about the possibilities and limits of legal transplants between different legal cultures.<sup>50</sup> Watson sees legal trans-

46 This term, introduced as a metaphor by *Alan Watson*, *Legal Transplants: An Approach to Comparative Law*, Edinburg 1993 (2nd edition) has been heavily criticized but has established itself as the keyword for the phenomenon of transnational legal influences. On the terminological discussion and development of the research on transplants: *David Nelken*, *Legal Transplants and Beyond: of Disciplines and Metaphors*, in: Andrew Harding/Esin Örcü (eds.), *Comparative Law in the 21st Century*, London 2002, pp. 19-34 (29 et seq.); *Michele Graziadei*, *Comparative Law as the study of transplants and receptions*, in: Reimann/Zimmermann, note 12, pp. 441-475 (443 et seq.).

47 The term is used to elaborate a less hierarchical metaphor, see *Sujit Choudhry*, *The Migration of Constitutional Ideas*, Cambridge 2013

48 On this connection, see below: (III).

49 On this significance of legal transplants, see below (IV.4).

50 See Légrand's critique of *Watson*, note 50: *Pierre Légrand*, *The Impossibility of „Legal Transplants“*, *Maastricht Journal of European Comparative Law*, 4 (1997), pp. 111-124, and *Watson's* reply: *Alan Watson*, *Legal Transplants and European Private Law*, *Ius Commune Lectures on European Private Law*, 2 (2006), [www.alanwatson.org/legal\\_transplants.pdf](http://www.alanwatson.org/legal_transplants.pdf) (last accessed on 05.06.2016). See also the statements on this debate by *Rolf Knieper*, *Möglichkeiten und Grenzen der Verpflanzbarkeit von Recht – juristische Zusammenarbeit aus der Sicht eines Beraters*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 72 (2008), pp. 88-113 and *Gunther*

plants as the main source of legal change and development and concludes from his studies about the European reception of Roman law that legal transplants can happen even between very different societies, and relatively independently of social context.<sup>51</sup> Legrand, by contrast, deems it impossible that a legal rule along with its significance can be transferred from one legal culture into another; this is because different legal cultures will attribute completely different meaning to the rule in question. In his opinion, all that remains of the legal rule are the words, devoid of their (original) meaning.<sup>52</sup>

Yet, both approaches are—in these extreme forms<sup>53</sup>—problematic, because they hardly attribute any significance to exchange and dialogue between different legal systems and cultures. Legrand's approach, denying in principle the possibility of legal transplants between legal cultures because they attribute completely different meanings to the same rule, denies the possibility of mutual understanding and dialogue. On the other hand, Watson's contrasting position, that transplants can be implemented independently of different social, legal, and cultural contexts, denies the necessity of such a dialogue.<sup>54</sup>

In practice, the latter position reinforces approaches that propagate reforms in countries of the periphery or semi-periphery by taking recourse to European or US-American legal models without taking into account the peripheral countries' own specific contexts.<sup>55</sup> This has been criticized with regard to the reforms in the former socialist states after 1990 and the US-dominated reforms in Latin America.<sup>56</sup>

*Teubner*, Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences, *Modern Law Review* 61 (1998), pp. 11-32.

51 *Watson*, note 50, pp. 21 et seq., 95 et seq.; *Id.*, Legal Change: Sources of Law and Legal Culture, *University of Pennsylvania Law Review* 131 (1983), pp. 1121-1157 (1125, 1134 et seq., 1141).

52 *Legrand*, note 50, pp. 114 et seq.

53 *Watson* employs exaggerating phrases and (illustrative but) simplifying metaphors, which create the illusion that legal norms can be transferred from one society to another without any regard for the social context. Legrand uses this as a point of attack, see the quotes from *Watson*, note 50 in Legrand, note 53, p. 112. However, *Watson*, note 50, expressly points to the fact that the same norm, even if it is transferred to another legal system word for word, can be understood differently and have different effects. *William Ewald*, Comparative Jurisprudence (II): The Logic of Legal Transplants, *AJCL* 43 (1995), pp. 489-510 thus distinguishes a "strong and a "weak Watson".

54 Similar: *Knieper*, note 50, p. 101.

55 *Schacherreiter*, Landeigentum als Legal Transplant. Rechtsvergleichende Analysen unter Einbezug postkolonialer Perspektiven, Tübingen 2014, pp. 64 et seq.

