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ARTICLE

The Guile and The Guise: Apropos of Comparative Law as We Know It

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Abstract

The field of comparative law prioritizes the ascertainment of universals or commonalities across laws, two chimerical pursuits. In the process, comparative research abides significant distortion of information, not always in good faith, and a correlative loss of intellectual warrant. This article urges acknowledgment of such serious epistemic deficit, of its detrimental impact on comparative law, and of the need to restore intellectual integrity to comparative research in law through a radically different approach to foreignness.

Keywords: Comparative Law; Critical Theory

> '[T]he worlds in which we live are different to the point of the monstrosity of the unrecognizable, of the un-similar, of the unbelievable, of the non-similar, of the non-resembling or resemblable, of the non-assimilable, of the untransferable'. – Jacques Derrida[1]

> 'Without acknowledging differences, comparison is partisanship, and not always in a good cause'. – Samuel Moyn[2]

> 'It is the strongest censorship, this search for non-difference'. – Jean Bollack[3]

Whether making strange law familiar or, even more audaciously, rendering familiar law strange, comparative law demands spontaneous attunement to differences across laws – or so one would readily expect. But comparatists are enthralled to universals, equivalences, and commonalities, often disingenuously so. Such fixation on the contrivance of evenness proves very damaging from an epistemic standpoint and generates confounding comparative inquiries or writing. To enhance the creditable epistemic yield of comparative research, this deplorable situation must be decried and changed. Justifiably claiming that '[a]nalogies and the presumption of similarity have to be abandoned for a rigorous experience of distance and difference',[4] Günter Frankenberg refutes 'the moral deficit that comes with the routine management of similarities' and prominently beseeches the major corrective that I exhort.[5] Frankenberg's demurrer accords with my own

[1]Jacques Derrida, *La Bête et le souverain*, vol 2 (Michel Lisse et al eds, Galilée 2010† [2003]) 367.

[2]Samuel Moyn, 'The Trouble with Comparisons' (The New York Review, 19 May 2020) <www.nybooks.com/daily/2020/05/19/the-trouble-with-comparisons/> accessed 20 October 2020 [on file].

[3]Jean Bollack, *Sens contre sens* (La Passe du vent 2000) 179–180.

[4]Günter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26(2) Harvard International Law Journal 411, 453.

[5]Günter Frankenberg, *Comparative Law as Critique* (Edward Elgar Publishing 2016) 88.

argument that '[t]he aim must be for comparatists to abjure the search for imputed sameness',[6] that 'discernment imposes to comparison the primary and fundamental search for difference'.[7]

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Within the field of comparative law, illustrations abound of a 'primary, precipitous tendency to reduce everything to the similar and the homogeneous'.[8] Consider the aspiration to 'a unitary sense of justice' and to 'natural law',[9] the proclamation that 'differences are … not relevant',[10] the injunction to practice 'the relativization of divergences',[11] the contention that differences belong to the realm of 'appear-[ances]',[12] the submission that the law of Jakarta as regards liability for bodily harm or the sale of a defective good is 'much the same' as the law in Tucson, Arizona,[13] the declaration that 'what is basically the same régime of matrimonial property' obtained in 'Visigothic Spain, parts of post-mediaeval Germany and nineteenth century California',[14] not to mention the assertion that '[t]here [is] nothing distinctively German, French or American about [German, French or American judicial] decisions',[15] to say nothing of the opinion that '[d]ifferent legal orders come, as regards the same questions of life, often down to details, to the same or at least perplexingly similar solutions' – an assumption embracing 'even countries of different social structures or different stages of development'.[16] Think also of the formulation of a '*præsumptio similitudinis*' to capture what is reckoned to be the prevailing dynamics across laws,[17] which would, unimpeachably, pertain to 'common sense'.[18] Envisage expressions such as 'legal transplants',[19] 'generic' law,[20] 'global … gene pool',[21] and 'Americo-European ius commune'.[22] These affirmations and terms all stand to confirm comparative law's patent propensity, 'the right way' for the comparatist being 'to knock about' in search of 'equivalences and resemblances' to the point where 'differences or even complete contradictions in the practical solutions … should make [him] suspicious and summon [him] to another examination' of his research.[23]

[6]Pierre Legrand, 'The Same and the Different', in Pierre Legrand & Roderick JC Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003) 287.

[7]Michel Foucault, *Les Mots et les choses* (Gallimard 1966) 69.

[8]François Jullien, *Si près, tout autre* (Grasset 2018) 12. With specific reference to comparative law, this penchant has been styled 'aggressive': David Kennedy, 'New Approaches to Comparative Law: Comparativism and International Governance' [1997] (2) Utah Law Review 545, 627 fn 119.

[9]Konrad Zweigert & Hein Kötz, *Einführung in die Rechtsvergleichung* (3rd edn, Mohr Siebeck 1996) 3 and 44.

[10]ibid 60.

[11]Uwe Kischel, *Rechtsvergleichung* (CH Beck 2015) 194.

[12]Basil S Markesinis, 'The Destructive and Constructive Role of the Comparative Lawyer' (1993) 57(3) Rabels Zeitschrift für ausländisches und internationales Privatrecht 438, 443.

[13]James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford University Press 1991) 1.

[14]Alan Watson, *Society and Legal Change* (2nd edn, Temple University Press 2001) 110. Lawrence Friedman properly observes that 'these premises are ludicrous': Lawrence Friedman, 'Some Comments on Cotterrell and Legal Transplants', in David Nelken & Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2001) 93.

[15]James Gordley, 'Comparative Legal Research: Its Function in the Development of Harmonized Law' (1995) 43(4) American Journal of Comparative Law 555, 563.

[16]Zweigert & Kötz (n 9) 38 and 45.

[17]ibid 39. The German text has 'praesumtio similitudinis'.

[18]Jaakko Husa, *A New Introduction to Comparative Law* (Hart Publishing 2015) 183. Contrast Richard Hyland, *Gifts* (Oxford University Press 2009) 66. Hyland remarks that, 'ha[ving] caused almost no one to think twice', 'the obviousness of the [*præsumptio*] only serves to conceal the fact that it is wrong'. Along the way, he aptly signals the virtue of stringent, non-abdicative argumentation.

[19]See eg, Alan Watson, *Legal Transplants* (2nd edn, University of Georgia Press 1993).

[20]David S Law, 'Generic Constitutional Law' (2005) 89(3) Minnesota Law Review 652. In András Jakab et al (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017), my computer counts 444 references to 'generic' law.

[21]Cheryl Saunders, 'Towards a Global Constitutional Gene Pool' (2009) 4(3) National Taiwan University Law Review 1.

[22]Stefan Grundmann, 'Germany and the *Schuldrechtsmodernisierung* 2002' (2005) 1(1) European Review of Contract Law 129, 147.

[23]Zweigert & Kötz (n 9) 39. The comparatist is invited to behave like the plumber knocking on the wall in search of a pipe that he knows to be there. The German verb is 'abklopfen'.

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Effectively, 'the comparati[st] presumes similarities between different jurisdictions in the very act of searching for them'.[24] The desire for consonance breeds the expectation of consonance which begets the discovery of consonance, never more so than when the comparatist clamours that a nucleus of identity, a 'common core', undergirds differences across laws,[25] duly relegated to mere 'technicalities',[26] than when he yearns for a world law[27] – two convergence models, either tellurian or transcendental. Brazenly, one is even told that one must engage in 'skilful (and well-meaning) manipulation' to avoid laws looking different.[28] In short, '[d]ifferences between legal systems [are] regarded … as evils or inconveniences to be overcome'.[29] Typically, comparative law thus deals in '[c]omparability in the sense of *similarity*'[30] – that is, in the same, '"[s]ame" … spell[ing] indifference to difference'.[31]

In reaction to this sustained institutional proclivity, deplorably inadequate to the intellectual and ethical remit of the comparatist, I frame this text around five principal motions. After introducing the rule of law as an exemplary would-be legal universal (I), I demonstrate that this alleged universalism, like all others, rests on fallacy, if not trickery. *Even the rule of law* is a construction local and localizable (II). On the understanding that the universal must depend on the existence of equivalences or commonalities across laws, I then articulate a case study showing that these also operate as make-believe or deception, always (III). Considering the empirical absence of universals, equivalences, and commonalities, I plead for the recognition of law's singularity and respect towards such singularity as a matter of the justice that is owed foreign law once the decision has been made to respond to it – to interpret and represent it (IV). I proceed to defend an alternative appreciation of what it must mean to commit to meaningful comparative research and writing, my abiding ambition being to assist comparative law in overcoming the delusion that there are universals and equivalences or commonalities traversing laws and in negating its toll on the epistemic output and merit of the comparatist's enterprise (V). Throughout, I approach comparative law as an intellectual endeavour warranting heightened sophistication so that it can act as an efficient antidote to persistent legal nationalism and parochialism, to the angustation of legal thought.

[24]Joseph Vining, *The Authoritative and the Authoritarian* (University of Chicago Press 1986) 65. cf Emanuele Lugli, *The Making of Measure and the Promise of Sameness* (University of Chicago Press 2019) 215: '[S]ameness is never a product of measuring; you need to believe in it before any measuring is even undertaken'.

[25]See eg, Rudolf B Schlesinger, 'Introduction', in Rudolf B Schlesinger (ed), *Formation of Contracts: A Study of the Common Core of Legal Systems*, vol 1 (Oceana 1968) 9 and 35; Mauro Bussani & Ugo Mattei, 'The Common Core Approach to European Private Law' (1997–1998) 3(3) Columbia Journal of European Law 339, 340.

[26]Ugo Mattei, *Comparative Law and Economics* (University of Michigan Press 1997) 144.

[27]See eg, Mireille Delmas-Marty, *Trois défis pour un droit mondial* (Editions du Seuil 1998); Mireille Delmas-Marty, *Vers un droit commun de l'humanité* (Textuel 1996). Universalism is a 'core elemen[t] of traditional comparative law': Mathias Siems, *Comparative Law* (2nd edn, Cambridge University Press 2018) 31. See also Henri Lévy-Ullmann, *Vers le droit mondial du XXe siècle* (Rousseau 1923); Louis Josserand, 'Conception générale du droit comparé', in Congrès international de droit comparé, *Procès-verbaux des séances et documents*, vol 1 (Librairie générale de droit et de jurisprudence 1905) 243.

[28]Basil S Markesinis, 'Why a Code Is Not the Best Way to Advance the Cause of European Legal Unity' (1997) 5(4) European Review of Private Law 519, 520. Samuli Seppänen appears to concur in Markesinis's plea for self-corroboration as he suggests that the deemed worthiness of a given ideological pursuit would warrant the comparatist-at-law's concoction of an equivalence or commonality across laws: Samuli Seppänen, 'After Difference: A Meta-Comparative Study of Chinese Encounters With Foreign Comparative Law' (2020) 68(1) American Journal of Comparative Law 186, 190 ('In [China's] political climate, an emphasis on "similarity" in comparative legal scholarship often signals openness to liberal legal and political reforms') and 220 ('Describing American and European law in terms of familiarity rather than difference supports efforts to advance and defend Western-style legal institutions in China').

[29]John H Merryman, 'On the Convergence (and Divergence) of the Civil Law and the Common Law', in Mauro Cappelletti (ed), *New Perspectives for a Common Law of Europe* (Sijthoff 1978) 195.

[30]Vicki C Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press 2010) 178.

[31]Djelal Kadir, 'Comparative Literature in an Age of Terrorism', in Haun Saussy (ed), *Comparative Literature in an Age of Globalization* (Johns Hopkins University Press 2006) 75.

