1999

Combating Legal Ethnocentrism: Comparative Law Sets Boundaries

Nora V. Demleitner
Washington and Lee University School of Law, demleitnern@wlu.edu

COMBATING LEGAL ETHNOCENTRISM: Comparative Law Sets Boundaries

Nora V. Demleitner*

The pulse of traditional comparative law in the United States has slowed down dramatically—becoming faint and almost indiscernible. The dual attacks of postmodernism and globalization have undermined the already amorphous purpose of comparative law and displaced it with more modern and trendy jurisprudential doctrines and theories of international or global law.

As a result, comparative law is in a state of disorientation; inside and outside of legal academia, it appears irrelevant and outdated. Comparative law scholars seem unable to define and develop comparative law as a coherent field of scholarship that serves any social purpose.[1] The reasons for this lack of focus are manifold:

> [M]any of [the comparative law techniques and methods] were developed in the late nineteenth century . . . [and] like the legal science of which they were a part, they have not proved fully adequate to the analysis of contemporary problems. . . . The conceptual apparatus developed in the *belle epoque* of comparative law was characteristic of the normal legal science of that period. It concentrated on formal rules, institutions, and procedure; it took the primacy of private law for granted, largely ignoring public law; and its sources-of-law theory assumed the centrality of case law in the Anglo-American systems and of civil codes in the Romano-Germanic systems.[2]

---

* Visiting Professor, University of Michigan Law School (Fall 1999); Professor, St. Mary's University School of Law, San Antonio, Texas. B.A., Bates College, 1989; J.D., Yale Law School, 1992; LL.M., Georgetown University Law Center, 1994. Many thanks for greater insights and encouragement go to the participants at the Comparative Law conferences at the University of Michigan and the University of California, Hastings College of the Law, the participants at the panel discussion on Comparative Law at the 1998 Law & Society Conference, David Gerber, James Gordley, Helmut Heiss, Marc Miller, Leslye Obiora, Michael Smith, and June Starr.

1. *Cf.* David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1063 (1974) (describing state of "law and development studies" in the early 1970s).

2. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 3 (1987).

In addition, comparative law focused on contrasting national legal systems rather than examining the non-dominant or informal sub-systems within the dominant legal structure or the developing international system.

The apparent apathy and lack of direction in the field might also be connected to the practical focus of comparative law in the past. Comparative law has traditionally served two overarching purposes. First, comparative law promised to provide insights on our own legal order through a comparison with other legal systems. However, modern jurisprudential doctrines, such as critical legal studies, legal feminism, law and economics, and critical race studies, have replaced comparative law by playing that role in a more challenging, provocative and appealing way.

The second purpose of comparative law was to illuminate the structures and internal processes of foreign legal systems, either for the purpose of legal harmonization, or to facilitate negotiations with foreign lawyers and business entities. However, these goals appear irrelevant and outdated in light of U.S. federalism and the convergence within the international legal system.[3] In the early twentieth century Justice Brandeis commented that the states in the U.S. federal system may serve as legal laboratories.[4] Why look abroad for examples of distinct legal approaches if different ideas can be developed and tested in a more homogeneous and therefore more transferable setting? And why look abroad if our own legal order appears so different and maybe even superior that it is difficult or impractical to implement legal ideas from abroad at home?[5] Another more recent development seems to render the comparative enterprise even more unnecessary. With the export of U.S. business laws and procedure, foreign legal systems increasingly resemble our own. If that is the case, why compare these systems to our own at all?[6]

---

3. In contrast to many Western European countries which require domestic law commissions to obtain information on foreign legal systems before proposing new legislation, neither the charters of state law revision commissions nor the American Law Institute operate under similar mandates. *See* Eric Stein, *Uses, Misuses and Nonuses of Comparative Law*, 72 NW. U. L. REV. 198, 210 (1977).

4. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

5. John Langbein has called the "ideology, which asserts the superiority of Anglo American legal procedure . . . 'The Cult of the Common Law.'" John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 551 (1995); *see also* James Podgers, *Message Bearers Wanted*, 85 A.B.A. J. 89 (Apr. 1999) (citing an A.B.A. survey that found eighty percent of survey respondents consider the U.S. justice system "the best in the world").

6. After World War II, many U.S. companies assumed that ultimately management styles would converge on their model. That belief informed the teaching of management theory and practice. *See* Joel D. Nicholson et al., *Survey of Selected Research on Values, Work Beliefs, and Socioeconomic Attitudes*, in CROSS-CULTURAL ANALYSIS OF VALUES AND POLITICAL ECONOMY

Because of these global changes, legal disciplines other than comparative law might be better situated to analyze foreign legal systems. For example, if knowledge about a foreign system per se is required, then a foreign law scholar rather than a comparativist will be the appropriate source. When issues connected to globalization and internationalization arise, then public and private international lawyers, international legal organization specialists, and conflicts of laws scholars are considered better qualified to respond than comparativists.

Will the decline of the recognition of comparative law lead us to witness its death? Funeral arrangements may be a bit premature. Comparative law has another opportunity to carve out an important niche for itself. In a multicultural society and a more integrated world, its inquiries should pursue the ultimate goal of overcoming prejudice and stereotyped notions of other cultures and legal systems. Like historians of religion, comparativists should "take responsibility, in a pluralistic but strife-ridden world, to use the comparative mirror to promote community rather than disunity."[7] In that way, comparative law can establish a unique place for itself that situates it squarely within postmodern discourse as well as the on-going human rights debate.

I. THE ETHNOCENTRISM OF LAW

Where do law and legal order begin, and where does culture end? A broad interpretation of culture renders it difficult, if not impossible, to delineate the two clearly.[8] Culture is "the interactive aggregate of common characteristics that influence a human group's response to its environment."[9] By that definition, law and legal ideologies are a facet of culture; they help construct and deconstruct culture.[10] Legal order "encompasses systems of political arrangements, social relations, interpersonal interactional practices, economic processes, cultural categorizations, normative beliefs,

---

ISSUES 19, 28 (Dan Voich, Jr. & Lee P. Stepina eds., 1994). A similar development can now be observed in law.

7 Rita M. Gross, *Studying Women and Religion: Conclusions Twenty-Five Years Later*, in TODAY'S WOMAN IN WORLD RELIGIONS 327, 358 (Arvind Sharma ed., 1994).

8 *See* Michael King, *Comparing Legal Cultures in the Quest for Law's Identity*, in COMPARING LEGAL CULTURES 119, 132 (David Nelken ed., 1997).

9. GEERT HOFSTEDE, CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK RELATED VALUES 25 (1980).

10 *See, e.g.*, BERNHARD GROSSFELD, THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW 41 (Tony Weir trans., 1990); Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44, 48 & n.30 (1997).

psychological habits, philosophical perspectives, and ideological values."[11] Even though scholars can study law, culture and society separately, in order to comprehend the causes, meanings and consequences of legal and societal change fully, they must analyze these three components together.[12] Therefore, comparative law must encompass the study and comparison of "our" law *and* society, and the law *and* society of a different group.[13] That means that comparative law "is necessarily inter- and multidisciplinary scholarship."[14] While many comparativists have recognized and embraced this conception of comparative law, the traditional perspective of comparative law differs dramatically because it is deeply grounded in the civil law notion of law as a science.[15] The comparative study of law, however, can only be fruitful if it is informed by data on the actual operation of different legal systems and the role of the legal system within the overall societal structure. A mere positivist approach may conceal blatant differences or similarities in the application of legal rules,[16] and therefore also mask critical variations in legal and non-legal culture. This holds true for the legal system of the United States where "diversity of practice" is often concealed, and applies with even more force to pluralistic legal systems and societies in turmoil.[17]

The limitation on what appears like an unbounded field of comparisons, is provided by the term "law." Law is "a particular type of social norms supported by a set of values/ideas under the legitimate authority/power of a

---

11 Janet E. Ainsworth, *Categories and Culture: On the "Reconfiguration of Norms" in Comparative Law*, 82 CORNELL L. REV. 19, 28 (1996).