56 On the former Socialist states, see *Knieper*, note 50, op. 89 et seq.; on the reforms in Latin America, see: *David Trubek/Marc Galanter*, Scholars in Self-Estrangement: Some Reflections on the Crises in Law and Development Studies in the United States, *Wisconsin Law Review* (1974), pp. 1062-1102 (1080 et seq.); *Schacherreiter*, Propertization as a Civilizing and Modernizing Mission: Land and Human Rights in the Colonial and Postcolonial World, in: *Dhawan*, note 15, p. 227; *Schacherreiter*, Die Agrarreform 1992 und der Agrarsektor in Mexiko heute: Rückblick und Kritik anlässlich eines 20jährigen Jubiläums, *Verfassung und Recht in Übersee* 45 (2012), pp. 450-466; criticizing Europe and the US's dominance in the field of transnational legal transfers: *Ugo Mattei*, A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance, *Indiana Journal*

Legrand's approach *prima facie* accommodates this critique because it stresses the differences between legal cultures and cautions against assuming that one's own legal models, as successful as they may be in one's own legal system, are capable of meeting the requirements of another legal culture. He explicitly demands that the Other not be equated with the Self, but rather allowed "the realization of its own view of the world."<sup>57</sup>

However, Legrand's approach is problematic too, as it links legal cultures to nation states<sup>58</sup> and presents these as fundamentally distinct and walled off from one another, but internally uniform. This leads to a radical cultural relativism that presents different legal cultures as monolithic national blocks incapable of dialogue and mutual understanding.

### III. *The Relationship of the Self and the Other*

The problems discussed above, under II, can be traced back to one fundamental problem: the epistemological simplification of the relationship between the Self and the Other. This chapter will analyse this relationship and try to reconstruct it in order to avoid the either-or between ethnocentrism and cultural relativism.

#### 1. Dichotomies and Homogenizations

The problematic simplification consists in placing the Self and the Other as homogenous entities in a rigidly binary opposition. Such an approach obscures the presence of the Self *in* the Other (and vice versa), the side-by-side presence of differences and similarities, and the instances of mutual influence and mixing.

Based on this epistemological constraint, the Foreign can only be identified either as the Same or contrasted against the Self as something fundamentally different: inclusion as a Same or exclusion as an Other. Both options hamper nuanced understanding, foster stereotypes, and tend toward the construction of hierarchies. Thus, the Other is defined by its differences, for example a lack of democracy or human rights, and by biased dichotomies such as modern/primitive or enlightened/traditional-religious.

Defining the Other as uniform, self-contained, coherent, and fundamentally different leads to "exoticization," which can be exploited politically for the purposes of "civilizing" interventions or lead to radical relativism, which impedes any critical analysis between cul-

of Global Legal Studies 10 (2003), pp. 383-448; Ugo Mattei/Laura Nader, *Plunder. When the Rule of Law is Illegal*, Oxford 2008.

57 Legrand, note 50, p. 123.

58 Legrand, note 50, distinguishes the French, German, English and Italian legal culture. This is criticized by Knieper, note 50, pp. 103 et seq. (as being susceptible to ethnocentrism and nationalism), Gebhard Rehm, *Rechtstransplantate als Instrument der Rechtsreform und -transformation*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 72 (2008), pp. 1-42 (16 ff.) and Alan Watson, *Legal Transplants and European Private Law*, *Ius Commune Lectures on European Private Law*, Nr. 2 (2006), [www.alanwatson.org/legal\\_transplants.pdf](http://www.alanwatson.org/legal_transplants.pdf) (last accessed on 05.06.2016).

tures.<sup>59</sup> At the same time, the position of Latin America among the legal families shows that not even the inclusion of the Other into the realm of the Self necessarily leads to acceptance and respect towards the Other as equal. Rather, inclusion can lead to the reduction of the Other to a “Same” still in development (thus only potentially equal). This can also serve as a justification for claims of assimilation.