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I. The rule of law, for example

A doctrinal paradigm whose contemporary significance is doubtless,[32] a referent heralded in the export programme of many occidental States, major international financial institutions, bilateral aid agencies, and non-governmental development organizations, the rule of law is readily held to justify application as a tool of governance irrespective of legal traditions, political conditions, and economic circumstances. Specifically, advocates of the rule of law, professing a vehicle to sustainable growth, defend its implementation in less advanced economies, thus explicitly embracing law as an engine of economic and social emergence. The idea that the rule of law stands as 'an unalloyed good, promoting and safeguarding values that are intrinsically desirable, such as economic development and social progress',[33] that is, the averment that the rule of law is an essential ingredient of industrialized societies lacking in others, more or less elliptically conjoins with the overarching narrative of US exceptionalism,[34] a Messianic intuition whereby US law-makers and intermediaries of all hues spontaneously 'equat[e] American governmental institutions with good legal institutions'.[35]

Praise for the rule of law is ubiquitous and grandiloquent, eulogies eagerly foregrounding its intercontinental reach. Cast as 'the common sense of global politics',[36] the rule of law is hailed as 'a new rallying cry for global missionaries'.[37] Arguing that the concept is 'everywhere',[38] an international lawyer claims that '[t]he degree of apparent international consensus on the value and importance of the rule of law is striking'.[39] Not only does 'the rule-of-law hold the promise to cure all manner of social ills from economic corruption to political tyranny', but it 'promises to do so in a nonpartisan manner' – which means that it would exist as 'a system of neutrally administered legal sanctions and incentives that provide the basis for an orderly modern society'.[40] The expression has assumed 'talismanic' value[41] – even a famous Marxist historian styling it 'an unqualified human good'.[42]

[32]Upendra Baxi refers to an 'explosion of the rule of law discourse': Upendra Baxi, 'Rule of Law in India', in Randall Peerenboom (ed), *Asian Discourses of Rule of Law* (Routledge 2004) 318. See eg, Jens Meierhenrich & Martin Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021); Mark Harris, *Human Rights, the Rule of Law and Exploitation in the Postcolony* (Routledge 2021); Alan Greene, *Permanent States of Emergency and the Rule of Law* (Hart Publishing 2018); Thomas Cottier et al (eds), *The Rule of Law in Monetary Affairs* (Cambridge University Press 2014); Mary Fran T Malone, *The Rule of Law in Central America* (Bloomsbury 2014); Christina Voigt (ed), *Rule of Law for Nature* (Cambridge University Press 2013); Whit Mason (ed), *The Rule of Law in Afghanistan* (Cambridge University Press 2011); Günter Frankenberg, *Political Technology and the Erosion of the Rule of Law* (Edward Elgar Publishing 2010); Brian Z Tamanaha, *On the Rule of Law* (Cambridge University Press 2004).

[33]Daniel B Rodriguez et al, 'The Rule of Law Unplugged' (2010) 59(6) Emory Law Journal 1455, 1456. cf Frank Lovett, *A Republic of Law* (Cambridge University Press 2016) 203, who preconizes 'the intrinsic value of the rule of law'.

[34]See Michael Ignatieff, 'American Exceptionalism and Human Rights', in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 13–14.

[35]Rodriguez et al (n 33) 1493. For an account of US voices enthusing about human rights beyond national borders, see Mark P Bradley, *The World Reimagined: Americans and Human Rights in the Twentieth Century* (Cambridge University Press 2016).

[36]Christopher May, *The Rule of Law: The Common Sense of Global Politics* (Edward Elgar Publishing 2014) x.

[37]Bryant G Garth & Yves Dezalay, 'Introduction', in Yves Dezalay & Bryant G Garth (eds), *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (University of Michigan Press 2002) 1.

[38]Thomas Carothers, 'The Rule-of-Law Revival', in Thomas Carothers (ed), *Promoting the Rule of Law Abroad* (Carnegie Endowment for International Peace 2006) 3.

[39]Thomas Carothers, 'Rule of Law Temptations', in James J Heckman et al (eds), *Global Perspectives on the Rule of Law* (Routledge 2010) 19.

[40]Teemu Ruskola, *Legal Orien*talism (Harvard University Press 2013) 13–14. My quotations pertain to Teemu Ruskola's critique of the 'popularly held view': ibid 13. For a vindication of Ruskola's account, see eg, Carothers (n 39) 26, who refers to the rule of law as having 'a usefully non-ideological appeal'.

[41]Stephen Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (Cambridge University Press 2010) 219–220. See also Galit A Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford University Press 2012) 60, who discerns 'a fetishism of the rule of law'.

[42]EP Thompson, *Whigs and Hunters* (Pantheon 1975) 266.

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As 'theories of the interdependence of legal form and economic activity lurk behind the rhetoric of the rule of law',[43] they do so, however, 'without a great deal of intellectual agonizing over exactly what this form of law entails, how it relates to economic activity, or how it fits in different political, social, and institutional contexts'.[44] What is on offer is a 'model of law detached from the social and political interconnections that form actual legal systems everywhere' – what one calls, in France, a framework '*hors sol*', literally, a composition without soily connections.[45] Universalizing postulates notwithstanding, the rule of law that is touted as a planetary remedy is firmly and consistently, *empirically*, embedded within local knowledge, within local legal/cultural constructs. Indeed, it is so entrenched three times over at least, which entails that any association of the expression 'rule of law' with the word 'universal' – as in '[t]he universalism of the rule of law ideology'[46] – discloses a gnomic oxymoron.

II. Whose universal?

A scholarly initiative critically described as an 'unfortunate outburst of Anglo-Saxon parochialism',[47] the rule of law in its modern instantiation is principally associated with AV Dicey, who hailed it as 'a peculiarity of English institutions'.[48] Not only did 'Dicey offe[r] a working definition of the rule of law that he based on distinctively British institutions', but '[he] drew on these institutions to contrast the British model with that of the [French] Conseil d'Etat'.[49] Because '[t]he … rule of law tradition claims deep roots in the British common law as well as in the constraints on royal power expressed in the Magna Carta',[50] and given the broad historical correlation – not an exact correspondence, but a recurring coincidence – between the common-law tradition and the English language, the expression 'rule of law' can ultimately be regarded as indissociable from English, a matter of the utmost significance since language is indispensable to perception.[51] Consider that neither French nor German, for instance, translate 'rule of law'.

Even within the anglophone common law, the meaning of 'rule of law' differs across polities, there being as many declensions of the phrase as there are identifiable configurations of local legal knowledge. Canadian ruleness (or lawness) is not Australian ruleness (or lawness), which is not Singaporean ruleness (or lawness), which, in turn, is not Nigerian ruleness (or lawness). Still, the resonance with the common-law tradition and the English language holds.[52] Nowadays, the

[43]Frank Upham, 'Mythmaking in the Rule-of-Law Orthodoxy', in Thomas Carothers (ed), *Promoting the Rule of Law Abroad* (Carnegie Endowment for International Peace 2006) 76.

[44]ibid.

[45]ibid. There is, ascertainably, 'a desire to escape from politics by imagining the rule of law as technical, legal, and apolitical': Balakrishnan Rajagopal, 'Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination' (2008) 49(4) William & Mary Law Review 1347, 1349. For his part, Bernard Harcourt refers to an 'excessive faith in the neutrality of the rule of law': Bernard E Harcourt, *Critique and Praxis* (Columbia University Press 2020) 245.

[46]Ian Hurd, *How to Do Things with International Law* (Princeton University Press 2017) 44.

[47]Judith N Shklar, 'Political Theory and the Rule of Law', in Allan C Hutchinson & Patrick J Monahan (eds), *The Rule of Law: Ideal or Ideology?* (Carswell 1987) 5.

[48]AV Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn, ECS Wade ed, Macmillan 1959 [1885]) 188.

[49]James E Pfander, 'Dicey's Nightmare: An Essay on the Rule of Law' (2019) 107(3) California Law Review 737, 744. The reference to 'British institutions' seems unduly cosmopolitan, for Dicey's focus was resolutely English. See Mark D Walters, *AV Dicey & the Common Law Constitutional Tradition* (Cambridge University Press 2020) 9 and passim.

[50]Paul Gowder, *The Rule of Law in the Real World* (Cambridge University Press 2016) 120. Indeed, 'the "rule of law" cannot be said to be deeply embedded within the legal structures outside of [the Anglo-American world]': Nadia E Nedzel & Nicholas Capaldi, *The Anglo-American Conception of the Rule of Law* (Palgrave Macmillan 2019) 153 fn 11.

[51]'Only where [there is] language, there is world': Martin Heidegger, *Erläuterungen zu Hölderlins Dichtung* (Vittorio Klostermann 2012 [1971]) 38. Only what one *calls* a mountain can exist as a mountain ('Oh! Look at the mountain over there…'). And then, one can only *see* the mountain in words. In one's head, one says: 'It is huge'; 'It is beautiful'; 'It is white'; 'There is snow'. Without words, one is unable to *see* the mountain. It follows that the mountain will be seen differently in different languages. *Quaere*: is there *the* mountain?

[52]For a brief historical panorama, see Allan C Hutchinson & Patrick J Monahan, 'Democracy and the Rule of Law', in Allan C Hutchinson & Patrick J Monahan (eds), *The Rule of Law: Ideal or Ideology?* (Carswell 1987) 101–106.

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echo is mostly traceable to the United States, the rule of law being readily identified as 'a U.S. product',[53] despite the fact that this country is itself 'subject to serious criticism from a rule of law perspective'.[54] Not least because '[l]aw in the United States historically has been able – indeed expected and desired – to gain the position of setting the key terms of legitimacy',[55] since '[w]ithout a common ethnic, racial, or religious heritage, American identity is peculiarly dependent on the idea of law',[56] and given that 'legal governance is probably more crucial to the US economic system than to that of any other country in the world',[57] the rule of law's circulation at the behest of US interests has assumed strong velocity and normativity.

Being spoken from a situated perspective, peculiarly a common-law, anglophone, and US standpoint, the expression 'rule of law' refers to operational technologies readily favoured by common-law, English-speaking, and US lawyers such as secure property rights (including intellectual property), enforceable contracts, civil rights, corporate governance structures, administrative agencies, or judicial review.[58] It must go without saying – but as French has it, *cela va mieux en le disant* – that these institutions are hardly theory-free, value-neutral, or apolitical. On the contrary, they always implement distributive decisions, no matter how much these get framed into the apparently impartial language of economic indicators or the seemingly disinterested formulations of laws – which are not at all mere graphological records devoid of interests, impulses, or desires. For instance, there is no legal allocation of rights, irrespective of any alleged 'objectification' or 'scientification', that does not incorporate a chosen rationality or preferred governmentality. And the politicized can be re-politicized. Within an adversarial model like the common law's, it is indeed easy to see how the wealthy and the shrewd can turn the rule of law's vaunted procedural safeguards to their advantage. Political theorist Judith Shklar thus recalls the compatibility between the rule of law's procedural legalism and repression.[59]

Because, within the common-law tradition and the English language, rule-of-law institutions are widely deemed to relate to market-making and market-maintenance, countries like Canada, the United Kingdom, and Australia have also been active exporters (thus encouraging something like legal liberalism, that is, endorsing legal forms closely imbricated with the tentacular reach of neoliberalism).[60] In addition, the International Monetary Fund and the World Bank have been relentlessly promoting adherence to the rule of law on the part of countries that seek financial assistance and demanding a wide variety of local legal changes to justify structural adjustment loans.[61] The World Bank would indeed have supported more than 300 rule-of-law endeavours in 100 countries over the years and, since the early 1990s, spent four billion US dollars or so on these projects.[62] And then, there is the American Bar Association's 'Rule of Law Initiative' and other governance projects

[53]Yves Dezalay & Bryant G Garth, 'Legitimating the New Legal Orthodoxy', in Yves Dezalay & Bryant G Garth (eds), *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (University of Michigan Press 2002) 307.

[54]Gowder (n 50) 6. See generally ibid 189–195.

[55]Dezalay & Garth (n 53) 307.

[56]Paul W Kahn, *The Cultural Study of Law* (University of Chicago Press 1999) 9.

[57]Curtis J Milhaupt & Katharina Pistor, *Law and Capitalism* (University of Chicago Press 2008) 186.