12 *See* Laura Nader, *Introduction*, in LAW IN CULTURE AND SOCIETY 1, 7-8 (Laura Nader ed., 1997); Mark Van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT'L & COMP. L.Q. 495, 498 (1998).

13 The term "group" is intentionally being used here since "group" connotes not only foreign legal systems but also the elements of foreign systems introduced into "our" legal order through migrant or other distinct communities. *See* Stein, *supra* note 3, at 201 (quoting Otto Kahn-Freund who concluded that "'[t]he use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores this context of the law'").

14 Susanne Baer, *A Different Approach to Jurisprudence? Feminisms in German Legal Science, Legal Cultures, and the Ambivalence of Law*, 3 CARDOZO WOMEN'S L. J. 251, 282 (1996) (describing feminist legal science).

15 *See* Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 62 (1998).

16 *See* Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 551 (1990); *see also* Trubek & Galanter, *supra* note 1, at 1068 ("The comparative lawyers saw in 'law and development' a way to break out of the rather sterile comparison of legal rules which had dominated comparative law studies").

17 Trubek & Galanter, *supra* note 1, at 1082.

certain social organization."[18] In that respect, law is different from culture and requires analysis based on these narrower terms. While legal rules provide the "hard" legal standards, "*legal postulates* in the form of ideas or ideology. . . base, orient and revise the legal rules."[19]

Comparative law promotes "thinking with another set of legal concepts and categories, [so that] we can then look back at our own legal world with a sense of it as newly strange."[20] Not unlike feminist legal scholarship, at its best, comparative law can be sensitive to the consequences of laws, skeptical of the legal system's claim to encompass all of social reality and practice, and critical of the law's discourse of dominance. "It confronts us with our own hidden conceptual, ideological framework."[21] Consequently, it offers different perspectives on the traditional view of the legal system in which we matured as people and as lawyers.[22]

But there must be more to comparative law. If its sole goal were to learn about our own law and culture, then modern jurisprudential theories which explain the operation of the domestic legal system would be equally useful. Yet even more disturbingly, comparative law--when its exclusive aim is to provide a reflection of ourselves—may lead to a merely superficial analysis of the foreign system.[23] Therefore, it can become a tool of ethnocentrism and prejudice.[24] Only awareness of its destructive potential will allow comparativists to avoid those pitfalls and develop a comparative law adequate to combat the ethnocentrism already embedded in law.

At its worst, comparative law will merely confirm personally, communally, and systemically preconceived notions about the comparativist's own system, and most distressingly, other legal systems and cultures. Lawyers are prone to accept stereotypes and make assumptions about other systems since they are frequently "caught by the thought systems of their own cultures and the way that different disciplinary lenses in legal studies

---

18. Masaji Chiba, *Other Phases of Legal Pluralism in the Contemporary World*, 11 RATIO JURIS 228, 240 (1998).

19. *Id.* at 241.

20. Kim Lane Scheppele, *The History of Normalcy: Rethinking Legal Autonomy and the Relative Dependence of Law at the End of the Soviet Empire*, 30 L. & SOC'Y REV. 627, 635 (1996).

21. Van Hoecke & Warrington, *supra* note 12, at 497.

22. My view of what American comparative law is and should be is dramatically different from the European, and especially the German vision of comparative law. *See* Baer, *supra* note 14, at 282 ("Prominent German legal scholars consider legal science to be primarily 'individual and disciplinary,' practiced alone and never crossing the boundaries of disciplines.")

23. *Cf.* UMA NARAYAN, DISLOCATING CULTURES 138 (1997) (critiquing use of Third-World context or individuals solely as "mirror[s] for Western self-reflection").

24. The term "ethnocentrism" is used here in its traditional meaning. "Ethnocentric" has been defined as the "belief in the superiority of one's own ethnic group." WEBSTER'S II NEW COLLEGE DICTIONARY 386 (1995).

screen out data."[25] Rather than questioning a previously constructed reality, comparative law can serve to affirm unwarranted assumptions about the "other." In that way, "'[b]ad comparative law is worse than none at all.'"[26]

The challenge in comparative law is not merely an intellectual one. Legal comparativists share with religious comparativists an emotional attachment to their own religion/law.[27] "For doctrinal law is a parochial science in the sense that it is of little concern to the traditional lawyer how other legal systems are treated, as long as his own system is approached with the proper respect."[28] The affinity for one's own system implies that any negative findings about that system will be reinterpreted so as to be reconcilable with a world view that elevates one's domestic system. For example, abuses that would lead to the conclusion that a violation of human rights has occurred are considered mere aberrations at home. If the same abuses take place abroad, however, they are deemed systemic, sometimes even culturally ingrained. For example, in the Western world, *sati*, or "widow burning," as previously practiced in India, is viewed as a serious human rights violation indicative of the low value Indian culture assigns women. Because of the Western definition of free will, however, we do not deem face lifts and cosmetic breast enlargements to be human rights violations. Even though frequently bemoaned, most of society views them as singular events rather than gauges of female oppression. On the other hand, Westerners often see *sati* as characteristic of a larger societal problem. While *sati* is defined as a crime in India, no pressure group has arisen in Western countries to advocate the criminalization of so-called "cosmetic surgery."

However, the ethnocentrism of law goes yet further. Karl Llewellyn aptly said: "Nowhere more than in law do you need armor against that type of ethnocentric and chronocentric snobbery—the smugness of your own tribe and your own time: *We* are the Greeks, *all* others are barbarians."[29] Such a warning is particularly compelling in light of the growing comparative focus on non-European societies. Preconceived notions of the inferiority of such legal systems are more prevalent even though they are increasingly more subtle. When another legal system is characterized as inferior, two

25. LAURA NADER, HARMONY IDEOLOGY 317 (1990).

26. GROSSFELD, *supra* note 10, at 39-40 (quoting Koschaker as "[c]ited by van Dunné, 'The Use of Comparative Law by the Legislator in the Netherlands'. *Netherlands Reports to the Eleventh International Congress on Comparative Law* 37 (1983).").

27. *See* WILLIAM A. LESSA & EVON Z. VOGT, READER IN COMPARATIVE RELIGION: AN ANTHROPOLOGICAL APPROACH 4 (4th ed. 1979); ERIC J. SHARPE, COMPARATIVE RELIGION: A HISTORY 318 (2d ed. 1986).

28. Vilhelm Aubert, *Competing Models of Law in Western Societies*, in LAW IN CULTURE AND SOCIETY, *supra* note 12, at 273, 274.

29. K. N. LLEWELLYN, THE BRAMBLE BUSH 42-43 (7th prtg. 1981).

conclusions follow first, an inferior system never has anything to teach a superior system, and second, the superior system is justified in challenging, intervening in and changing an inferior structure. Ultimately, this attitude warrants the destruction of legal diversity—domestically and globally.