In order to create a forum for analysis, understanding, and critique on an equal footing, we have to find a new way of conceptualizing the relationship between the Self and the Other. This could be achieved by employing postcolonial theory, which contrasts essentialist conceptions of culture with the permeability and hybridity of cultures, and traces purportedly universal principles back to their place of origin without adopting cultural relativism.<sup>60</sup>

The main thesis of Said’s “Orientalism”<sup>61</sup> is that comparative methods that employ the ontological differences between the Self and the Other do not rely on empirical observation and careful distinction, but rather on preconceived doctrines and rigid systems of classification. They do not produce understanding, but rather validate prejudice and stereotypes. This form of comparison, in his opinion, does not foster understanding, it impedes it.<sup>62</sup> “Orientalism” is meant to describe the occidental discourse on the Orient, which is based on the distinction between “the Orient” (“them”) and “the Occident” (“us”) as though there were a fundamental difference in nature and ontological structure between the two. This discourse constructs the Orient as a fundamental Other and creates a judgmental hierarchy with the Occident above the Orient, aiming at control and domination.<sup>63</sup> The notion of “the Orient” in the context of this critique does not refer to any real, cognizable entity but to a mere representation created by Orientalism.<sup>64</sup>

Similarly, Fanon argues that there is no specific identity of “the black culture” that could be distinguished from “the white culture.” There is only a conceptual difference tracing back to the colonial conception of “the Black.”<sup>65</sup> Such essentialist representations of the Self and the Other are not fundamentally different from racist approaches.<sup>66</sup> In the context

59 Similarly: *Nathaniel Berman*, note 13, pp. 281-286.

60 Renowned representatives of postcolonial theory working in this field are for example *Edward Said*, *Frantz Fanon*, *Homi K. Bhabha*, *Dipesh Chakrabarty* and *Enrique Dussel*. For an overview of postcolonial theory in the German language, see: *Mar Castro Varela/ Dhawan*, note 3. On the issues treated in this contribution there have been only occasional references to postcolonial theoreticians, for example: *Ruskola*, note 2; *Kennedy*, note 13, p. 622; *Berman*, note 13; *Crossman*, note 13, pp. 534 et seq.

61 Note 11. *Said’s* Orientalism is considered to be among the founding documents of postcolonial theory, see: *Mar Castro Varela/ Dhawan*, note 3, p. 29.

62 *Said*, note 12, pp. 177, 193, 239.

63 *Said*, note 12, pp. 1 et seq., 40, 45, 222.

64 *Said*, note 12, pp. 4 et seq.

65 *Frantz Fanon*, *The Wretched of the Earth*, New York 2001, pp. 166 et seq.

66 *Said*, note 12, pp. 206 et seq., 232.

of Orientalism, an Arab is firstly an Arab, and only secondly a human being that, again, is defined by sharing supposedly characteristic features with all other Arabs, but which differ fundamentally from those of Europeans.<sup>67</sup>

Postcolonial analysis of the relationship between Europe and Latin America in particular shows that the equation of the Foreign and the Self can lead to hierarchization and the devaluation of foreign cultures—especially if the otherness of the Foreign is reduced to the mere potential of becoming the Self.<sup>68</sup>

In a similar vein, Dipesh Chakrabarty criticizes that the “now” of non-western cultures is seen as a mere “not yet” in relation to contemporary Europe: the colonized Other is not yet civilized, not yet modernized, etc. and thus functions as a point of reference in order to establish a superior, modern Europe. The “civilized” man needs the barbaric in order to create his own identity.<sup>69</sup>

This representation of the Other also determines the self-representation of Europe. The binary oppositions between the Self and the Other create frames of reference in which the Self (Europe as the centre of the world, the Occident) imagines itself in contrast to the Other (America as European periphery, the Orient). The Self is dependent on its specific conception of the Other in order to create and maintain its own identity. In this respect, the Other is present in the Self and vice versa.

Said argues that not only the Orient but also the Occident is a discursively constructed representation. The Occident creates a certain conception of the Orient in order to identify itself as its contrast.<sup>70</sup> The Orient is considered to be irrational, primitive, and culturally inferior; the Occident is rational, progressive, and culturally superior.<sup>71</sup> Similarly, Dussel argues that the colonized America was represented as a pre-modern Other in the European view of the world, whereby Europe positioned its identity, by contrast, as the center of the world and the pinnacle of a universal process of development.<sup>72</sup>

Finally, essentialism is also problematic when it is employed by those who are considered to be at the bottom of the resulting hierarchy, for example, when Arabic peoples represent themselves as fundamentally different from the West, but uniform among themselves in identity.<sup>73</sup> Thus, Fanon criticizes the concept of a “culture of (all!) Black people,” even when Black people employ it themselves, sometimes with reference to pre-colonial origins, in order to oppose a (former) colonial power. According to Fanon, it soon becomes evident

67 Said, note 12, pp. 49, 102.

68 See for example Dussel, note 9, pp. 36 et seq; *Edmundo O’Gorman*, *La invención de América*, Mexico 2006 (3rd edition).