[58]See eg, Ronald A Cass, *The Rule of Law in America* (Johns Hopkins University Press 2001).

[59]See Judith N Shklar, *Legalism* (Harvard University Press 1964) 17. See also Harcourt (n 45) 256. Meanwhile, an expression of established comparative law's bemusing apoliticism is in Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Instalment II of II)' (1991) 39(2) American Journal of Comparative Law 343, 392: '[M]any legal rules … do not represent any value, do not correspond to any ideology, are foreign to any moral system'.

[60]See Rosa E Brooks, 'The New Imperialism: Violence, Norms, and the Rule of Law' (2003) 101(7) Michigan Law Review 2275, 2276–2289.

[61]'[M]ilitary intervention' would be a third vehicle implementing the planetary 'impos[ition]' of the rule of law: Boaventura de Sousa Santos, *Epistemologies of the South* (Routledge 2016) 169.

[62]Alvaro Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development', in David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development* (Cambridge University Press 2006) 253 fn 1.

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along analogous lines.[63] Not unreasonably, it is said that 'the [international rule of law] movement has morphed into an "industry"'.[64] Indeed, these diffusion processes are empirically verifiable, and no one, surely, would seriously contest the prevalent propagation of the rule-of-law paradigm. Yet, even leaving aside the fact that '[r]ule of law initiatives are dominated by the agendas and ideological views (including modernization assumptions) of the promoters on the delivery side … more than they are about finding concrete ways to serve the pressing needs of the receiving populace',[65] the further fact that rule-of-law interventions serve in particular to expand the role of the 'exporting' institutions in local policies,[66] and the other fact still that the idea of measuring compliance with the rule of law is inherently fraught,[67] the comparatist cannot be content with a superficial understanding of the strategies that have been unfolding.

First and foremost, appreciations of the rule of law's itinerance would prove strikingly deficient if they failed to emphasize that no text circulates by itself, that '[a]n idea, even brilliant, even salutary, never moves on its own. There must be a force that comes to fetch it, seizes it for its own motives, moves it'.[68] Now, the individuals and institutions engaging in the dissemination of rule-of-law models are situated participants in these various diffusion initiatives. They are ensconced in specific cultural settings, mostly national configurations.[69] In fact, the authority that a given endeavour commands, or the extent to which it manages to allay scepticism on the part of those it seeks to convince, may hinge significantly on the personal or institutional eminence that the promoter enjoys within his academic discipline. For instance, one's ascendancy can be enhanced if one holds a tenured position at a prestigious US law school. Local circumstance thus informs governance tactics mobilized by the 'rule doctors' that purport to make the implementation of the rule of law within foreign institutional structures at once necessary and legitimate.[70] Even the legal 'globalizers' are accordingly, to an extent at least, constructed out of their own legal culture's materials of meaning and expression and, to that extent at least, remain encultured: *I am what I have been* ('I am-been', to write like Martin Heidegger).[71] Legal 'globalizers' are possessed by the legal culture that they have been thrown into,[72] that they

[63]See eg, Lelia Mooney (ed), *Promoting the Rule of Law* (American Bar Association 2013). See also eg, the World Justice Project, which releases an annual *Rule of Law Index*: World Justice Project, 'Research and Data' <https://worldjusticeproject.org/our-work/wjp-rule-law-index> accessed 20 October 2020. For a discussion of the *Index*, see Jothie Rajah, '"Rule of Law" as Transnational Legal Order', in Terence C Halliday & Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015) 340–373; René Urueña, 'Indicators and the Law: A Case Study of the Rule of Law Index', in Sally E Merry et al (eds), *The Quiet Power of Indicators* (Cambridge University Press 2015) 75–102.

[64]David Marshall, 'Introduction', in David Marshall (ed), *The International Rule of Law Movement* (Human Rights Program, Harvard Law School 2014) xiv. For a critique of the rule-of-law profession, see Deval Desai, 'In Search of "Hire" Knowledge: Donor Hiring Practices and the Organization of the Rule of Law Reform Field', in David Marshall (ed), *The International Rule of Law Movement* (Human Rights Program, Harvard Law School 2014) 43–83.

[65]Brian Z Tamanaha, 'The Primacy of Society and the Failures of Law and Development' (2011) 44(2) Cornell International Law Journal 209, 244.

[66]cf Santos (n 62) 255.

[67]How does one measure the rule of law's success? 'Suppose we can say that a developing country has an independent judiciary with a strong system of judicial review and, for those reasons, is high on the [rule of law] "scale", but [that] it also has a strong, unitary executive branch that, as best [as] we can discern, does not reliably respect decisions of the judiciary': Rodriguez et al (n 33) 1474. How does one assess the condition of the rule of law when institutions of governance are working in opposite directions?

[68]Bruno Latour, *Pasteur: guerre et paix des microbes* (2nd edn, La Découverte 2011) 32–33.

[69]See Yves Dezalay & Bryant G Garth (eds), *Lawyers and the Rule of Law in an Era of Globalization* (Routledge 2011).

[70]Garth & Dezalay (n 37) 1.

[71]Martin Heidegger, *Sein und Zeit* (Max Niemeyer 2006 [1927]) 326. The German text has 'ich bin-gewesen' [emphasis omitted].

[72]'Thrownness' ('Geworfenheit') is a key Heideggerian motif. Heidegger's 'thrownness' percipiently captures the idea that one is delivered over to a factical existence pertaining to the public space and not of one's own making or under one's control. Specifically, one is thrown into the constitutive features of one's enculturation such as language, religion, morality, forms of politeness – or law. One is *assigned*.

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have incorporated, that they embody.[73] The alternative – that one would somehow operate *sans* local culture from the moment one steps beyond national borders – defies plausibility.

Apart from the rule of law being circulated by culturally-encumbered agents, local knowledge must inform the substantive contents of all rule-of-law models being disseminated. There is, then, the singularity of the rule of law a second time. A travelling law that would have escaped all cultural grammar, an *acultural* law, cannot be reasonably envisaged. Every law in motion emerges from a local meaning system – it is the outcome of local cultural flow – and continues to reveal a dependence upon a certain kind of learning upon diffusion. It is *that law* that is circulating (a subordination limiting expectable cultural variability at the point and time of arrival). Displacement can no more make law culture-less than it can the legal disseminator.

And then, there is the fact that wherever it spreads, law must undergo a process of acculturation: it requires to be re-territorialized or re-localized. And this is how the rule of law is singular a third time. This aspect of dissemination processes takes the form of an intertextual assemblage of the itinerant rule of law with local knowledge at destination. There is no rule of law doctrine that can journey, simply to take root somewhere else 'as such'. Wherever it goes and is adopted, the rule of law finds itself adapting locally: adoption means adaptation. Indeed, it must undergo local adjustment in order to fit local circumstances if it is to have success where it is being imported. Rather than any straightforward legal unification or uniformization, what takes place, pursuant to sociologist Roland Robertson's inspired neologism, is a 'glocalization'.[74] Helpfully underlining how the local station – local knowledge, local circumstance – must assume continued relevance, glocalization captures the contingent and provisional outcomes of negotiations between the legal-other-come-from-elsewhere-as-a-purportedly-universal-norm and the local self-in-the-law. Specifically, glocalization refers to operations whereby '[itinerant] products and processes take on local characteristics',[75] to the way in which 'local societies indigenize the global order'.[76] I maintain that '[the term] serves well … to describe precisely the experience that is fundamental' to all patterns of diffusion of the rule of law – indeed, of the legal capaciously understood.[77]

Any rule-of-law institution imported in any jurisdiction is received within a pre-existing network of local/cultural norms that must steer and constrain accommodation. Recall how the rule of law, in line with its common-law profile, comprehends the enforceability of contracts. Now, a stock illustration amongst legal anthropologists showing how re-territorialization or re-localization of legal knowledge must work concerns *suki* in the Philippines.[78] It is reported that, especially in rural areas, Filipinos tend not to accept that a written marketing contract will safeguard them from opportunistic behaviour and cheating. There is a general perception that written agreements can protect the rich but not the poor, who lack the resources and power to enforce them. What Filipinos value beyond all else is a *suki* relationship. Over time, repeated transactions with someone lead to the emergence of the bilateral trust that lies at the heart of a *suki* connection. If your trading partner has become your *suki* and you yourself have become your partner's *suki*, there are then, on both sides, reduced search, negotiation, and monitoring costs because of the *suki* bond that has been created. Anthropological evidence indicates that the market for perishable vegetables – an important

[73]For a discussion of the presence of the local on the international legal scene, see Daniel Peat, *Comparative Reasoning in International Courts and Tribunals* (Cambridge University Press 2019).

[74]It is asserted that the English word transliterates the Japanese: see Roland Robertson, *Globalization* (Sage 1992) 173. For an excellent study, see Victor Roudometof, *Glocalization* (Routledge 2016).

[75]Eduardo Mendieta, *Global Fragments: Globalizations, Latinamericanisms, and Critical Theory* (State University of New York Press 2007) 28.

[76]Marshall Sahlins, *What the Foucault?* (Prickly Paradigm Press 2018) 50.

[77]Mendieta (n 75) 28.

[78]See generally William G Davis, *Social Relations in a Philippine Market* (University of California Press 1973) 211–287. William Davis suggests translating *suki* as 'special customer': ibid 217.

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trading forum in the Philippines – operates exclusively by means of *suki* dynamics.[79] Even as the World Bank is earnestly promoting the introduction of the rule of law in the Philippines, notably the implementation of enforceable contracts, local farmers do not trust contract but *suki*. As enforceability must adapt itself locally, it is reductive to assume that one can take the idea of enforcement of contracts obtaining in the United States, pretend to implant it 'as such' in the Philippines, and expect it to produce results in Manila or Davao as in Washington or New York. Rather, the travelling legal figure (say, the US doctrine of enforceability of contracts), as it finds itself disseminated and adopted in another locale (say, the Philippines), does not, upon settlement in its new environment, afford an instance of legal unification or uniformization.

Consider Bangladesh. Against the backdrop of fieldwork spanning a number of years, Tobias Berger's captivating account demonstrates that for rule-of-law norms to harbour any hope of local effectiveness, as they travel from the desks of EU bureaucrats to UN officials in Dhaka to local NGOs in the countryside and to the rural Bangladeshi themselves, they must be translated into language that resonates culturally. Indeed, this translation process must be so extensive – Berger talks of 'significan[t] alter[ation] [of] … meaning'[80] – that the accultured discourse requires to be regarded as 'an original in its own right'.[81] Specifically, there takes place a fully-fledged re-creation of meaning from the neo-liberal script 'into the normative vocabularies of community harmony and Islamic law'.[82] For instance, neo-liberal demands for gender equality are expressed in the language of Islam and Islamic law. Indeed, 'the promotion of women's rights is only possible through the language of Islam and Islamic law'.[83] All along, the human rights being fostered are not cast as entitlements against the State (according to the habitual neo-liberal template), but as 'claims against one's own social context'.[84] While human rights continue to be vaunted as ensuring 'protection of individual autonomy against illegitimate outside interference',[85] crucially the locus of 'outside interference' changes.[86] Instead of the State, 'the addressee of rights claims' becomes society.[87] In line with this approach, local NGOs activate the rule of law not through the official State judiciary, but by way of non-State institutions such as village courts enjoying optimal proximity with local people. In the process, '[t]hey … tolerate … non-adherence to procedural obligations', once more in breach of the neo-liberal rule-of-law model.[88] Also, although 'the … rule of law insists on the impersonal application of legal principles to any given conflict',[89] village courts favour 'context-dependent negotiations of disputes' where 'interpersonal relationships play a fundamental role'.[90] Holding that 'the global simply cannot overcome the local',[91] that there must necessarily unfold 'the provincialization of the international',[92] Berger concludes that '[w]hen norms travel, they never encounter empty islands'.[93] Rather, they meet 'pre-existing concepts, categories,

[79]See Tracey Paska, 'Be My "Suki": A Market Relationship in the Philippines' (Simple, Good and Tasty, 3 June 2013) <http://simplegoodandtasty.com/2013/03/06/globally-aware-be-my-suki-a-market-relationship-in-the-philippines> accessed 20 October 2020 [on file].