While legal ethnocentrism affects the view of *all* other legal systems, its effect is most noticeable on the legal systems in non-Western, non-Christian, non-white, and economically less developed countries. Colonialism and Social Darwinism were the primary contributors to the ethnocentric illusion of the superiority of Western cultures, and with it Western law.[30] The economic and political success of Western regimes has continued to reinforce that attitude.

The academic discipline assigned to study particular societies also indicates the disregard for the legal traditions and cultures of the so-called "developing world." While the differences between common law—the United States and England—and civil law countries in Western Europe have been the subject of comparative *law* analysis, the legal systems of countries in Africa, the Middle East, and to a lesser extent, Asia, have frequently been delegated to the realm of *anthropology*.[31] Presumably the comparison of similar legal systems is viewed as exciting and intellectually stimulating because we can understand and identify with the "reasoning and results" generated in countries that appear legally and culturally alike.[32]

The Western belief in the superiority of its legal systems has triggered a contest for the preeminence of a specific Western legal system in many developing countries, especially in Eastern Europe and the former USSR. Western lawyers have become missionaries,[33] engaged in one of many

30 *See* EUGENE HILLMAN, MANY PATHS: A CATHOLIC APPROACH TO RELIGIOUS PLURALISM 1 (1989).

31 *See, e.g.*, JOHN H. BARTON ET AL., LAW IN RADICALLY DIFFERENT CULTURES (1983). For concerns about bias in anthropological work, see Antoinette Sedillo López, *A Comparative Analysis of Women's Issues: Toward a Contextualized Methodology*, 10 HASTINGS WOMEN'S L.J. 347, 353 (1999).

32 Walter O. Weyrauch, *Oral Legal Traditions of Gypsies and Some American Equivalents*, 45 AM. J. COMP. L. 407, 407 (1997).

33 Law schools, national and state bar organizations, the U.S. government and its entities, and private foundations have become involved in efforts to teach free market ideology, democratic principles, and the rule of law in Eastern Europe and the former Soviet republics. *See generally* John C. Reitz, *General Report on Reciprocal Influences and Evolving Legal Systems*, *in* COLLECTION OF GENERAL REPORTS OF THE XVTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW (Académie Internationale de Droit Comparé ed., forthcoming 1999) (manuscript on file with author). Professor Reitz is the editor of a forthcoming book by Mecro Publishers, which will include a revised version of his general report together with all the national reports on this topic.

marketplace struggles fought in transitional systems.[34] The competition for the adoption of a particular legal model, however, is often not grounded in comparative inquiry but rather is based on beliefs about the presumed inferiority of the "other" system, restricted to a reductionist understanding of "foreign" legal cultures and informed by marketing strategies that extol the virtues of the product peddled.[35] The hype surrounding the adoption of Western/U.S. law is yet more surprising in light of the domestic challenges to the dominant legal order launched by critical legal studies, radical feminists and critical race theorists, among others. It might indicate, however, how persistent and resilient the belief in the assumed superiority of the Western legal system is; it survives despite serious intellectual challenges levied against it at home.

This worst case scenario of comparative law must not become its sole reality. Rather, comparative law must develop into a field that provides the necessary bridge between the domestic critique of the governing order and a more searching analysis of foreign systems so as to acknowledge the multiple legal realities, values and ways to resolve conflict. To accomplish these goals, the legal community will be required to overcome its complacency and challenge the assumptions underlying our legal culture and legal system, and "expand[ ] our perceptions to encompass new visions and new modes of vision."[36]

II. COMBATING LEGAL ETHNOCENTRISM: THE VALUE OF COMPARATIVE LAW

This section will highlight the value of comparative law in overcoming legal ethnocentrism. Comparative law can reveal and equalize the relationships between different legal cultures. The recalibration of comparative law and its potential are exemplified in two situations. First, the interplay between the legal culture of the host country and the migrants can illuminate legal changes in both systems, as well as create new, mixed systems. Second, comparative law can provide a crucial role in the human rights debate by deconstructing the static notions of universality and relativism.

---

34. *Cf.* ALAN RACE, CHRISTIANS AND RELIGIOUS PLURALISM: PATTERNS IN THE CHRISTIAN THEOLOGY OF RELIGIONS 1 (1982) (stating that with the end of "religious and cultural isolationism . . . religions jostle with one another in a market-place of possibilities")

35. *See* Reitz, *supra* note 33.

36. Curran, *supra* note 15, at 66

The on-going globalization of all aspects of life has led to increasing cultural penetration. The choices of food, clothing, religions, and life-style options have dramatically expanded all over the world because of the development of global media and the facilitation of international travel. States are no longer nations, if they ever were; rather the same geographic space is inhabited and shared by groups with diverse cultural and legal backgrounds.[37] Therefore, the focus on nation-states as the boundary of legal analysis has become unsatisfactory. The erosion of national identities has contributed to the local resistance to globalization, and helped strengthen particularistic identities, often through violent means. Nevertheless, internationalization and globalization have brought even vastly diverse societies closer together. Primarily because global trade and modern means of communication and transportation—of goods and people—have led to closer connections even between remote areas of the world, "new identities of hybridity" have replaced national identities.[38] However, there is reluctance to recognize, let alone accept, such changes politically, economically, socially, and legally. The degree of such denial provides "a valuable clue for coming to know [particular] culture[s]."[39]

While the original purpose of comparative law was to facilitate European cross-border trade through a comparison of legal rules,[40] today it can assist in mediating conflicts that may arise from the cross-border movement of persons who are imbued with the values of the legal culture into which they were born. Such a practical component can lead to greater insights. Comparative law can reveal how another person perceives the world, and how law contributes to and reflects the culture of a country. The ultimate goal of such an inquiry is to establish our own identity. But rather than seeing the others as not so much like us,[41] we should see ourselves as very similar to others while acknowledging, accepting, embracing, and even

37. *See* Ann Belinda S. Preis, *Human Rights as Cultural Practice: An Anthropological Critique*, 18 HUM. RTS. Q. 286, 289 (1996); *see also* Stuart Hall, *The Global, the Local, and the Return of Ethnicity*, *in* SOCIAL THEORY: THE MULTICULTURAL AND CLASSIC READINGS 626, 631 (Charles Lemert ed., 1999) ("This formation of ethnic-minority 'enclaves' within the nation-states of the West has led to a 'pluralization' of national cultures and national identities."); Legrand, *supra* note 10, at 45 n.7.

38. Hall, *supra* note 37, at 630.

39. Legrand, *supra* note 10, at 46.

40. *See* Albin Eser, *The Importance of Comparative Legal Research for the Development of Criminal Sciences*, *in* INTERNATIONAL ENCYCLOPAEDIA OF LAWS; WORLD LAW CONFERENCE: LAW IN MOTION 492, 495 (Roger Blaupain ed., 1997).

41. *See* Gunter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L. J. 411, 414 (1985) ("[T]he unconscious spell . . . holds us to see others by the measure of ourselves . . .").

admiring our differences.[41] Instead of taking ourselves as the yardstick, or as the norm, we must situate ourselves equidistant from the "others" in the world, whoever they might be. This will require us to "defin[e] ourselves neither by distancing others as counterpoles nor by drawing them close as facsimiles but by locating ourselves among them."[42]

After recognizing commonalities and similarities, it is then necessary to manage the difference, not to abolish it.[44] Even an internationalized world and a global world society should not connote uniformity but rather equality in diversity and difference, since difference often drives creativity.[45] The difference between men and women, for example, which leads to different perceptions and experiences, is frequently portrayed as complementary and necessary to create a whole. The differences between individuals from different legal cultures should be viewed similarly. Only if difference is conceived in this positive, affirming light can it also make interdependency—whether between men and women, between states, or between individuals in a multi-cultural society—appear non-threatening and even enriching.[46] Should this perceptual reevaluation fail, difference will continue to stand for a threatening, alien quality.[47]

Two dynamic developments in society and the legal academy present an opportunity for comparative law to accomplish these goals. First, national and international legal systems, driven by economic globalization, migration

---

42. *See* Legrand, *supra* note 10, at 62.