69 Dipesh Chakrabarty, *Provincializing Europe. Postcolonial Thought and Historical Difference*, United Kingdom, New Jersey 2000, 249 f.

70 Said, note 12, pp. 4 et seq., 202 et seq., 322, 332.

71 Said, note 12, pp. 7, 38 et seq., 40, 42, 300.

72 Dussel, note 9, pp. 11 et seq., 31 et seq., 38 et eq.

73 Said, note 12, pp. 269 et seq.



that “the culture of the Black people,” as well as the culture of Arabic peoples are mere constructions. They are neither homogenous among their supposed peoples nor throughout time.<sup>74</sup>

## 2. Dialectic, Heterogeneity, and Hybridity

The way out of these essentialist conceptions is to stop searching for characteristic features of specific cultures, and instead focus on their heterogeneity and processes of hybridization.<sup>75</sup> This applies to the representation of foreign cultures in Occidental thought, but also to the self-conception of the Occident.

For example, according to Said, western civilization can only be correctly understood if analyzed with regard to processes of colonization and migration, as well as the resulting mix of cultures and people.<sup>76</sup> On the other hand, Fanon emphasizes that (formerly) colonized peoples should not base their self-definition on rigid opposition—even if they oppose the (former) colonial power. He describes overcoming the opposition as a dialectic development starting with the identification with European (white) culture, which is followed by the rejection of that culture in favor of the return to an “original,” autochthonous culture. But this state of nostalgic exoticization has to be overcome as well. Culture, in his opinion, is dynamic and subject to constant change and diverse influences over the course of history. The present culture of the formerly colonized is made up in equal parts of pre-colonial tradition, colonization, and anti-colonial struggle, and can only be correctly understood with all these different, in part contradictory, aspects in mind.<sup>77</sup>

Building on Said and Fanon, Bhabha focuses on the subjects of hybridity, heterogeneity, translation, and dialogue between different cultures. At the center of his work is the “in-between space” (“Third Space”) between different cultures, especially those that have traditionally been conceived of as fundamentally different. In the Third Space, there is room for dialogue, negotiation, and translation between cultures. It is a space for cultural interaction in which cultures can meet and mutually question, compare, and analyze each other. According to Bhabha, these spaces of in-between and negotiation are where new forms of cultural meaning and production occur. As cultural production thus results from cultural difference, culture is never pure, but always hybrid.<sup>78</sup>

Realizing the hybrid character of cultures helps overcome the conception of pure, authentic, and uniform cultures. The culture’s inner inconsistencies and variety become the focus, and the search for a culture’s characteristic features is replaced by the endeavor to understand its different sources, influences, and inner diversity.

74 *Fanon*, note 65, pp. 166 et seq.

75 *Said*, note 12, pp. 348 et seq., *Fanon*, note 65, pp. 166 et seq., 177 et seq.

76 *Said*, note 12, p. 349.

77 *Fanon*, note 69, pp. 179 et seq.

78 *Bhabha*, note 12, pp. 34 et seq., 36 et seq.

This is a way out of the either-or dichotomy of ethnocentrism and cultural relativism. The dialectic between the Self and the Other can serve as a source of understanding; mutual influences and intermixture as well as heterogeneity become the focus of analysis. New “in-between spaces” for intercultural action and cultural interaction, comparative understanding and dialogue, as well as mutual analyses and critique arise on an equal footing. The following examines how this program can be implemented in the aforementioned areas of comparative law.

#### IV. Approaches to a Postcolonial Comparative Law

Based on this revised understanding of the Self and the Other, I will now elaborate alternative approaches for the areas of comparative law discussed under II with respect to trying to overcome ethnocentrism and cultural relativism.

##### 1. Universal Standards and Value Judgments

As discussed in II.1., there appear to be only two options when dealing with one's own standards: either to use them as supposedly neutral parameters to evaluate the Other (ethnocentrism) or to deny them any legitimacy in developing value judgments about the Other (cultural relativism). The Foreign is thus subjected to the Self or contrasted to it as an incommensurable Other. In order to overcome this unhelpful either-or dilemma, this essentialist dichotomy between the Self and the Other has to be dissolved. Yet, the dialectic tension between the Self and the Other can be maintained; it may even be beneficial as a basis for comparison and the formation of value judgments.