[80]Tobias Berger, *Global Norms and Local Courts: Translating the Rule of Law in Bangladesh* (Oxford University Press 2017) 118.

[81]ibid 28.

[82]ibid 140.

[83]ibid 143.

[84]ibid 109.

[85]ibid.

[86]ibid.

[87]ibid.

[88]ibid 156.

[89]ibid 129.

[90]ibid.

[91]ibid 164.

[92]ibid 165.

[93]ibid 25.

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institutions, and practices'.[94] Berger's verdict is clear: the only way in which NGOs are able to make the rule of law work in Bangladesh is 'precisely because they abandon "the rule of law" as it is imagined by international donor agencies'.[95]

Meanwhile, in her absorbing study of rule-of-law glocalization in Guatemala, Lisbeth Zimmermann observes how 'where norm promoters adopt a conditionality-oriented approach in order to secure full adoption of a norm, this in fact blocks further adoption into law'.[96] Indeed, 'every norm is made sense of in a specific socio-political context'; otherwise said, '[a] norm is something that has to be brought to life in its new context by a process of discursive interaction, negotiation and contestation'.[97] Zimmermann thus explains how the 1989 United Nations Convention on the Rights of the Child underwent 'a "back-and-forth" process',[98] that is, an 'interaction between external norm-promotion activities and domestic norm translation point[ing] to the formation of "feedback loops" in reaction to the activities of rule-of-law promoters'.[99] Indeed, 'UNICEF promoted full legal adoption of the [Convention] in Guatemala and an initial code of rights for children was enacted. In the second step, however, major contestation erupted and the code never came into force. UNICEF then revised its interaction strategy'.[100] In 2003, by way of 'third step', the Guatemalan Congress adopted a new law 'reshaping … the [Convention] standards in line with a "family-based" approach to children'.[101] Zimmermann's research illustrates to excellent effect not only what happens, but what must happen as a purportedly universal norm like the rule of law seeks to earn local recognition and respect, in practice, local legitimacy and efficacy.

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A sensitive comparatist, George Fletcher, writes that the rule of law is an 'opaque' idea, that 'we are never quite sure what we mean by [it]'.[102] Through the darkness and indeterminacy, it remains possible nonetheless to discern how the concept is situated and how – in its contemporary configuration at least, that is, in terms of the circulating model that currently acts as principal referent – it ordinarily belongs to the common-law world, the English language, and, principally, US legal culture. It is also easy to observe that once it is on the move, the rule of law must adjust to local practices if it is to have any hope of repeating locally the results that it may have achieved whence it came.[103] In other words, even as one witnesses the defenders of the rule of law and of its planetary implementation inevitably 'think[ing] out of a particular accretion of histories, whether or not [they] could excavate such pasts fully',[104] the necessary presence of as many local variations as there are intertextual assemblages between itinerant and local knowledge remains undeniable.

[94]Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (2nd edn, Princeton University Press 2008) xii.

[95]Berger (n 80) 158. Concurring, Ridwanul Hoque remarks that '[t]he realisation of rule of law is deeply tied with political and social culture, tradition, and practices' and that '[i]n the context of Bangladesh, … seeing social and economic justice purely as a matter of political wisdom of the executive and legislative branches would render the rule of law an empty rhetoric': Ridwanul Hoque, 'Rule of Law in Bangladesh: the Good, the Bad and the Ugly?', in Chowdhury IA Siddiky (ed), *The Rule of Law in Developing Countries: The Case of Bangladesh* (Routledge 2018) 38 and 27.

[96]Lisbeth Zimmermann, *Global Norms with a Local Face: Rule-of-Law Promotion and Norm Translation* (Cambridge University Press 2017) 197. Zimmermann expresses surprise that 'in contravention of the prevailing paradigm of context sensitivity, this is still the first strategy opted for by international norm promoters': ibid.

[97]ibid 207.

[98]ibid 53.

[99]ibid 61.

[100]ibid 83.

[101]ibid. Zimmermann notes that in the 2003 statute, '[t]he text [i]s marked by its use of a strong, family-based vocabulary and the various freedoms [a]re subject to a greater degree of parental oversight': ibid 113.

[102]George P Fletcher, *Basic Concepts of Legal Thought* (Oxford University Press 1996) 11.

[103]Often, this adaptation proves problematic. See eg, Pádraig McAuliffe, *Transitional Justice and Rule of Law Reconstruction* (Routledge 2013) 43.

[104]ibid xiv.

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Ultimately, '[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning' – and only glocalization can transform transnational assertiveness into local retentiveness.[105]

Upon examination, there is thus no such entity in existence as 'the' rule of law, no sustainable argument that can be allowed to read into this designation 'an entelechy of universal reason'.[106] The key epistemic point is that a concept readily claimed to be universal is in fact 'drawn from very particular intellectual and historical traditions that [can]not claim any universal validity',[107] that it is then re-territorialized or re-localized by encultured individuals whose idea of universalism must ultimately be their own, and that any such re-territorialization or re-localization takes place in manners and settings that are themselves meaningfully singular. From any of these three angles, the rule of law can only exist as a local configuration.[108] Even so-called 'global legal orders', therefore, '[do not] waive space altogether'; on reflection, 'how could they?'.[109] The fact is that '[t]he law governs human behaviour, and human behaviour takes place in space'.[110] *Epistemology is geo-epistemology*.

III. Framing equivalences or commonalities

Universalism assumes equivalence or commonality. However, no equivalence or commonality exists across laws except what the comparatist, in line with his plan of action, decides to name thus. Consider Michel Foucault: 'There is no resemblance without signature'.[111] Insightfully, Foucault says of the realm of equivalence or commonality that '[it] can only be a marked world'.[112] Foucault's argument is that it does not pertain to any entity (say, to any law) to be like another entity (say, another law). Far from constituting an essential characteristic, likeness is always an analyst's attribute. Hence, Foucault's contention that every resemblance bears someone's imprint. Probing the term 'resemblance', Jacques Derrida further observes that '[t]he way in which resemblances constitute or stabilize themselves is relative, provisional, precarious'.[113] If equivalence or commonality is the product of an analyst's interpretive input, one can indeed expect any ascription to depend on a specific interpreter, that is, to be liable to ongoing emendation and therefore inherently uncertain. Because a similarity heralds a difference, albeit inconspicuous, rather than the identity that it is unabashedly taken to evoke,[114] Nelson Goodman concludes that in the epistemic way in which it is harnessed '[s]imilarity … is a pretender, an impostor, a quack'.[115] As he draws attention to the term's 'insidious' character,[116] he contends that all attempts to explain the world by way of 'similarity' must be abysmally deficient. Indeed, similarity is 'an empty … relation'.[117] Unsurprisingly, Goodman thus chastises the prevailing 'addiction to similarity'[118] – for instance, the fact that '[h]istorically … comparative frameworks have been directed toward gaining an understanding of similarities', that 'similarities have guided [comparative] inquiries, explicitly or

[105]Robert M Cover, '*Nomos* and Narrative' (1983) 97(1) Harvard Law Review 4, 4.
[106]Chakrabarty (n 94) 29.
[107]ibid xiii.
[108]McAuliffe's leitmotiv is that any application of the rule of law within transitional justice must answer the singularity of circumstance: see McAuliffe (n 103) passim. See also Ruti G Teitel, *Transitional Justice* (Oxford University Press 2000) 11–26.
[109]Hans Lindahl, 'A-Legality: Postnationalism and the Question of Legal Boundaries' (2010) 73(1) Modern Law Review 30, 33.
[110]ibid.
[111]Foucault (n 7) 41.
[112]ibid.
[113]Jacques Derrida, *Politique et amitié* (Michael Sprinker ed, Galilée 2011† [1993]) 112.
[114]See eg, Legrand (n 6) 302–303.
[115]Nelson Goodman, *Problems and Projects* (Hackett Publishing 1972) 437.
[116]ibid.
[117]ibid 443
[118]ibid 438.

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implicitly'.[119] For his part, the distinguished analytical philosopher Willard Quine refers to 'sameness of meaning' as 'an ill-conceived notion within traditional semantics'.[120]

Along with Foucault's and Derrida's, Goodman's and Quine's intuitions are sound, and the deployment of terms like 'similarity' and 'sameness' proves misleading. To maintain that entity A (say, US judicial review) is similar to entity B or is the same as entity B (say, the Mexican *amparo*) – in brief, that it features an equivalence or commonality with entity B – must mean, on every occasion, that entity A effectively differs from entity B, that it is singular vis-à-vis entity B. *This is what is the case*. Remember Leibniz, an analytical philosopher *avant la lettre*, and envisage what has been labelled 'Leibniz's Law',[121] an enunciation that I am minded to rephrase thus: if there is more than one in co-presence, there must be difference. To apply the proposition to law: if there is more than one law of strict liability being compared, there is difference between these laws of strict liability. *There is difference, and there must be difference: these laws of strict liability cannot not differ*.[122] Only if entity A were identical to entity B would it not distinguish itself from entity B. But the only way in which entity A could be identical to entity B would be for entity A to be entity B. However, if entity A were entity B, the very idea of a comparison featuring entities A and B would be non-sensical. I maintain that this logical demonstration is decisive for comparative law and that only the ignorant or the duplicitous would dismiss it as sophistry. As Derrida exclaims: '[T]o compare[:] [t]here has to be a difference permitting it'.[123] I now turn to an illustration exemplifying how there is no equivalence or commonality across laws, except if imputed, how difference across laws therefore remains 'irreducible'.[124] Inasmuch as it pertains to the doctrine of equality, this example unfolds as an epitomic application of the rule of law.[125]

In 2004, France enacted a statute holding that '[i]n public primary and secondary schools, the wearing of signs or attire whereby students ostensibly demonstrate religious belongingness is prohibited'.[126] Soon after, the Supreme Court of Canada's unanimous decision of 2 March 2006 in the case of *Multani v Commission scolaire Marguerite-Bourgeoys* pronounced that the absolute prohibition by a school board on the wearing of a *kirpan* (a twenty-centimeter metal dagger), which a twelve-year-old orthodox Sikh boy kept on him according to the dictates of his faith, infringed the student's freedom of religion and effectively deprived him of his right to attend a public school, thus violating the Canadian Charter of Rights and Freedoms.[127] As I explore the investigations that French and Canadian laws impetrate, I am guided by the *empirically-ascertainable fact* of the singular existence, of the untranslatability of each law.

In the face of such an obvious differend across law-worlds, the Canadian multiculturalist can clearly regard the French statute as intolerant. Meanwhile, the French republican can evidently claim that the Canadian judicial decision panders to fundamentalist culturalism. In each instance,

[119]Aram A Yengoyan, 'Comparison and Its Discontents', in Aram A Yengoyan (ed), *Modes of Comparison* (University of Michigan Press 2006) 144.

[120]WV Quine, 'Indeterminacy of Translation Again' (1987) 84(1) Journal of Philosophy 5, 10.

[121]See Gottfried Wilhelm Leibniz, *Nouveaux essais sur l'entendement*, in *Die philosophischen Schriften von Gottfried Wilhelm Leibniz*, vol 5 (CI Gerhardt ed, Olms 1965 [1764†]) 49: '[B]y virtue of imperceptible variations, two individual things … must always differ'.

[122]cf Jean Milet, *Ontologie de la différence* (Beauchesne 2006) 76: '[T]he differentiated, or the differential, is a given'.

[123]Jacques Derrida, *La Vérité en peinture* (Flammarion 1978) 429.

[124]Jacques Derrida, *Limited Inc* (Galilée 1990) 253. See also Milet (n 122) 21, who writes of difference as 'the *absolutely first* and irreducible given'.