43. CLIFFORD GEERTZ, LOCAL KNOWLEDGE. FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 186 (1983).

44. *See id.* at 216.

45. The debate about difference and sameness also runs through feminist jurisprudence. *See, e.g.*, Christine A. Littleton, *Reconstructing Sexual Equality [1987]*, *in* FEMINIST LEGAL THEORY 35 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (critiquing feminist legal theories based on equality and difference models).

46. *Cf.* Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *reprinted in* SOCIAL THEORY, *supra* note 37, at 447-48.

> Advocating the mere tolerance of difference between women is the grossest reformism. It is a total denial of the creative function of difference in our lives. Difference must be not merely tolerated, but seen as a fund of necessary polarities between which our creativity can spark like a dialectic. Only then does the necessity for interdependency become unthreatening. Only within that interdependency of different strengths, acknowledged and equal, can the power to seek new ways of being in the world generate, as well as the courage and sustenance to act where there are no charters.

Id. at 448.

47. Historically, men have often portrayed women in such a manner, and whites have viewed other races as threatening. *See, e.g.*, Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213, 1230 (1997); Tseming Yang, *Race, Religion and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 135 n.79 (1997).

and the advancement of human rights, have begun to mix, intersect and cross-fertilize.[48] The resulting overlap of different normative orders in space and time leads to legal pluralism and intersectionality, the intersection of different legal orders which are "non-synchronic and thus result in uneven and unstable mixings of legal codes."[49] Second, domestic interdisciplinary approaches to law now conceptualize law very differently.[50] Among the most prominent of these approaches are law and economics, law and feminism, and law and race. These progressive modern jurisprudential theories have been constructed to address domestic problems, and have therefore focused primarily on societal dislocations at home. Despite their inward-looking focus, they can innovatively and appropriately assist in exploring foreign legal systems because they are concerned with the role law plays in any society.[51]

Folding these two developments into comparative law will help to illuminate the differential impact of law and varying conceptions of legal order at home and abroad:[52] "varieties [of legal methods will be turned] into commentaries one upon another, the one lighting what the other darkens."[53] While "complete understanding of a foreign legal institution is almost impossible to attain,"[54] adding the methodological approach of comparative law to the domestic approaches presently used will permit innovative analysis of the same phenomenon or question so as to produce distinct but mutually enriching explanations that reveal a fuller picture of the legal system's actual workings in its place of origin. Moreover, this method of analysis will move away from the still privileged discourse of inter-state differences to a more differentiated consideration of inter- and intrajurisdictional distinctions.[55]

48. *See generally* STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING (Esin Örücü et al. eds., 1996).

49. Boaventura De Sousa Santos, *Law: A Map of Misreading. Toward A Postmodern Conception of Law*, 14 J.L. & SOC'Y 279, 298 (1987).

50. *See, e.g.*, Sanford Levinson, *Judge Edward's Indictment of "Impractical" Scholars: The Need for a Bill of Particulars*, 91 MICH. L. REV. 2010, 2014 (1993).

51. In that respect, they might be able to restore the damage done by another domestic jurisprudential movement, legal realism, to comparative law. *See* Langbein, *supra* note 5, at 551.

52. *Cf.* Curran, *supra* note 15, at 44 (advocating approach to comparative law that "allows for findings of irreducible differences among legal cultures").

53. GEERTZ, *supra* note 41, at 233.

54. GROSSFELD, *supra* note 10, at 38.

55. *Cf.* Curran, *supra* note 15, at 47 ("[T]raditional categories of legal analysis obfuscate differences within those categories.").

A. Illuminating the "Other" at "Home": Migrants and Two Legal Systems

Postmodernism and modern jurisprudential movements have revealed the multiple "others" in our societies and the ways in which law has traditionally disadvantaged them.[56] Only relatively recently has the legal system begun to address the problems one group of "others"—migrants—experiences in adjusting to the legal system of the host society.[57] Often traditions inherited from another dominant legal system influenced the actions of migrants.[58] The host society's legal response has tended to be categorical, only sometimes tempered with mercy.[59] While the dominant U.S. legal system has viewed actions by migrants which are considered illegal in the United States as outright attacks on the existing legal order, little attention has been paid to the indirect influence of migrants on the legal system. This is surprising since historically the development of so-called mixed jurisdictions has been attributed to the flexibility and adaptability of law and the mobility of persons.[60] Might the current denial of the potential influence of these new migrants on the legal system be a result of the mainstream disregarding, exploiting, dismissing, and labeling the migrants as hailing from economically, politically, socially, and/or legally "underdeveloped" countries?[61] Might our legal system be so integral to our identity that any challenge from within cannot even be acknowledged? Might it be deemed so static that it is viewed as unable to evolve and adapt to changing circumstances?

Some scholars believe the reason for the denial of the influence of others on our legal system derives from our belief in the independence of legal systems: "[T]he concept of separate legal systems is related to statehood and is a reality of the last two centuries."[62] At bottom, all legal systems are mixed—derived from imported structures, concepts and ideas but also emanating from different normative systems which are based on customs, religions and languages, habitat and natural resources, families, geography

---

56 *See, e.g.*, Anthony E. Cook, *Foreword: Towards a Postmodern Ethics of Service*, 81 GEO. L.J. 2457, 2460-63 (1993).

57. *See* Van Hoecke & Warrington, *supra* note 12, at 522.

58 *See, e.g.*, Holly Maguigan, *Will Prosecutions for "Female Genital Mutilation" Stop the Practice in the U.S.?*, 8 TEMP. POL. & CIV. RTS. L. REV. 391 (1999).

59. *See, e.g.*, Bui v. State, 717 So. 2d 6 (Ala. Crim. App. 1997); Maguigan, *supra* note 58.

60. *See* Esin Örücü, *Mixed and Mixing Systems: A Conceptual Search*, in STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING, *supra* note 48, at 335, 341.

61 *Cf.* TRINH T. MINH-HA, WOMAN, NATIVE, OTHER 97-99 (1989) (explaining that use of the term "Third World" can be derogatory but also empowering to individuals from those countries).

62. Örücü, *supra* note 60, at 341-42.

and climate, conceptions of morality, and other features.[63] A fusion has occurred even in the development of international law as a result of colonization, which led to large scale two-way borrowing.[64] Despite such a penetrating mixture of law, the Western world has come to insist on the myth of a pristine, uniform, nation-state based legal system as the sole functioning model for a modern state. That myth emanates from the creation of a state system made up of independent and sovereign countries. In the future, mixed legal systems will become ever more important and predominant as they "reflect the needs of changing and shifting populations."[65] However, pressures for uniformity which are facilitated, and possibly even driven, by the information society and the missionary zeal of the exporters of Western notions of law will counter the increasing development of mixed legal systems in pluralistic populations.