The dialectic development of value judgments involves, first of all, understanding and acknowledging the Other in the context of its standards, which will require in-depth analysis of not just legal but also cultural and historical aspects.<sup>79</sup> Thus, we grant the Other an equal position. Nevertheless, the Other must be confronted with the Self's own standards, which are thereby acknowledged as a basis for judgment but not presented as universal or neutral; rather, they are standards to be contextualized. Contextualization of one's own standards necessitates self-reflection and gaining a critical distance from oneself, attempting to view the Self as just as “exotic” as the Other. These self-reflective steps are facilitated or even made possible by engaging with the Other.<sup>80</sup>

In this context, it can be helpful to engage with legal history. For example, private property of land, a concept utterly natural to us today, is a relatively young legal institution only

79 For example in the sense of *Grosswald Curran's* „cultural immersion“.

80 In the literature on comparative law, there have been occasional suggestions for these self-reflective processes in different theoretical contexts: *Crossman*, note 13, pp. 536 et seq. describes these processes as a “gaze of comparison back on itself”. Similarly: *Frankenberg*, note 2, p. 414 et seq. Describes them as “distancing” and “differencing”, see below (IV.2). *Bermann*, note 13, p. 282 also calls for the conscious consideration of one's own subjective perspective.

imaginable since the agrarian reforms of 1848. In this specific context, private ownership of land may have signified (at least for some social groups and some world views) progress, modernization, and liberty. But this does not mean that private ownership of land has to be the norm for everyone, across all time. Considering the geographical origin of this legal institution—in Europe—helps contextualize and relativize it, not leading to a value judgment but merely countering any claim to universality. There are other concepts of land management, especially in, but not limited to, the periphery and semi-periphery—for example, among indigenous peoples. It is both possible and useful to compare these concepts with the concept of private property without presenting the latter as a neutral standard or political aim.

Such an approach would take Bhabha's above-mentioned in-between spaces seriously, allowing for dialogue, translation, analysis, and critique between the Self and Other on an equal footing. This does not limit one's own standards to the Self. Instead, they remain—in a more thought-through form—the basis for the evaluation of the Other. The resulting value judgment cannot be considered neutral or universal. Rather, it is to be considered a value judgment that resulted from a specific (disclosed and thought-through) context. Nor does this mean that one's own standards cannot claim intersubjective validity. Only the idea of absolute, universal value judgments has to be relinquished. This does not in turn justify a cultural relativist position, or, accordingly, reject the possibility of intersubjective value judgments.<sup>81</sup> Rather, we develop a position that allows us to form a contextualized value judgment based on extensive engagement—but not identification—with the Other and self-critical analysis—but not abandonment—of our own standards.<sup>82</sup>

Looking at our own heterogeneity and the heterogeneity of the Other can complicate the question of accountability to moral standards. Human rights and their understanding, for example, can be highly controversial within a legal culture. Representatives of authoritarian regimes will hold different views from local resistance groups. Resistance groups in the periphery and semi-periphery might even make human rights claims that surpass the human rights standards of the European mainstream, for example, in relation to social rights.<sup>83</sup>

## 2. Method and Understanding

Depending on how we deal with our own standards, we develop different methodological approaches. It follows that our own perspectives and categories have to be considered from a self-critical distance.

81 On these contextualized value judgments: *Grosswald Curran*, note 14, pp. 89 et seq.

82 See also *Susanne Baer*, *Verfassungsvergleichung und reflexive Methode: Interkulturelle und intersubjektive Kompetenz*, *ZaöRV* 2004, 735-758.

83 See *Judith Schacherreiter/Guilherme Leite Gonçalves*, *The Zapatista struggle for the right to land: Background, strategies and transnational dimensions*, in: *Andreas Fischer-Lescano/Kolja Möller* (eds.), *Transnational Social Rights*, Cambridge 2016, 735-758.