[125]See eg, Paul Gowder, 'The Rule of Law and Equality' (2013) 32(5) Law & Philosophy 565, 565: 'The rule of law is morally valuable … because it is required for the state to treat subjects of law as equals'. Already, see Dicey (n 48) 193.

[126]Loi no 2004–228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Statute no 2004–228 of 15 March 2004 enframing, in application of the principle of laicity, the wearing of signs or attire demonstrating religious belongingness in public primary and secondary schools], art 1 ('Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit').

[127][2006] 1 SCR 256.

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this preference remains situated. It cannot be expressed objectively nor can it be formulated by reference to truth. Otherwise said, there is 'no rigorous argument that is not obedience to [one's] own conventions'.[128] In the light of the obvious fact that a French 'lycée public' differs institutionally, politically, socially – culturally – from a Canadian secondary school, given that 'each term of this plurality of identities finds within itself the principle of its own validity',[129] what would be, to channel the Latin expression in use within orthodox comparative law, a *tertium comparationis* allowing for a comparison? What would be an interface serving as a point of entry into the comparison between the French and Canadian laws on religious attire in public schools? Is there a covering measure – a meta-measure – that would permit one to argue, say, that there is more of 'it' ('freedom', 'dignity') here and less of 'it' there, so that here is 'better' than there, that here is indeed correct or right, perhaps that here affords a true referent? The short answer must be that '[w]e do not have units of measurement, but only multiplicities or varieties of measurement'.[130] The comparative issue cannot be addressed, then, according to a meta-language agreed by both constituencies: such a meta-language does not and will never exist, no matter how hard and long the comparatist pursues it. In fact, no comparison can abide an existing common referent. Meanwhile, the application of either the French or Canadian resolution to settle the differend would wrong the other law. As it is cast in one language, one law's legitimacy cannot imply the other's lack of legitimacy as it is framed in another language.

Percipiently, the playwright Samuel Beckett captures the enigmaticity of this situation as he refers to 'the simple and necessary and yet so unattainable proposition that their way of being we, [is] not our way and that our way of being they, [is] not their way'.[131] When the Canadian State is being a State dealing with religious attire in public schools, like France, the Canadian State's way of being *that* (a State dealing with religious attire in public schools) or the Canadian State's way of being a State that, like France, is dealing with religious attire in public schools or, in short, the Canadian State's way of being France as regards religious attire in public schools, is not France's way. This position also carries in reverse concerning France vis-à-vis Canada. Even as I allow for the fact that there are people in France who are drawn to multiculturalism and that an argument for laicity could win some support in Canada – although one would expect either proposition to have to be adjusted, or localized, so that it could resound beyond the legal culture of whose practice it is the theory – the singularity of the two laws and the untranslatability across laws require acknowledgement. The French statute and the Canadian judgment thus exist on a par: they are *coeval*,[132] parity entailing 'non-zero difference'.[133] It is not, then, that one is better or worse than the other, and it is not either that one is as good as the other, because these three scenarios all assume a referential goodness against which each model could be measured in terms of identical units, and such referential goodness and identical measurement units do not exist. It is instead that each model is good in terms of its own goodness. And it is against the basis of this parity that difference can be ascertained, asserted, and justified. In the face of singularity and untranslatability, parity allows the differential comparison to hold – it makes a given comparatist's differential comparison possible.

To underscore how the comparatist's interpretive motion intervenes with a view to illuminating the legal/cultural singularity inhering to any law and the legal/cultural untranslatability across laws, I elect the notion of 'empowerment' as connector between the French and Canadian law-texts. Observe that this connector, this point of entry into the comparison, is *mine*: it is my decreed attribution to the French and Canadian law-texts that I see existing before me. As I proceed, I must

[128]Richard Rorty, *Consequences of Pragmatism* (University of Minnesota Press 1982) xlii.

[129]Ernesto Laclau & Chantal Mouffe, *Hegemony and Socialist Strategy* (2nd edn, Verso 2001) 167.

[130]Gilles Deleuze and Félix Guattari, *Mille plateaux* (Editions de Minuit 1980) 15.

[131]Samuel Beckett, 'The Capital of the Ruins', in *The Complete Short Prose* (SE Gontarski ed, Grove Press 1995 [1946]) 277.

[132]See Ruth Chang, *Making Comparisons Count* (Routledge 2002) passim.

[133]cf Natalie Melas, *All the Difference in the World: Postcoloniality and the Ends of Comparison* (Stanford University Press 2007) 31: '[T]here is a "basis for comparison" …, but "no ground of equivalence"'.

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accept that I am unable completely to surmount the artificiality of the comparative enterprise, since there is nothing like 'empowerment' *as such* against which I could gauge both French and Canadian law on an identical scale. And because I cannot use either French or Canadian 'empowerment' (as I would be undermining coevalness by marshalling one law to judge the other), all I can offer is a 'thirding' of knowledge, that is, I can articulate a 'third' notion that I call 'empowerment' after my understanding of 'empowerment'. Now, the notion of empowerment that I am introducing differentiates itself from the two laws' local 'empowerments' even as it resonates with each of them. In this sense, 'the interface is a reprocessing'.[134] By way of empowerment as I contemplate it, I believe I can elucidate certain traits that, on the basis of my acquaintance with what I reasonably name 'French culture', I feel able to associate with France. (It remains legitimate to talk of 'French culture' although culture in France is obviously multiple, disparate, and labile – and ever-recommencing.) Simultaneously, my notion of empowerment makes it possible for me to display various specificities that, on account of my experience with what I reasonably style 'Canadian culture', I feel in a position to link with Canada. In the sense in which I make it connect with France and Canada, '[my] interface is a palimpsest'.[135]

As comparatist, I must work as the encultured being that I am – not least as a Canadian having lived in France for over twenty years. My situated self, as I discern it, is my only standpoint. This fact both helps and hinders the trialectical process that I apply, which even as it purports to convey information about the two laws, inescapably effectuates a transformation and deformation of them, all the way from the inception of my investigations to the inscription of my conclusions. At every stage, I am filtering French and Canadian laws through my predilections and predispositions – those of an individual who was socialized and institutionalized into a legal culture somewhere in particular, attended law school somewhere in particular, and trained as a comparatist somewhere in particular (and with someone in particular). Complicated as my trajectory may have been – I am neither a typical Canadian lawyer nor a habitual French jurist – I remain, along with every comparatist, an encultured interpreter, which means that my best efforts notwithstanding, *I cannot tell otherness as such*. Indeed, how could I depict exactly in my language, in a finite language that I cannot escape, the other enacting his law-world in his language?[136] Because it is unsheddable, my encultured sieving implies transformation/deformation of the laws before me, entails that I am effectively doomed to non-knowledge (knowledge assuming certain or correct cognizance), and means that I must accept how '[e]very comparison is, at the outset, defective'.[137] Yet, my cognitive predicament does not detract from the need to design an interface – or, more accurately, since there is no shared ground on which instantiations of cultural plurality effectively meet, to delineate an interface-like-interface. While the comparison is, strictly speaking, impossible, it must happen, lest law-worlds should be abandoned to their soliloquies – the kind of defeatist epistemology that a comparatist cannot even countenance. As the responsible comparatist *responds* to the laws before him, his task is thus to channel both his proximity and distance vis-à-vis the French and Canadian models to interpretively enabling and critical effect. Note that as the comparatist inscribes his interface and records his inquiries, he aims to persuade his readers or auditors, possibly in the face of competing interpretations supplied by other comparatists. He therefore proceeds rhetorically, thereby enhancing the artificiality of his comparison. (A comparison always conceals a serviceable rhetorical practice informed by a theory of rhetorics, whether there is calculation or not, whether there is awareness or not.)

[134]Alexander R Galloway, *The Interface Effect* (Polity 2012) 44.

[135]ibid.

[136]cf Luigi Pirandello, *Uno, nessuno e centomila* (Piero Cudini ed, Giunti 1994 [1926]) 32: 'We used, you and I, the same language, the same words. … And you fill them with your meaning, as you speak them to me; and I, welcoming them, inevitably, fill them with my meaning. We believed we understood each other; we did not understand each other at all'.

[137]Stéphane Mallarmé, 'Divagations', in *Œuvres complètes*, vol 2 (2nd edn, Bertrand Marchal ed, Gallimard 2003 [1897]) 138.

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Moving from my interface to the French configuration, I hold, intervening as self-authenticating comparatist, that the 2004 statute silently implements an idea that, in France, is closely associated with the hugely influential political philosophy of Rousseau, whose key contention in this regard is that the State is created to preserve freedom and that it is in one's interest to submit to the State so that one can be favoured with freedom (a condition that despotism would deny one). Accordingly, the citizen enjoys freedom as the State defines it, which means that ultimately freedom is achieved *through* the State. In the words of prominent French politist Lucien Jaume, in France 'the recognition of an individual right … cannot come first; it is obtained by subtraction from or through an autolimitation of its prerogatives by the public authority', which entails the 'precariousness of individual right'.[138] The State is thus conceptualized as 'the body defining, controlling, and implementing the general interest',[139] so that private interests can only enjoy derivative legitimacy. In sum, 'centralization and the omnipresence of the State [are thought as being] indispensable for individual freedom'.[140] Pursuant to a local conception of empowerment whereby the French empowerment of the individual emerges from his subjection to the State, it is arguable that after the coming into force of the statute on religious attire in public schools, a French citizen enjoys more freedom than was previously the case. Specifically, the French citizen is now endowed with freedom from disturbance at having to confront irritating manifestations of religious allegiance in public schools.

Elsewhere, the Canadian judicial decision is regarded by Canadians as 'empowering' as it confirms one's entitlement freely to express one's religious allegiance in public schools. Consider David Beatty, a foremost Canadian academic: '*Multani* is such a compelling story because justice prevails in the end. His is as good as a David and Goliath story can get. A twelve-year-old adherent of a minority religion stands up to the Leviathan and wins. And he prevails not because he is faster or smarter or because of an act of God. Justice triumphed purely and simply because reason and the rule of law required that it should do so'.[141] Beatty adds that *Multani* was 'an easy case'.[142] Indeed, he explains how '[t]he politics and philosophies of the eight judges who ruled in Multani's favour were irrelevant', since '[t]he relative weights would be the same no matter who sat on the Bench'.[143] Being configured within a different, non-Rousseauian, 'rights-against-the-State' model, Canadian empowerment is premised on the fact that if 'the diverse cultural ways of the citizens are excluded or assimilated, [the constitutional order] is, to that extent, unjust'.[144] This postulate finds its expression in individualism (thus, Beatty: 'A fundamental aspect of identity and autonomy is lost if a person's appearance is dictated by someone else'[145]); in the recognition by the State of identity groups deploying comprehensive and ascertainable world-views informed, amongst other constitutive features, by religious convictions; and in the willingness of the State to grant these groups some form of self-government within the public sphere. Through the judicial decision of the Supreme Court of Canada, State law reveals a normative commitment to cultural accommodation that makes it possible for one to be governed, as a matter of Canadian law, by the institutions and traditions of the religious group to which one professes allegiance. As it fosters pluralism, this approach to legal/cultural governance implements an institutional design featuring a specific distribution of rights and authority between the [S]tate and the group allowing for 'group-differentiated rights'.[146] It also promotes a conception of the polity incorporating the view that legal/cultural narratives are inextricably

[138]Lucien Jaume, *L'Individu effacé* (Fayard 1997) 371 and 372.
[139]ibid 18–19 [emphasis omitted].
[140]Jean-Fabien Spitz, *Le Moment républicain en France* (Gallimard 2005) 447.
[141]David Beatty, 'Law's Golden Rule', in Gianluigi Palombella & Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009) 103.
[142]ibid 102.
[143]ibid 104. The Supreme Court of Canada consists of nine judges, but the *Multani* bench featured a vacancy.
[144]James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press 1995) 6.
[145]Beatty (n 141) 102.
[146]Will Kymlicka, *Multicultural Citizenship* (Oxford University Press 1995) 6.