While distinct legal systems may officially coexist on the same territory under equal conditions, covert legal pluralism implies imbalance of power and ultimately instability. Therefore, only the intermingling of the existing models will establish symmetrical coexistence and affirm the equal empowerment of all population groups. That is not to argue that this process will evolve quickly since "[t]he tenaciousness of law is assisted by legal language, by legal technique, by legal education, and by the stuff of law itself, in brief by lawyer's law, as well as by the principles of inertia and economy."[66]

Two different theories—assimilation and integration—have guided the reception of migrants into the host society. While assimilation presupposes that the migrant minority will ultimately disappear in the majority society, integration recognizes limited cultural and ethnic plurality based on a tolerance of difference, at least as long as the migrants' distinctiveness does not interfere with their functioning in the receiving country.[67] While social scientists acknowledge the different cultural traits that migrant groups bring with them when emigrating to Western countries, not much thought has been given to the notions of law and the legal order which they bring with them from their home countries. This is surprising since law has often been

63 *See id.* at 342; *see also* GROSSFELD, *supra* note 10, at 74.

64 *See* James Thuo Gathii, *International Law and Eurocentricity*, 9 EUR. J. INT'L L. 184, 197 (1998).

65. Oruçu, *supra* note 60, at 352; *see also* MINH-HA, *supra* note 61, at 98-99.

66. GROSSFELD, *supra* note 10, at 43.

67. *See* GRETE BROCHMANN, EUROPEAN INTEGRATION AND IMMIGRATION FROM THIRD COUNTRIES 112-13 (1996).

deemed, negatively or positively, "innate."[68] Nevertheless, both assimilation and integration doctrines demand that the migrants relinquish their received conception of law and legal order.

The view that migrants must shed their prior political allegiances and attitudes toward law and legal order replicates the old "liberal legalism paradigm" that dominated law for many years and is indicative of "profound issues of collective self-identity and the associated insecurities and fears, pride, and hope that run deep in the national psyche of modern nation-states."[69] Since we deem law an instrument for social change, migrants are assumed to internalize the values of the host country as a consequence of their compliance with its laws.[70] This notion is mirrored in the post-modern assumption that law and culture are identical. However, comparative law tests that assertion. A comparative assessment of legal systems ascertains what the migrants' pre-existing legal conceptions are and how they differ from the majority view of law. Without such an assessment, it would be impossible to analyze whether legal values or state-enforced norms can be separated from cultural values, or personally and socially enforced norms, and how they affect the assimilation or integration of migrants.

The answer to these questions will help determine the space needed and permitted for legal as compared to social difference between dominant and migrant groups. After all, in an ideal world, "social integration is a result of *interaction* and *communication*."[71] With respect to legal integration, only a mutual appreciation of the cultural embeddedness of law can preserve its legitimacy for all of society.[72] By seeing the "other" in society, the host society will reconstruct itself and its understanding of law. It will come to understand to what extent social values generally shape legal norms, and how far the two can diverge before needing realignment.

Since neither the territorially existing nor the newly arriving cultures are static, the social integration of migrants will lead to the creation of a new culture, including a new legal culture, by combining the migrant culture with the already existing culture.[73] Whether and how this occurs despite

---

68. *See* GROSSFELD, *supra* note 10, at 44. While Goethe referred to law as "transmitted, like some dread disease," *id.* (quoting Goethe's Faust, Part One, The Student Scene), law has also provided the necessary stability in democratic governments.

69. Astri Suhrke, *Foreword*, to BROCHMANN, *supra* note 67, at viii.

70. *See* Teubner & Galanter, *supra* note 1, at 1079-80.

71. BROCHMANN, *supra* note 67, at 112-13.

72. *See* WINNIFRED FALLERS SULLIVAN, PAYING THE WORDS EXTRA: RELIGIOUS DISCOURSE IN THE SUPREME COURT OF THE UNITED STATES 20-21 (1994) (describing one view of law within the American academic legal community).

73. The term "legal culture" includes institutions, behaviors, beliefs and attitudes held by the general population and legal professionals. *Cf.* Erhard Blankenburg, *Patterns of Legal Culture:*

resistance by the state will depend on the size and composition of the migrant community, on the legal status of its members, and on their political influence.[74]

Stratification within the migrant community is also likely to occur. While some of its members will continue to adhere to the cultural and legal notions of their homeland, whether present or past, others will move to adopt the values and the legal notions of the host country. An example is the refugee Hmong youth who practiced the traditional ritual of "marriage by capture" of a Hmong woman. The young woman, however, reported his action, and he found himself charged with and convicted of abduction and rape. Clearly, within the same migrant community, different norms have developed, some of which accord with the legal system of the host society.[75] The interaction between state law and community norms causes a clash of norms and values and creates a pluralism which leads to the modification of the existing legal structure merely by the young woman's choice of one system over the other.[76]

The resulting changes in the culture and legal system will not be solely the consequence of the addition or subtraction of certain cultural elements. Rather, "new cultural and institutional [and legal] expressions are being created using the symbols and institutions of the received tradition."[77] Architecture furnishes an appropriate analogy. Architects bound space in a functional way that is rooted in the purpose of a structure as well as the cultural setting in which it is located. When migrants or other non-majority groups inhabit such space, they often try to adapt it to help them define themselves and make "the space their own."[78]

The Netherlands Compared to Neighboring Germany, 46 AM. J. COMP. L. 1, 39-41 (1998) (using "legal culture" as comprehensive term encompassing behavior and legal institutions but not normative judgments).

74. *Cf.* Barbara D. Metcalf, *Introduction: Sacred Words, Sanctioned Practice, New Communities*, in MAKING MUSLIM SPACE IN NORTH AMERICA AND EUROPE 1, 12 (Barbara Daly Metcalf ed., 1996) (stating that the size of the migrant group, the legal status of individual members and characteristics of society as a whole help shape even the migrants' rituals and domestic life).

75. For background and analysis of this case, see Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?* 70 N.Y.U. L. REV. 36, 64-65 (1995); Rone Tempest, *Ancient Traditions vs. the Law*, L.A. TIMES, Feb. 18, 1993, at A1.

76. *See* Chiba, *supra* note 18, at 738.

77. Metcalf, *supra* note 74, at 7.

78. Mustapha Diop & Laurence Michalak, *"Refuge" and "Prison,"* in MAKING MUSLIM SPACE IN NORTH AMERICA AND EUROPE, *supra* note 74, at 74, 90.

The French "headscarf" case exemplifies how a migrant community challenged the legal conception of the majority culture.[79] Here, the migrant community produced a symbolic equivalent to the dominant religion which elicited a reaction by the native population that caused the migrants to use the legal tools existing in the host society to bring about change. The uniqueness of that legal response, however, is lost without an understanding of the legal culture of the migrants' country of origin.[80] While the case is usually cited as indicative of the challenge that fundamentalist Islam poses to secularized societies, which mandate the separation of church and state, it is possibly more indicative of the way migrant communities attempt to adjust to the legal system of their host countries, which have been shaped by their own cultural values.

The case of the Muslim girls' wearing headscarves to public school reveals the cultural and legal impact of French society on some migrants. The French government's response to the girls' action resulted in an absolute ban on the wearing of headscarves in public schools. The government deemed the clothing not only a challenge to French law but to the fiber of French society and its established legal order.[81] Subsequently, the French *Conseil d'Etat*, the highest administrative tribunal, ruled several times that the traditional Muslim headscarves are compatible with a secular educational system but left the decision in individual cases to the principals' discretion. Since that ruling Muslim girls and their parents have filed scores of lawsuits to overturn the discretionary decisions of principals prohibiting the wearing of headscarves.[82] The government's response illuminates the dominant French conception of the role of religious institutions in the state and of the functioning of educational institutions in the integration of migrants. The analysis of the interaction between the migrants' and the state's actions reveals competing views of law in one society.