Here lies the specific potential of comparative law: our background and culture do not have to be a pitfall, they can also be an opportunity to shed new light on the Foreign from a distance. Even the resulting misunderstandings can be useful. The dialectic tension between the Known and the New is thus not a disturbance, but a source of understanding to be maintained as such.<sup>84</sup>

It should therefore not be the aim of comparative law to immerse itself completely in the Other, thereby rejecting the Own.<sup>85</sup> Rather, we have to rethink the patterns of comparative analysis, which generate our conceptions and our knowledge of the Other. According to Said, we have to forget the idea of being able to represent a foreign culture "the way it really is." Representations of foreign cultures, according to Said, are never a reflection of their inner truth, but always embedded in the perspective and discourse of the representor. Comparative analysis should not be about finding the inner truth of foreign cultures, but reflecting the dynamics of the processes of representation.<sup>86</sup>

Said expressly states that the fact that a foreign culture cannot be observed impartially from one's own perspective does not mean that the West cannot generate any understanding about the Orient.<sup>87</sup> The realization that comparative understanding is biased by one's own culture does not necessarily imply cultural relativism, which rejects any possibility of understanding a foreign culture due to absolute incommensurability. Nor does it mean that one's own perspective cannot be transcended at all. Transcendence in this sense does not mean total independence, but critical "distancing" and questioning.<sup>88</sup> Legal comparison is thus possible, not in the sense of perfect commensurability and perfect understanding of the Other, but as an attempt at coming as close as possible to this ideal, thereby accepting that a certain distance will remain.<sup>89</sup> Ultimately, it is this very distance that makes specific comparative understanding possible.

Returning to the above-mentioned example of private property, the comparison of private land property (as established in European countries) and the communal property in countries of the periphery can of course generate intersubjective understanding – provided the respective historical, economic, social and cultural contexts are considered. The objective for the European comparatist should not be to promote or demote the known concept of private property, but to engage with different forms of land management and their implications, try to understand them, and then for the comparatist to examine their own conception of private property based on this understanding.

84 Similarly: *Frankenberg*, note 2, pp. 413 et seq., 445.

85 *Frankenberg*, note 2, p. 415 names and criticizes this approach as "going native".

86 *Said*, note 12, pp. 272 et seq., 322, 331.

87 *Said*, note 12, p. 322.

88 *Frankenberg*, note 2, also calls for such "distancing", note 12, pp. 414 et seq., 442 et seq.

89 See *Grosswald Curran*, note 14, pp. 90 et seq.

### 3. Systematization of Legal Systems

Section II. 3. discusses the problem of classifying the world into rather large and seemingly uniform units of legal culture, namely legal families or legal spheres. Moreover, these units are presented as universal categories while, in fact, they are derived from western, European legal systems. Thus they reinforce the universalization of European standards and the tendency to classify foreign legal systems into the binary system of the Same and Other. These categories obscure the side-by-side presence of differences and similarities, the inconsistencies and variety inside one legal system, as well as the mutual influences among different legal systems. This often goes hand in hand with implicit hierarchies topped by western, European legal systems.

So does this mean that the concept of legal spheres and families should be abandoned altogether? Is Said right when he writes that every classification of the world into large, fundamentally different cultural units risks racial discrimination between superior and inferior cultures and societies<sup>90</sup>, and that all knowledge based on those "hard-and-fast distinctions" tends towards polarization, hierarchization, and racist generalization?<sup>91</sup>

Considering the explanations above concerning the necessity of analyzing one's own processes of representation, legal families and spheres should be critically examined as the result of European processes of representation, thereby taking into account the side-by-side presence of similarities and differences as well as the mutual influences between cultures. Reference should be made to the latest edition of Schlesinger's *Comparative Law*, which largely abstains from generalizing categorization and, although maintaining the traditional distinction between common law and civil law, relativizes these categories with regard to a postcolonial context.<sup>92</sup> Moreover, a whole chapter is dedicated to legal transplants, thereby illustrating hybridity and including postcolonial themes.<sup>93</sup>

Another approach could be to abandon any geographic-cultural classification and to develop new forms of classification. Mattei<sup>94</sup> proposes a taxonomy that is completely without geographic-cultural criteria and resumes Max Weber's idea of social behavior being influenced by three sources, namely law, politics, and tradition. Correspondingly, he distinguishes between "professional law," "political law," and "traditional law."<sup>95</sup> According to Mattei, every legal system is determined to differing degrees by these three patterns of law. Their significance varies depending on the legal area and historical context.<sup>96</sup> These three

90 *Said*, note 12, pp. 206 et seq., 232.

91 *Said*, note 12, pp. 46, 119 et seq., 322.