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intertwined even at the price of some social fissiparity.[147] Now, the demand for public recognition of one's particular views is, of course, precisely what Rousseau abhorred. Charles Taylor thus points to a key passage where Rousseau castigates the moment when individuals begin to solicit 'preferential esteem' within a society.[148] For Rousseau, this is 'the first step towards inequality and towards vice at the same time'.[149] 'By contrast', in Taylor's words, 'in republican society, where all can share equally in the light of public attention, [Rousseau] sees the source of health'.[150]

Even as I claim that in both jurisdictions it will be thought that the law has intervened to empower citizens, I acknowledge that French citizens can be expected to take the view that by allowing express manifestations of religious allegiance in public schools, the Canadian court is 'forcing' religion onto all students in the classroom and thus confining many students' freedom in a way that effectively disempowers them, while Canadians may readily interpret the French statute as an affront to individual freedom and a prime illustration of disempowerment of the individual by the State. Indeed, for Beatty, '[t]he French government's assessment of the weight of its case seems to be badly overstated'.[151] According to the Canadian critic, inasmuch as French lawmakers have struck 'the balance … unfairly in their own favour' it can legitimately be observed that in France 'the commitment to the rule of law is still hesitant and partial'.[152] It must be clear, however, that the French and Canadians are using different conceptions of empowerment – or rather, of what I, operating as comparatist, denominate as 'empowerment'.

For I am indeed at work *inventing* an (unobjectivizable and untruthable) notion of empowerment through a 'thirding' of knowledge on account of which I can stage a forced negotiation between French and Canadian laws possibilitating my comparison. Observe how my notion of empowerment enacts my decision to compel French and Canadian laws into a negotiation that would not otherwise happen. It is not, obviously, that local manifestations of empowerment can be reduced to a figment of my imagination. Rather, it is that, in interpretive response to the information that I have garnered in the course of my research, in reaction to the particulars that I have chosen to retain out of the available concatenation of details, I frame empowerment in my (enculturated) way, according to my (enculturated) ingenuity – to my (enculturated) 'flair'[153] – in the humble realization that my (enculturated) construction is refutable, at least to the extent that a more convincing argument can be found to carry over mine (or that I myself may later commit to an improved interpretation). And I must accept that my empowerment pertains to narrativity, for no reading of a law-text can be dissociated from a commentary on it. Since no account of foreign law is wholly free of narrativity, it follows that every report on foreign law is autobiographical, the expression of a *partial* point of view that, like every comparatist, I call 'mine' (and that finds itself vying for influence with other partial observations by other comparatists).[154] Note that no amount of logic, precision, or clarity in the comparatist's record of foreign law – and certainly no so-called 'method' – can eliminate narrativity from his transcript, which will remain an *incomplete* and *orientated* exposition. Indeed, the more the comparatist 'keeps wanting to add just one more word, in the futile hope of making it all clear',[155] the more *storied* his rendition of foreign law becomes.

[147]I track Ayelet Shachar, *Multicultural Jurisdictions* (Cambridge University Press 2001) 1–2.

[148]Charles Taylor, 'The Politics of Recognition', in Amy Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1994) 35.

[149]Jean-Jacques Rousseau, *Discours sur l'origine et les fondemens de l'inégalité parmi les hommes*, in *Œuvres complètes*, vol 3 (Bernard Gagnebin & Marcel Raymond eds, Gallimard 1964 [1754]) 169–170.

[150]Taylor (n 148) 35.

[151]Beatty (n 141) 108.

[152]ibid 110 and 107.

[153]Jacques Derrida, *De la grammatologie* (Editions de Minuit 1967) 233.

[154]Because of enculturation, every report on foreign law is also heterobiographical.

[155]J Hillis Miller, 'Zero', in Julian Wolfreys (ed), *Glossalalia: An Alphabet of Critical Keywords* (Routledge 2003) 388.

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It is not plausible, indeed, for a comparatist-at-law to *conceive* of something existing independently of his thinking of it, a view already expressed by Bishop Berkeley, who called the contrary proposition 'a manifest repugnancy'.[156] Framed differently, my claim is that even assuming a given law-world (whether French or Canadian), that world is inevitably given to the comparatist-at-law by way of his enculturation. No measure of 'givenness' pertaining to foreign law should therefore lead one to the view that the comparatist's interpretive contribution is superfluous on the ground, say, that there would be a foreign law-text in meaningful existence 'as such' somewhere outside of any reading process. Without an interpretive realization, foreign law cannot mean anything to the comparatist: it cannot *signify*. Consider the French statute or the Canadian judicial decision: paper and ink (or pixel) molecules do not signify by themselves.[157] Yet, even as foreign law cannot make sense except through the comparatist, even as there is no foreign law that is accessible to the comparative intervention outside of the comparatist's language and interpretation, foreign law exists irrespective of any comparatist: it exists before him, which means that it cannot collapse into mere comparative perception. The French statute *is* on the French statute-book, and the Canadian judicial decision *is* in the official Canadian law reports. It is not that there is no referentiality, but that referentiality is 'inscrutable' or 'indeterminate'.[158] In effect, and no doubt counter-intuitively, the comparatist *invents* foreign law – he finds it in the library ('to find' is one meaning of the verb 'to invent'),[159] and he designs it for reporting purposes ('to design' is the other meaning of the verb 'to invent').

As I re-present, as I present anew according to my interpretive lights each law-text on religious attire in public schools as a singular enunciation whose argument offers a variation on the theme of local knowledge, I renounce any identification of either statement as truth in the received sense of the word, that is, as truth carrying a 'covering' value that would embrace the other law-text. Between the French and Canadian models, each configuration stands as a rational presentation locally and as an irrational commitment when envisaged from a different world-view. The incongruity of French law from a Canadian perspective is indeed on display in Beatty's critique as it discloses a lack of appreciation for French culture ('It leaves no room for individual choice'),[160] reveals a misunderstanding of the role of public schools within French society ('If headscarves can be accommodated in universities, why should secondary schools be any different?'),[161] and shows incomprehension in the face of French Islamophobia ('[The French government cannot] say that allowing headscarves in schools would constitute a major threat to public order and/or the rights of others').[162] Not uncharacteristically in terms of comparative law as we know it, Beatty's confusion leads him into contempt: 'Even in a culture that puts a lot of emphasis on appearances, can clothes be that important?'.[163]

[156]George Berkeley, *Principles of Human Knowledge*, in *Principles of Human Knowledge and Three Dialogues* (Howard Robinson ed, Oxford University Press 1996 [1710]) §23, 33.

[157]See Peter Shillingsburg, *Textuality and Knowledge* (Penn State University Press 2017) 168, 129, and 129. For a refutation of the 'mystical idea' that 'linguistic signs can somehow speak their own meaning', see also ED Hirsch, *Validity in Interpretation* (Yale University Press 1967) 23. It follows that '[l]egal rules … obviously do not apply themselves': Jorge L Esquirol, *Ruling the Law* (Cambridge University Press 2020) 84.

[158]See WVO Quine, *Word and Object* (MIT Press 1960) 26–79; WV Quine, *Pursuit of Truth* (2nd edn, Harvard University Press 1992) 50.

[159]For example, in the Roman liturgical rite, the feast of the Invention of the Holy Cross (*Inventio Sancta Crucis*), that is, the reputed finding of the Holy Cross by Saint Helena in 326, was long observed on 3 May. Pope John XXIII abolished this celebration in 1960. The Church of the East still honours the Invention of the Holy Cross on 13 September, which it regards as a major festivity. Also, from 1562 to 1566, Tintoretto painted *Il Ritrovamento del corpo di San Marco*. 'Ritrovamento' stands for finding or discovery. In French, the painting is known as *L'Invention du corps de Saint-Marc*.

[160]Beatty (n 141) 110.

[161]ibid 108.

[162]ibid. Etymologically, 'Islamophobia' means a fear of Islam.

[163]ibid 109.

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What must remain fanciful, though, is a contention vindicating one of the different claims in a way that would prove acceptable *both* to the French and Canadians or that would seem persuasive within *both* prevailing paradigms – any such statement evoking a contrived universal, equivalence, or commonality. To emphasize that equivalent or common meaning, equivalent or common reference, and equivalent or common standard of judgment are absent across the Canadian and French legal/cultural landscapes, consider how the French accentuation of statism and the Canadian insistence on individualism already emerge from even a cursory literal reading of relevant constitutional legislation. While in France the *Déclaration des droits de l'homme et du citoyen* (1789) enacts that '[n]o one shall be investigated for one's opinions, even religious, provided that their manifestation does not disturb the public order established by the law'('pourvu que leur manifestation ne trouble pas l'ordre public établi par la loi'), the Canadian Charter of Rights and Freedoms (1982) holds that 'freedom of conscience and religion' and 'freedom of thought, belief, opinion and expression' are 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. One cannot therefore reasonably imagine a situation where, say, the French would understand the Canadian position on its own terms and according to its own justifications; then proceed to identify inadequacies in the Canadian view that Canadians themselves would accept; and finally explain how, by resorting to the French model, these Canadian difficulties could be avoided in a manner that Canadians would allow. Even if practically everyone in France, in Canada, and beyond was to ascertain one position as more 'adhesion-worthy' than the other from practically every perspective, such convergence of views would still not make the argument qualify as a universal, equivalent, or common referent. Rather, the contention would continue to concern the matter of interpretive attribution. And irrespective of how many attributers, the claim would remain fallible and contestable, that is, *defeasible*.

Since each law *exceeds* the other, the comparatist cannot exhaustively assimilate a law's meaning to the other's. Within the comparison, the differend is fated to persist because the sense to be ascribed to each law must be singular and thus different from that to be assigned to the other law. It is not, however, that the comparatist must avoid critique by opting for quietism (comparative law is not about legitimating the *status quo* or normalizing the logic of the singular as the way things are or are destined to be), but that his warrant for the assertability of his assessment cannot circumvent his local, embedded, and therefore contingent rationality, which cannot be equated to rationality *tout court* (that is, to a non-existent Rationality). Far from generating but low-wattage French law, the comparatist's reading of French law, for example, can carry significant surplus value vis-à-vis the French readings of French law inasmuch as it can contribute a critical stance that French interpreters themselves cannot offer, that is, an enlarged or other-worldly thought ranging beyond French local knowledge. While they will fail to capture French law's quiddity (the self cannot be the other), the comparatist's insights can raise productive questions and offer rewarding reconfigurations for French legal culture that French legal culture would not be in an epistemic position to suggest for itself (one of the signal advantages afforded by a comparative endeavour). There remains one important limit to the reach of comparative appraisal, however, which is that, applying the principle of charitable interpretation, the comparatist must resist pronouncing the French view as non-sensical.

Epistemically, the untranslatability across the laws being compared means a state of incommensurability 'in which an undistorted translation cannot be produced between two or more denotational texts'.[164] There is French law's world there, and there is Canadian law's world here. In the absence of isomorphism, these two law-worlds speak different monologues.[165] There is coevalness of laws without there being correlation across laws, and the comparison reveals interruption or

[164]Elizabeth A Povinelli, 'Radical Worlds: The Anthropology of Incommensurability and Inconceivability' (2001) 30 Annual Review of Anthropology 319, 320.

[165]cf Martin Heidegger, *Unterwegs zur Sprache* (Günther Neske 1959) 265: '[L]anguage *is* monologue'.