A further comparison with the U.S. and British approach to the wearing of headscarves illuminates fundamentally different conceptions of the role of the state in the integration of migrants, and the role of religious institutions in public life. On a more macroanalytical level, this example serves as a case study of different conceptions of individual and group rights in a legal system and the differentiation of public and private space.

---

79 *See* Cynthia DeButa Baines, Note, *L'Affaire des Foulards - Discrimination, or the Price of a Secular Public Education System?*, 29 VAND. J. TRANSNAT'L L. 303 (1996).

80. *Cf.* Metcalf, *supra* note 74, at 12 (explaining that Muslim religious life in Western countries begins to diverge from traditional practice because of the impact of the host society and its expectations).

81. For background on the dispute, see generally Baines, *supra* note 79.

82. *See, e.g., id.* at 307.

Unlike the comparative law analysis I propose, the traditional analysis of state laws on the religion/church-state relationship would overlook the interplay between migrant and host society. In addition, it would fail to provide such a richly textured analysis of church/state relationships in different Western democracies. A culturally and legally comparative analysis situates the case in "a 'displaced discourse' of fear of difference and racism" which is located in the perceived threat to French political autonomy and cultural identity.[83] That fear is prevalent in most Western societies today but plays out in different contexts. In countries such as France and Germany the discourse about migrants and the domestic "other" centers primarily on religion and the incompatibility of the Muslim faith with Christian norms. In the United States and Great Britain, the parallel debate focuses largely on racial oppression and racism. While the different composition of the respective migrant groups accounts for some of that distinction, much is due to different legal norms and legal experiences.

The study of migrant groups within a larger, different culture reveals much about the legal systems in the migrants' home countries, compliance with those legal norms, and the migrants' ability and willingness to observe legal norms in their host society. It also presents a different picture of migrants as active participants in choosing the legal rule to follow rather than as mere passive recipients of formal law.[84] The Muslim headscarf case bears this out. In response to the rulings of the *Conseil d'Etat*, a number of Muslim girls used those legal decisions to fight their principals' denials of their expression of a religious/cultural value through particular clothing. To some extent, these girls and their communities embraced the legal norms and institutions of the host society to maintain their religious/cultural beliefs.

Enforcement of non-compliance with legal norms, in turn, reflects the values that the host society deems crucial to its survival. In the United States those perceived core values tend to be defended primarily with criminal prohibitions. A recent example is the federal legislation outlawing clitoridectomy.[85] This law, which threatens imprisonment of up to five years for anyone performing clitoridectomy, highlights the emphasis on bodily integrity in the U.S. legal culture and is part of the current campaign against violence committed against women and children. Therefore, its symbolic value, rather than its practical impact, is paramount.[86]

---

83 Metcalf, *supra* note 74, at 15.

84. *See* Chiba, *supra* note 18, at 239.

85. 18 U.S.C. § 116 (West Supp. 1999).

86. The law has been attacked as unnecessary, violative of principles of federalism and as ethnocentric. *See, e.g.*, Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1 (1997);

A mere statistical examination of normative compliance and non-compliance by majority and minority groups, however, will tend to conceal the reasons for such actions and the assumptions upon which they are based. For example, Turkish families in Berlin commonly fail to adhere to the minimum number of square meters legally required per inhabitant per housing unit.[87] The reason may be in part cultural, in part economic. Most likely, however, it is not a conscious attempt at defying the state or indicative of planned opposition to this particular regulation. The response of the Turkish families, once the infraction was brought to their attention, supports this conclusion: "Reactions from the Turks to the space requirement range from confusion to embarrassment, as they realize that they are being legally—and morally—sanctioned for what they take to be normal behavior."[88] This statement indicates that the German regulation is based on a spatial norm established and culturally accepted by the majority culture. Therefore, the reaction of the minority culture to the housing mandate illuminates the understanding of space in Germany and in Turkey, and the way in which that culturally determined conception is converted into law.

Other examples of clashes between migrant and "native" norms frequently arise in the criminal context when a migrant faces charges based on factual circumstances which would not constitute a criminal act in his country of origin.[89] For example, in recent years, new migrants in many Western countries have been charged with statutory rape or its legal equivalent for having had sexual intercourse with minors after having "married" them. While the girls were of the legally or socially permissible marriage age in their home countries, they were not under the laws of the host country, and the marriages were invalid.

A determination of the factual accuracy of the defense, which in the United States has been labeled "cultural," requires not only a study of the legal norms in the defendant's country of origin but also mandates consideration of the way in which law enforcement and the judicial system treat such an action there. Whether the defense is entertained in assessing the defendant's guilt and/or his punishment provides insight into the penal and migrant policies underlying the host country's legal system. Exclusion

---

Maguigan, *supra* note 58. For an in-depth discussion of the issue of female circumcision or female genital mutilation, see Colloquium: *Bridging Society, Culture and Law: The Issue of Female Circumcision*, 47 CASE W. RES. L. REV. (Winter 1997).

87. *See* Ruth Mandel, *A Place of Their Own: Contesting Spaces and Defining Places in Berlin's Migrant Community*, in MAKING MUSLIM SPACE IN NORTH AMERICA AND EUROPE, *supra* note 74, at 147-48.

88. *Id.* at 149.

89. *See* Eser, *supra* note 40, at 499.

of such a defense is indicative of the recipient country setting a threshold level for conduct required within its borders and demanding legal assimilation at least to that level. Consideration of such a defense, however, signals the recognition and validation of legal differences while establishing different tiers of behavior for distinct national, ethnic, racial, social and/or religious groups within its territory. In that way, a comparative law study of migrant recipient countries will illuminate their self-understanding as states and nations.

By studying the legal responses of migrant communities to the legal order established by the majority society (or by select portions of the majority society), comparative law will provide insights into the cultural understanding of the majority of migrant groups as well as the legal systems in the countries from which the migrants hail. In this way, comparative law allows post-modern jurisprudential approaches which frequently unravel how law is determined by power within one society to expand their analyses across national borders. Ultimately, such a combined approach may help preserve the legitimacy of law, which can only be guaranteed if the existing law corresponds with the cultural understanding of the population it governs. Moreover, such a comparative approach will illuminate the ongoing human rights debate, which is hindered by a lack of cross-discussion and a lack of understanding of other legal systems. This is knowledge that comparative law could and should inject.

B. Comparative Law and Human Rights: Uncharted Territory

Comparative law and human rights so far have largely failed to intersect even though they could enrich each other's discourse.[90] Comparative law has remained trapped in the belief that laws and legal institutions in a country are shaped solely by national characteristics, without any regard to the global society or even regional developments.[91] Therefore, human rights law with its global perspective has found comparative law inhospitable and unsuitable for analysis. On the other hand, to a large extent, the failing ability on part of the discussants to enter the legal and cultural understanding of the "other" has driven the false dichotomy in the human rights debate between universalism and relativism. One's own often limited and biased perspective has dominated any analysis of other systems. Comparative law can provide a

90. That does not hold true to the same extent for the intersection between comparative law and (public) international law. *See* GROSSFELD, *supra* note 39, at 19 ("For public international law and its general principles comparative law is vital.").

91. *See* King, *supra* note 8, at 132.

mechanism to control for such biases and allow for a more nuanced comprehension and appreciation of other systems.

While we have come to recognize and permit some plurality and diversity at home, the human rights debate itself continues to center around the universality of law and legal norms.