92 *Mattei/Ruscola/Gidi*, note 23, p. 230.

93 *Mattei/Ruscola/Gidi*, note 23, pp. 223 et seq.

94 *Mattei*, note 23.

95 *Mattei*, note 23, pp. 12 et seq., 19 et seq.

96 *Mattei*, note 23, pp. 14, 16 et seq.

patterns, as well as legal transplants and legal formats<sup>97</sup>, are, according to Mattei, the determining factors of law<sup>98</sup>. This leads him to adopt a pluralistic and open conception of law, viewing legal systems as heterogeneous and mutable. His categories do not classify the world into large camps of (legal) culture, but instead encourage us to uncover the nuances within one legal order or legal culture. Although Mattei has been criticized for generalizing the differences between legal culture himself when implementing his theory,<sup>99</sup> his taxonomy remains in principle an alternative to the traditional categorizations and avoids homogenization and essentialism.<sup>100</sup>

Another possibility, proposed by Glenn, is to divide the world into legal traditions. This approach also emphasizes historical developments and changes, as well as mutual influences, and encourages a comparative analysis of the permeability and the side-by-side presence of different legal traditions in contrast to a fixed categorization into legal spheres or families.<sup>101</sup>

#### 4. Legal Transplants

The analysis of legal transplants is pivotal in order to overcome essentialist conceptions of legal cultures because it emphasizes mutual influences between legal systems during their historical development. This analysis reveals legal systems to be hybrid and permeable entities characterized by multiple influences, differences, and ambivalences. The study of legal transplants is not about determining the nature or the characteristic features of a homogenous legal culture, but understanding its hybridization.

As explained in II. 4., the analysis of legal transplants is also in danger of committing the either-or fallacy of ethnocentrism versus cultural relativism. Either western transplants are promoted as a means of guaranteed success in peripheral or semi-peripheral countries, or the differences in legal systems and cultures are overemphasized to a point where legal transfers appear impossible. However, the cultural relativist position—due to its defensiveness—fails to deliver an accurate critique of "legal imperialism" because the subject countries' legal systems are hardly ever completely different from those of the imperialist country, and the success of a nuanced engagement between the two cannot automatically be ruled out.

Bhabha's concept of hybrid cultures and the Third Space presents an alternative for dealing with legal transplants. The Third Space hosts dialogue, negotiations, and translation

97 This term, coined by Rodolfo Sacco, refers to the various, and possibly contradictory, formulations of the same rule, which include for example the wording of statutes, judicial statements and academic doctrines, *Rodolfo Sacco*, Legal Formants: A Dynamic Approach to Comparative Law Part I und Part II, *AJCL* 39 (1991), pp. 1-34 and 343-401.

98 *Mattei*, note 23, pp. 14, 15 et seq., 20 et seq.

99 *Abu-Odeh*, note 2, p. 821; *Harding*, note 2, pp. 48 et seq., *Husa*, note 23, p. 32.

100 In spite of her criticism, in principle similarly: *Abu-Odeh*, note 2, p. 821.

101 *Glenn*, note 23, pp. 425 et seq., 428 et seq., 436.

between cultures; here, different cultures meet as equals, comparing and mutually questioning each other.<sup>102</sup> In a setting like this, legal transplants can occur successfully even between very different contexts since the process of transplantation is carried out neither by ignorantly imposing legal institutions nor by simply implementing legislation devoid of contextual meaning. In the Third Space, new legal culture and meaning can be created. Legal transfer is understood as a creative process.

### *V. Conclusion*

In summary, postcolonial theory can help comparative law to develop contextualized value judgments based on extensive engagement—but not identification—with the Other and self-critical analysis—but not abandonment—of our own standards. This implies to understand comparison not in the sense of perfect understanding of the Other, but as an attempt at coming as close as possible to this ideal, thereby accepting that a certain distance will remain and accepting this distance as a source of knowledge. Postcolonial analysis furthermore encourages to categorize legal systems with an emphasis on historical developments and changes, as well as mutual influences and to promote legal transplantation between different contexts as a creative process.

Thereby, comparative law can tap into its very own source of understanding: the relationship between the Self and the Other with all its heterogeneity and ambiguity. If comparative law does not find a way to transcend the either-or dichotomy of ethnocentrism and cultural relativism—either through this approach or another—it is in danger of losing this valuable source of understanding.

102 See above (III.2.).