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disrelation.[166] For instance, to use the German 'öffentliches Gymnasium' in order to discuss, in German, the 2004 French statute featuring 'lycée public' is to assimilate, to colonize, and thus to *angle* French law. Again, the German comparatist cannot tell it 'as such' for 'translation … invest[s] the source text with a significance that is specific to the translating language and culture'.[167] (Once more, this is not at all to say that such structural limitation – neither skill nor competence is at stake[168] – must somehow hinder the pursuit of comparative studies or of translation.) Yet, within comparative law the fantasy of translatability has long been applied like a patch on the fact of incommensurability in order to hide the active differentiation and fragmentation that comparatists, bizarrely subjugated to the idea of oneness even as they must *ex hypothesi* dwell in more than one law, do not want to see. Indeed, one can easily read the history of comparative law as the ideological forgetting of incommensurability of languages and of laws, of law-worlds.[169] Although they deal in distance, comparatists act as regards the laws they are comparing '*as if* [they] inhabited the same world and spoke of the same thing and spoke the same language' while, in effect, the ontological gap between self and other is unbridgeable (no matter how much the self wants to assume the other's transparency).[170] Contrary to comparatists, who have been proving absent to their cognitive boundaries, Beckett, a translator of his own work over decades, pithily captures the fact of the unattainable linguistic consilience, of the unsurpassable linguistic alternation: 'I feel kept at word's length'.[171] The comparatist's challenge thus becomes the articulation, within the third space, of a scene of comparability over against the dissensus that necessarily exists and beneficially remains across law-worlds (reserving the case of extremism, disagreement is indeed the opportunity for further debate and discussion, for enhanced appreciation). Eschewing authoritarian objectivity or truth, the comparatist requires to tame this democratic agonism into a structurally constitutive feature of his comparison.

IV. Singularity is what is the case

Law proceeds through place, and '[t]here exists no place that can be said to be "non-local"'.[172] Non-location in space (like non-situation in time) is untenable. Any instantiation of the legal – even of the most allegedly universal or global sort – must be located in space (and situated in time). No matter how purportedly borderless the transnational institution or practice, any *effectuation* of it must manifest itself singularly. Thus, 'homogeneity … is still the local kind',[173] an observation that promptly returns one to the felicitous notion of glocalization. The ultimate dependency of the 'global' on the local – '[t]he law needs … a point of contact with concrete human activity'[174] – reveals

[166]cf Sarah Maitland, *What Is Cultural Translation?* (Bloomsbury 2017) 8: 'The act of translation … means living *with* difference … . It means acknowledging the … incommensurables that separate us'.

[167]Lawrence Venuti, *Translation Changes Everything: Theory and Practice* (Routledge 2013) 11.

[168]cf Michael Lambek, 'The Hermeneutics of Ethical Encounters' (2015) 5(2) Hau: Journal of Ethnographic Theory 227, 228, who observes that incommensurability is not 'a preventable pathology of culture or thought'.

[169]Within comparative law, incommensurability has been misapprehended as incomparability: see H Patrick Glenn, 'Are Legal Traditions Incommensurable?' (2001) 49(1) American Journal of Comparative Law 133, 135. But see, eg, Thomas S Kuhn, 'Commensurability, Comparability, Communicability', in *The Road Since Structure: Philosophical Essays, 1970–1993* (James Conant & John Haugeland eds, University of Chicago Press 2000) 36: 'No more in its metaphorical than its literal form does incommensurability imply incomparability'. See also Umberto Eco, *Dire quasi la stessa cosa* (Bompiani 2003) 40: '[I]ncommensurability does not mean incomparability' [emphasis omitted].

[170]Derrida (n 1) 369.

[171]Letter of 14 February 1976 from Samuel Beckett to Nicholas Rawson, in George Craig et al (eds), *The Letters of Samuel Beckett*, vol 4 (Cambridge University Press 2016) 422.

[172]Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford University Press 2005) 179.

[173]Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (WW Norton 2006) 102.

[174]Costas Douzinas, *The Radical Philosophy of Rights* (Routledge 2019) 103. See also Sandra Fredman, *Comparative Human Rights Law* (Oxford University Press 2018) 7: 'Even if there were universal human rights values, there would be a need to determine how they applied to the local context in different jurisdictions'.

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itself notwithstanding how much one wants to see legal artefacts 'as hovering nonemergently in some special epistemic heaven and controlling practice from without'.[175] Any enunciation of the rule of law therefore exists as a local configuration. It follows that when the US legal arrangement travels, it does so in important respects as a US cultural statement that harbours many singular US commitments. Because law is always-already law-*in*-world, any law features something of its world within it, *as* itself – which entails that it is artificial to treat US law, even itinerant US law, as if it stood apart from US culture. And law's intrinsic worldliness means that when the US legal/cultural statement lands in Japan or Indonesia, it must become law-*of*-world and acquire a local worldliness as a condition of its very survival locally. What the comparatist can see happening in Japan or Indonesia is therefore a singular intertextual assemblage, that is, an idea emerging from the United States intertwining itself with local knowledge (the enmeshment of the constitutive parts being, in effect, extraordinarily complicated and potentially unravellable). What the comparatist can see materializing in Japan or Indonesia is the local self-in-the-law undergoing re-signification through the affectation of otherness-in-the-law to its 'body legal'. The self becomes a revised self on account of the other. Although it is now *othery*, the self has emphatically not changed through and through into the other. Accordingly, the outcome remains a Japanese or Indonesian legal/cultural self, which it would be profoundly reductive to dilute into a purportedly 'universal' or 'global' configuration called (in English!) 'rule of law' that would now obtain everywhere, if with slight variations rapidly to be deemed secondary or even irrelevant. Instead of convergence around a single, originally common-law, anglophone, or US institution, there is an irreducible multiplicity of irreducibly singular legal/cultural models – some of which actually stand as strong expressions of resistance to unification or uniformization processes. What there is, in sum, is not universalism but differentialism, not equivalence or commonality but a differend. This result ought not to prove surprising if one reminds oneself of Leibniz's precursive 'glocalizing' insight.

An analytically autonomous notion featuring a specific explanatory input, glocalization accepts that there *is* a reconfiguration of spatial boundaries. But it holds that the metaphorical compression of the planet that is effectively manifesting itself is not unfolding as a unified or uniform anglobalization of any kind. Rather, in every locale there takes place a complex interaction between standardization and (irreducible) indigenization in the form of a seemingly infinite array of customized and differentiated intertextual assemblages, each heterogeneous construction being ascertainably singular. There is, then, the irreducibility of the glocal, because there is 'the irreducibility of idiom'.[176] Importantly, 'globalization' is therefore not to be apprehended as standing in opposition to local forces or beyond them. Nor can it be understood as destroying the local. Rather, the flow of 'globalization' finds itself being interrupted along its homogenizing trajectory as the 'global' is made to address local processes with which it must accord as a condition of its successful implementation in a particular place.

Recall the furtherance of rule-of-law institutions. '"Global" entities such as international organizations, courts and expert bodies all interpret norms to differing degrees and promote these interpretations [transnationally] – often in concert (or conflict) with particular governments, foundations, international [non-governmental organizations] and others. [Local agents], meanwhile, contest, reinterpret and reshape these norms and, in their turn, trigger reactions' – the deliberation and confrontation of norms constituting an important assertion of democratic rights and thus showing how 'localization is at least recognized as having the potential to produce outcomes of a more legitimate, more stable and locally more appropriate kind' (although one must allow for local objections issuing from dictators, corrupt officials, or war-lords).[177] In other words, '[t]he overall pattern … is that of a "feedback loop": international promoters begin by pressing for full

[175]Andrew Pickering, *The Mangle of Practice: Time, Agency, and Science* (University of Chicago Press 1995) 200.
[176]Gayatri Chakravorty Spivak, *An Aesthetic Education in the Era of Globalization* (Harvard University Press 2012) 472.
[177]Zimmermann (n 96) 15 and 51.

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adoption of global standards using a conditionality-oriented mode of interaction; in response to local interpretation and contestation, they shift to a more persuasion-oriented (and less transparent) style of interaction and allow more scope for discussion about local translation'.[178] The key, then, is local reverberations. For there to be a normative fit, there must be a local cultural match. In sum, 'every norm is made sense of in a specific socio-political context' – although no claimed match or absence of match occurs without translation processes being fashioned locally by power or interest.[179] Illustrations of such arrangements are plethoric, all of them examples of the international being moulded into local knowledge through various adjustment processes.

Contemplate Christianity and the strategies of local adaptation it had to adopt to assert a presence in China. Or envisage 'Spanglish' in the United States, or think of the English spoken in Hong Kong or India. The latter linguistic configurations, for instance, show how the late-twentieth-century dissemination of the English language from the United States (the 'global' fact), far from leading to a monolingual planet, has instead prompted the formation of many glocal articulations whereby local syntax and vocabulary (the local fact) have shaped 'English' into different 'Englishes' and effectively turned 'English' into singular linguistic arrangements (the glocal outcome). Now, consider a Paris version of the Starbucks coffee-house – an apposite instance of the singularization of a 'global' brand in order to appeal to the local market.[180] Also, one can advantageously deconstruct the broadcast of FIFA's World Cup final. While the transmission may appear at first sight as the perfect example of 'globalization' given the planetarity and instantaneity of the game's diffusion on account of information technology, closer examination reveals that in each country the broadcast undergoes local calibration in significant ways, for example, as it disseminates through local commentators speaking local languages, showcases local celebrities being interviewed at half-time (this Italian superstar in Italy and that Argentine celebrity in Argentina), and displays local advertising – even the planetary sponsors' advertisement being released in local languages. It follows that there is more than one FIFA World Cup final (although there are obviously less than two), each operating as a differential national or regional instantiation and all being branded as the FIFA World Cup final. This point can also be made as regards the Olympic Games, although in this case the salience of the local, or the local anchoring, finds itself heightened – thus challenging even more directly the homogenizing grid – since certain sports are given pride of place, for instance, those that are most popular locally, with respect to which the local teams have a particularly good chance of success or in which the local team is fielding a high-profile athlete. Meanwhile, other sports are relegated to a supporting role, if not rendered invisible altogether.

Rather than the isomorphism that an unexamined view readily assumes, what effectively occurs in all such situations is allomorphism – not unification or uniformity, but fragmentation, that is, acculturation and differentiation. To be sure, the local has never been 'purely' local, and local knowledge has always been constructed through outside influences. What is different as regards glocalization is that the relevant outside influence takes the form of an identifiably transnational phenomenon. To continue with sports, cricket shows, if one is prepared to look closely, that the assertion of localism can be particularly strong. Picture a game between India and Pakistan. Not only does this encounter reveal cricket to have been 'hijacked' from the English and made more aggressive and spectacular, but it also discloses how 'England … is no longer part of the equation'.[181] Once more, it is not that

[178]ibid 192. More precisely, 'translation from the "global" to the "local" takes place in three dimensions: translation into discourse, translation into law and translation into implementation': ibid 54.

[179]ibid 207.

[180]A variation on this theme concerns the local use of a 'global' brand: '[A]t a respectable funeral in the United States, you wouldn't serve Coca-Cola. At a funeral in Ghana, if you don't serve Coca-Cola, you are not at a respectable funeral. … In every case, there's a material thing that circulates, but what it is doing is different': Kwame Anthony Appiah and Homi Bhabha, 'Cosmopolitanism and Convergence' (2018) 49(2) New Literary History 171, 188. The words are Appiah's.

[181]The term 'hijacking' is in Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (University of Minnesota Press 1996) 108 and 113. I quote from ibid 109.

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glocalization is reducing the significance of space. Rather, it is that any simplistic binarism or dichotomy between the 'global' and the local finds itself superseded in favour of *glocal hybridity*.[182] Note that it would be too facile to equate the 'global' with form and the local with contents. What takes place instead is that the entity undergoing dissemination is developing through rhizome-like local connections that are always-already singular and partial. While one witnesses a certain epistemic anarchy as connections may be produced with any local entity by way of a range of different intertextual assemblages, it remains that relevant glocal connections will undeniably happen. As they do, they attest to plurality across locales rather than unification or uniformity.

Victor Roudometof helpfully mobilizes the metaphor of the 'wave' to convey the interaction between flows and places, thereby showing the mutually constitutive character of both notions.[183] Again, and importantly, the 'global' entity ascertainably exists, ahead of any localization. There are, then, waves of 'globalization' spreading across the planet. Harnessing a second metaphor, Roudometof explains what takes place locally through the idea of 'refraction'.[184] As it asserts a specific wave-resistance capacity, each locality refracts the 'global' through its prism. Just as light passing through glass radiates an entire spectrum, the 'global' passing through the prism of the local radiates an array of differences. The final outcome of the 'wave + refraction' composition is neither a denial of the 'global' nor a disavowal of the local, but the affirmation of a process, which is glocalization, and of a resulting condition, which is glocalism.