> [T]he fact that so many fundamental features of culture are universal, or at least occur in many isolated places, interpreted by the assumption that the same features must always have developed from the same causes, leads to the conclusion that there is one grand system according to which mankind has developed everywhere; that all the occurring variations are no more than minor details in this grand, uniform evolution.[92]

However, with respect to legal universality such a conclusion may be fatally flawed since existing variations might conceal very substantial differences, and/or the same phenomena might result from distinct causality.[93]

While universality may exist for some values at least at some level of abstraction, it might not be the general norm. Any general assumption of universality, however, will foreclose a searching, independent analysis of the norms underlying different legal cultures. Such norms can only be discovered through a study of the acceptance of the existing legal structure in a society. That requires recognition of the fact that those within another legal system will fundamentally disagree with each other about particular values and practices in their own legal culture. While we recognize such multiplicity within our own society and legal system, there is often still reluctance to accept the absence of a uniform legal system and experience in other countries.[94]

---

92 Franz Boas, *The Limitations of the Comparative Method in Anthropology*, 4 SCIENCE 901, 904 (1896).

93. Professor Curran identifies the Holocaust's legacy as a crucial element of the efforts of European-born comparativists to develop a uniform private law. *See* Curran, *supra* note 15, at 66-78. The experience of the Holocaust may have reinforced their need to believe in a common humanity. *See id.* Even though that belief has influenced the development of modern human rights law and post-World War II comparative law, it has not brought the two disciplines together. *See id.*

94. *Cf.* NARAYAN, *supra* note 23, at 152. Narayan notes that

> [T]here are substantial normative disagreements among those who are "insiders" to any context about the meanings and values of particular cultural practices and institutions, about their centrality or place within a culture, and about whether these practices and institutions in fact comport with what are the core values of the culture.

Id.

Some non-Western countries have responded to the claim of the existence of universal human rights with a charge of imperialism since they perceive some, usually Western, countries as attempting to impose their legal systems on others.[95] Western countries tend to justify such attempts, if they are not denied, by the existence of their more advanced, more civilized, more modern legal systems which are based on principles of democracy, rule of law and free market liberalism. The widespread adoption of these norms has caused the West to assume that legal orders will eventually converge so as to reflect a slightly modified version of their own systems. However, universalization through human rights law and international trade has caused non-Western countries to sound alarms.

When developing countries accuse Western states of cultural imperialism, the criticism often connotes a critique of modernity, which includes capitalism, urbanization, and a secular, technical-rationalist mode of discourse. They regard these aspects of modernity as homogenizing international discourse because they view all of Western or American culture as homogeneous, which it appears to be if "experienced from outside."[96] For these countries cultural imperialism constitutes "a threat to [their] collective imaginings of a culturally definitive past."[97] This is not much different from the internal threat some Western countries see migrants posing to their legal and political systems.

Cultural identity equals identification with the nation and its political, legal and cultural institutions, such as the media and the state.[98] Law which is posited as "local knowledge" is part of this identity.[99] Even though much cultural identity is of fairly recent origin, subject to constant change and often invented by the nation-state, it provides a sense of tradition and identity.[100] Only an understanding of the make-up and composition of cultural identity allows for a recognition of the threat that "cultural and legal imperialism" poses for any society.

Since "in human rights research . . . the temptation to confuse our local culture with universal human nature has proven to be such a marvelous temptation,"[101] a comparative analysis will benefit the human rights area by

95 *Cf.* Frances Elisabeth Olsen, *Feminism in Central and Eastern Europe: Risks and Possibilities of American Engagement*, 106 YALE L.J. 2215, 2223 (1997) (noting that Western feminists are often accused of supporting Western imperialism).

96. JOHN TOMLINSON, CULTURAL IMPERIALISM: A CRITICAL INTRODUCTION 26-27, 75 (1991).

97 *Id.* at 92.

98 *See id.* at 83, 91.

99. *See* GEERTZ, *supra* note 43, at 215.

100. *See* TOMLINSON, *supra* note 96, at 91.

101. Preis, *supra* note 37, at 314.

looking at the contingency of law. Ultimately, human rights law can only gain from mutually recognized and understood diversity which is protected by general principles. Comparative law can play an active and useful part in this process. It will be of particular relevance to distinguish between the law employed by the people and the law applied by the political elite. Often, the latter advocate for cultural relativism and legal traditions on the international scene which have already come under attack at home.[102] Such a particularized and finely calibrated analysis would contribute substantially to the otherwise unfiltered discussion surrounding cultural relativism and universalism, and help us understand the social limits on the development of a universal law. Not only would the normative ideal of open, cross-cultural discourse develop a truly universal language, comparative law could finally also live up to its promise and goal of becoming "a *worldwide* legal discipline."[103]

Much of the debate over universalism, relativism and cultural imperialism is driven by the use of the term "culture," which obscures more of the relevant discourse in human rights law than it reveals. The frequently postulated connection between culture and human rights law aligns the two concepts too closely. That alignment allows human rights advocates to attack aggressively another's culture rather than its laws or the way in which such laws are applied.[104] Such assaults lead the attacked to act defensively, possibly taking a more uniform stance than would have occurred otherwise, and resisting any internal change as externally dominated.

Moreover, the descriptive content of the term "culture" suffers from a lack of boundedness.[105] If the term "culture" is viewed as the context that provides meaning to an individual's life, it becomes clear very quickly that, as experienced from inside, there is no single, monolithic culture.[106] Neither a Western culture nor an individual country's culture exists because of the heterogeneous make-up of these societies in terms of gender, ethnicity, race, religion, and many other factors, and individuals do not tend to identify with only one of these sub-categories to the exclusion of all the others. Culture does not exist "separate from reality. . . ."[107] In addition, no culture is static but rather constantly evolves and changes subject to influences from the

102. *See* L. Amede Obiora, *Feminism, Globalization, and Culture After Beijing*, 4 IND. J. GLOBAL LEGAL STUD. 355, 387-88 (Spring 1997).

103. Van Hoecke & Warrington, *supra* note 12, at 511.

104. *See* Joseph Raz, *Multiculturalism*, 11 RATIO JURIS 193, 205 (1998).

105. *See, e.g.*, TOMLINSON, *supra* note 96, at 4-6.

106. *See id.* at 18.

107. NADER, *supra* note 25, at 291.

outside and the inside.[108] Because of the lacking permanence of culture and its permeation by new external influences, often neither different sub-groups located within the same territorial space nor similarly situated groups in different spaces share the same values. For example, migrant communities do not partake in all the values and norms of their home countries or their host society but rather develop new norms and adapt existing norms in response to the community surrounding them.[109] Acceptance of that reality may quiet the anti-migrant and exclusionary forces which have focused on the incompatibility between the migrant and the native communities, and often describe migrant "culture" as static and predetermined by home country experiences.[110]

Human rights have become part of a practiced, international "culture."[111] They are debated within a network of perspectives that extends beyond individual countries.[112] This on-going discourse points to the social constructedness of human rights values. As the recognition of domestic divisions and their consequences has come to undermine the notion of a unitary national community and revealed "the 'otherness within'. . . ,"[113] internationally we must also acknowledge the impossibility of one reality and of scientific objectivity in determining a country's human rights record.[114] Comparative law could play its part since "in the legal field . . . comparison is the best medicine against the myth of absolute truth."[115]

One example of the value of comparative law in the human rights discourse is the United Nations Standard Minimum Rules for the Treatment of Prisoners which recommended single occupancy of prison cells. Social science research, however, failed to provide any support for the desirability of such a regime which is now considered outmoded. In addition, some commentators have noted that in southern Europe, for example, prisoners would find separate cells inhumane. It is the culturally constructed view of space that determines what form of prison occupancy is desirable, and when a prison is "overcrowded." The social sciences and comparative law can render helpful assistance in reaching an agreement on general standards of

108. *See* TOMLINSON, *supra* note 96, at 70; *see also* BROCHMANN, *supra* note 67, at 7-8.

109. *See* Rachel Bloul, *Engendering Muslim Identities*, *in* MAKING MUSLIM SPACE IN NORTH AMERICA & EUROPE, *supra* note 74, at 234-35 ("'Global culture flows' may well create differences and an intensified sense of criticism or attachment to home politics in displaced populations.").

110. *See* Kunal M. Parker, *Official Imaginations: Globalization, Difference and State-Sponsored Immigration Discourses*, 76 OR. L. REV. 691, 693 (1997).

111. *See* Preis, *supra* note 37, at 290.

112. *See id.* at 306.

113. Scheppele, *supra* note 20, at 636.

114. *See* Preis, *supra* note 37, at 309.

115. Eser, *supra* note 40, at 517.

overcrowding which may then have to be refined to guide different societies appropriately. Without such a "cultural" understanding of space, legal regimes for prisoners may be praised as humane even though they are deeply inhumane. Rather than merely focusing on the development of specific, culturally bounded rules, comparative law must assist human rights norms in uncovering and disclosing the underlying values at which these rules are aimed.

The above example also indicates that grouping countries for purposes of creating uniform standards may be misleading. Not all European countries share the same legal systems or the same cultural conceptions, in this case of space. Therefore, we would fail to draw "an accurate, detailed, or coherent portrait of any of them" were we to classify them as one.[116] As "comparative law is sometimes seen—and justified—as a tool for shaping or guiding domestic decision-making, particularly legislation."[117] it may be applied in a similar vein in the human rights arena. However, so far, it has not been considered a basis for the re-thinking of human rights norms even though it could increase the acceptability of the international human rights regime by allowing adaptation to local circumstances.

As culture and law are changed and reshaped at home through the influence of outsiders and collective experience, the impact of human rights law and discourse globally alters law. These changes do not occur in a directly linear, centralist manner but rather through the mediation and transformation of legal mandates.[118] To understand the influence of human rights norms on different legal systems, the response of the legal elite and the population at large must be observed longitudinally.[119] Ultimately, no legal change will attain legitimacy if the society where it is to be implemented does not internalize and support it.[120]

An analysis of the impact of human rights norms will also reveal the contingency and often domestically driven choice of issues that dominate the international human rights debate. For example, much of the U.S. and Western European discussion surrounding the position of women in Central Europe centers on domestic violence even though these might not be the most

116. Frase, *supra* note 16, at 549

117. David J. Gerber, *System Dynamics: Toward A Language of Comparative Law?*, 46 AM J. COMP. L. 719, 721 (1998)

118. *See* Preis, *supra* note 37, at 312-13

119. *See* James L. Gibbs, Jr., *Law and Innovation in Non Western Societies*, *in* LAW IN CULTURE AND SOCIETY, *supra* note 12, at 169, 173

120. *Cf.* Reitz, *supra* note 33, at 34-38 ("Strategies for Exporting Democracy, Free Markets, and the Rule of Law through Legal Exports" require the acceptance and legitimization of the exports).

prominent or pressing issues for the women in these countries.[121] The agenda, however, is set by human rights advocates and feminists abroad for whom those are the most salient issues because they are of preeminent importance at home.

In addition, the comparison of a problem abroad with a problem at home often leads to the glorification of the domestic approach. This is especially the case when the law in action in the other system is compared with law on the books or the myth of how law *should* function at home. In any comparison between foreign reality and domestic myth, the reality of the "other" will be disappointing, open to criticism and even rejection while the domestic system and its values will provide (unsubstantiated and undeserved) cause for celebration and even glorification.[122]

The absence of a "common core" of values and legal norms, however, should not be interpreted as lack of a common humanity but rather as recognition of different normative values and possibly institutional processes. Moreover, a group's identification of difference may serve to "'create[ ]' the community and 'create[ ]' the difference with the outside world."[123] Such a process may be psychologically necessary to counteract the perceived pressure to achieve cultural and legal uniformity, as expressed through universal human rights standards.

The connection between human rights analysis and comparative law could provide us with less fragmentary knowledge than we currently have within the two separate fields. While full information and cognizance can never exist, a less distorted view of legal systems and of the on-going debates within and between countries would provide a useful step toward greater mutual comprehension. Examination of an entire foreign legal system or of a substantial part of it would provide a more developed understanding of such a system since "'[i]t is often difficult to understand the nature and significance of any particular fiber without at least a general appreciation of the function of other threads, and also a realization of the impact of the whole.'"[124]

Since the best human rights discourse does not include a cross-national evaluative component, comparative law must beware of introducing that aspect into the analysis. The insights comparative law can provide should not be used to assess practices and then rank them hierarchically in light of

121. *See* Olsen, *supra* note 95, at 2224.
122. *See* Weyrauch, *supra* note 32, at 412.
123. Van Hoecke & Warrington, *supra* note 12, at 536.
124. Frase, *supra* note 16, at 549 (quoting Professor George Pugh).

Western standards of rule of law and human rights, but instead illuminate differences based on systemic and legal cultural differences.

The psychoanalyst and social psychologist Alexander Mitscherlich required "a practiced victory over oneself as prerequisite for the recognition of the antagonist's interests."[125] While this type of analysis will not hide differences and difficulties in relations with the "other," who is not necessarily antagonistic, it is the only principled way to allow better understanding and informed discourse. A recognition of difference reaffirms true acceptance and inclusion.[126]

III. CONCLUSION

Comparative law could live up to its promise of providing a perspective on our own legal system through the presence of a vibrant migrant population from different legal systems on our territory. The understanding of, respect for, and engagement of foreign legal systems rather than their mere tolerance will allow us to appreciate cultural, gender-based, religious, and legal differences at home to a greater extent. To accomplish these goals, it is necessary to discard the missionary approach and replace it with that of an insightful traveler who gains insights on her home system through distance. While culture is relevant to the development of law, comparative law may be able to help us see the fault lines between law and culture more clearly, whether in developing a coherent legal response to the arrival of migrants from different legal backgrounds or in refining the international human rights system.

Tolerance alone will not suffice since it might merely amount to "smugness, condescension, contempt for others, and intellectual isolation."[127] What is needed is real engagement with different ideas, different views that put "our own most deeply held beliefs . . . always at risk."[128] Ultimately, only that approach of comparative law will bring us from more accurate knowledge of "the other" to "empathy and respect in a pluralistic world."[129]

---

125. Alexander Mitscherlich quoted in Volker Eisenhal, *Idylle oder Information?* (1998) (on file with the author) (translation by author).

126. *See* Nora V. Demleitner, *Challenge, Opportunity and Risk: An Era of Change in Comparative Law*, 46 AM. J. COMP. L. 647, 654-55 (1998). *Cf.* Curran, *supra* note 15, at 73 ("[T]he acknowledgement of diversity might be compatible with tolerance and inclusion.").

127. Anthony Kronman, Yale Law School Welcoming Address, 1997: *The Character of Our Community* 10 (1997) (transcript available at the Yale Law School) (discussing the difference between tolerance and sympathy when creating a real community at the Yale Law School).

128. *Id.*

129. Gross, *supra* note 7, at 358.