This entanglement implicates a power relationship. The power play – which may involve prestige, money, information, or other resources – can ultimately favour the 'global' or the local. For example, some locales show themselves to be more wave-recalcitrant than others or reveal themselves to be better able to alter the passing waves. Observe that the fabric of the glocal and the fact of the glocal's unceasing persistence, whatever be the intensity with which local knowledge deploys itself, directly defeat all totalitarian claims, not least the various arguments supporting universality, equivalence, or commonality, that is, purporting to sustain the view of a full-scale diffusion and implementation 'as such' of some aspect or other of the disseminating model. Indeed, the cabbalistic narratives that I contest – the universal, the equivalent, and the common – cannot withstand the relativization that glocalization empirically imposes on the legal. Along the way, through its insistence on a more agential perspective bearing on the 'global' reach of models, ideas, and practices, glocalization aptly emphasizes the central role of local circumstances.

To cast the argument from a different angle, any ontology of law (any account of law's being) must be apprehended as a 'hauntology'.[185] Far from being pure, the very being of law is indeed haunted. For law to be as 'law' means for law to be constitutively visited by spectres, that is, by discursive formations (historical, political, economic, social, psychological, linguistic – cultural!) that, although not necessarily 'present' in the usual sense that they would be 'there', on the sheet of paper or on the computer screen, in so many words, graphically, are nonetheless present as the text of the statute or judicial decision inasmuch as they pertain to the fabric of the law at least as significantly as the express wording of the statute or judicial decision. These cultural traces are the *archive* of the law. What does not immediately show itself (say, the culturality of the legal discourse) belongs to what shows itself (the express words of the statute or the judicial decision), and it partakes of the law-text so crucially as to be constitutive of its very texture as law-text. As it leaves the United States, the rule of law is haunted by US culture. And as it embeds itself in Japan or Indonesia, it becomes haunted by Japanese or Indonesian culture. It is not that there is the rule

[182]'Glocal hybridity' is not redundant because 'hybridity' *tout court* can dispense with the local. For example, Québec has historically featured a hybrid legal system, that is, an intricate mixture of French and English law. As these two legal models combined in the eighteenth century, they did not initially comprehend much of a local dimension. While there was hybridization, there was therefore no glocalization. Indeed, the glocal is best understood as the hybrid *asserting the local*.

[183]Roudometof (n 74) 64.

[184]ibid 64–66.

[185]This clever neologism is in Jacques Derrida, *Spectres de Marx* (Galilée 1993) 255.

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of law here and culture over there, beyond the law-box. Instead, it is that the very fabric of the rule of law is cultural first and last, that law exists *as* culture (it is emphatically not, then, that culture is contextual to law, that it is to be found besides the law, apart from it). The rule of law thus exists as a singular intertextual assemblage of US/Japanese or US/Indonesian culture speaking legally (culture can also express itself architecturally, literarily, culinarily, economically, or philosophically). And comparative law therefore becomes an exercise in spectrography, a quest for law's cultural aperture rather than a search for its alleged positivistic closure.

V. Comparing on

Acknowledging that no purported universal, equivalence, or commonality can occur other than in the smithy of my mind, wanting to attenuate the danger of thin understanding and the attendant risk of thin interpretation, wishing to mitigate the epistemic ascendancy being visited on foreign law-texts, accepting that I am forging differential analysis of laws and that I am thereby engaging in symbolic violence, but taking the view that the violence that purports to inscribe the differend that is the case across laws on account of the inescapable local linkage between law and world is emphatically the lesser violence (in contrast to the fundamentally aggressive model of universalism, equivalence, or commonality that will do whatever it must, whether in good faith or not, to force the square peg of singularity into the round hole of *mêmeté*), valuing the contrarian challenge that arises from differential comparatism in lieu of the identification of pseudo-identities, thus placing myself firmly in the critical camp, I defend a basic interpretive strategy aiming to overcome the analytical reductivism to which involvement in ideological projects pursuing the unification or uniformization of laws in its various declensions has apparently condemned comparatists. In effect, I advocate a richer, more creditable interpretive *yield*. And this is why the claim, say, that the Danish law of *that* is like the German law of *this* always-already remains profoundly inadequate: it elucidates far too little about either law. To talk of an imaginary construct like 'European Contract Law' is not helpful either. Instead, the comparatist's task must be to unravel the singularity of Danish law, German law, or the various European laws of contract, to hearken to texts on their terms, to allow law-texts to speak for themselves and as examples of themselves. Only this interpretive engagement can properly be defended as *edifying* comparative analysis and perhaps as an intervention on the verge of *just* comparison.

Observe that the singularity at issue does not resolve itself into idiosyncrasy or oddity, which is why there appears no judicious way in which a striving for improved appreciation of foreign law can be denigrated as 'a position of "hyperparticularity"', and there seems to be no reasonable sense in which one can hold that 'hyperparticularity is too pessimistic a view of the possibilities of learning'.[186] Querying is quarrying, quarrying is learning, *and there are never enough details*. What a foreign law-text is – what it exists as – concerns precisely its force of implication in a network of cultural assumptions, a concrete and constitutive worldly state of affairs informing and sustaining law-words, thus inviting ever-more excavation and elucidation. The comparatist, recognizing and respecting the singularity of foreign law with a view to doing it justice through his interpretive intervention, must actively scrutinize the law-text in an effort to clarify the legal enunciation on its terms as much as is possible given the cultural embeddedness of the discourse, on one hand, and the discontinuous prejudices (themselves culturally embedded) that he will unavoidably apply to his interpretive deed, on the other. Ultimately, there will not be correspondence, and a lag will therefore remain – the comparatist's ambition being to minimize this interpretive gap while appreciating its necessity and value (it is required so that the other persists as other without epistemic appropriation, and it is worthy inasmuch as it allows for the pursuit of a conversation that affirmations of objectivity or truth would cancel). To be sure, the governing idea cannot be for the comparatist to

[186]Jackson (n 30) 179.

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withdraw from the law-texts' singularity or abdicate interpretive concern vis-à-vis foreign law's worldliness.[187]

As I recommend vigilant awareness – a resolute hearkening – regarding the infinite singularity of the individual law-text, as I cast such attentiveness as the comparatist's abiding epistemic responsibility with respect to the foreignness before him, it bears emphasizing that I am not embracing a configuration of law-worlds existing as so many colliding soliloquies – otherwise, I would not be comparing on. Yet, the fact of foreignness's singularity entails that 'one understands *differently*, *when one understands at all*',[188] which is not to say that comparatism can indulge the undue ethnocentrism that Beatty visits on French law: it cannot do to downgrade otherness as unduly particularistic on the basis of an undue distension of one's own particularism. (Observe that human-rights proselytizers readily fall into this trap when they bring to Ethiopia or Cambodia the practices of the United States or France somehow cast as other-than-structures-of-domination deemed disseminable and reputed worthy of export as truth in order to correct or replace local ways.[189])

While my argument wants to be an explicit and strict movement towards elucidation, that is, luminosity, it cannot eschew the pitfalls that must qualify the enterprise of sense-making – the fact of the 'filtering' presuppositions that the interpreter inevitably projects in advance of his interpretation being one of these and the problem of the cessation of re-presentation being another (since a comparison is never a completion, how far must one go in inventing meaning?). Even as I accept that the assignment of singularity to the foreign includes the provocation of an immeasurable remainder of foreignness within the crypt of the law-text (the economy of the comparison is such that there is never either enough time or enough words to be had so as to saturate otherness), I hold the recognition of foreign law's singularity and the manifestation of respect for foreign law to pertain to an ethics of understanding offering the most defensible model of reading – also the most demanding as it involves a consideration of the depth and breadth of a law-text's encultured minutiae and therefore the relinquishment of compartmentalized thought safely cabining itself within a constricted and sterile positivistic law-box.

Evidently, '[l]egal universalism cannot deliver on what it promises. The contingency of legal orders … cannot be overcome: not in fact, not in principle'.[190] No claim to universality can enact the universality that it profers. One explanation why no law can express universal values is because there are no universal values for any law to express: *the set of universal values is empty*. Another argument is that every law being in situation, no law can express anything that would be universal. For difference to be recognized and respected within comparative law, artificial universals and their artificial equivalences or artificial commonalities require to be jettisoned. Indeed, neither universalism nor equivalence or commonality can accord with the difference that there is across laws. (I refuse to address the fantastic claim that differences would stand as deviations from a pre-existing

[187]My reference to abdication – that is, to relinquishment of epistemic responsibility – brings to mind the oh-so-typical assertion to the effect that '[a]ll comparative work involves the exploration of similarities and differences': David Nelken, 'Comparing Legal Cultures', in Austin Sarat (ed), *The Blackwell Companion to Law and Society* (Blackwell Publishing 2008) 119. See also, eg, Paul Craig, 'Comparative Administrative Law and Political Structure' (2017) 37(4) Oxford Journal of Legal Studies 946, 946: 'Study of comparative administrative law reveals commonality and difference between the systems studied. This is axiomatic and self-evident'. In my view, the only self-evidence on display is a cavalier apprehension regarding the workings of research into foreign law for no commonality can be 'reveal[ed]'.

[188]Hans-Georg Gadamer, *Wahrheit und Methode* (5th edn, Mohr Siebeck 1986) 302.

[189]'No country … is a model to another country, though the discussion of modernity that thinks in terms of "catching up" precisely posits such models': Chakrabarty (n 94) xii. But, cf Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2013) 338–339, where Dworkin claims 'absolute truth as the basis of a theory of human rights' and adds that '[w]e have no option'. In fact, there is an alternative to Dworkin's doctrinaire value monism and objective morality. Instead of the right-answer thesis, think *comparative*, think *value pluralism*.

[190]Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge University Press 2018) 282. See also Andreas Fischer-Lescano & Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25(4) Michigan Journal of International Law 999.

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universal.) Worse, as they serve to distract from what is taking place in effect and, indeed, as they act as aggressive vehicles of effacement of legal differentiations, 'as a means of fusing, defusing and refusing deontological or epistemological horizons',[191] universals, equivalences, and commonalities are akin to epistemicide.[192] Moreover, the argument from universals, equivalences, or commonalities assumes a level playing across laws that does not effectively obtain, which means that these arrangements ignore the distribution of epistemic power. (Who thinks of what would be Portugal's influence on a European Civil Code vis-à-vis Germany's – except, presumably, Portugal?)

To dispense with universals, equivalences, and commonalities as comparative strategies of standardization is to accept that law *depends* on localization. It is thus to concede law's vulnerability to contingency. To return to the rule of law, Stephen Humphreys castigates its 'easy universalism'.[193] For him, it is highly problematic that 'the expression "rule of law" [has] shift[ed] from signifying the "peculiar colour" of the English legal system, as Dicey had it, to indicating instead the optimal desiderata of *any* legal system, the *sine qua non* for a State to *be* a State, regardless of local or cultural history or circumstance'.[194] As I interpret Humphreys, he is reminding his reader that '[t]he rule of law is not something that exists "beyond culture". … In its substantive sense, the rule of law *is* a culture'.[195] Again, it is very much that law exists *as* culture (not that culture is contextual to law). The key intimation is glocalization, which evokes an array of situated intertextual assemblages, each singularly combining the 'global' and the local.

I insist on the inevitability and significance of local creative agency. Since law emerges each time according to a singular turn – a local-instantaneous and local-exclusive twist – what there are, therefore, are not at all 'transplants' on a 'global' or any other scale, but so many instances of cultural catachresis and transformation. To iterate my claim, while there is an expansion of networks, an acceleration of mobilities in an ever-more connected and digitized world, there is no legal migration, diffusion, or circulation that is not attuned to the local whether at the point of departure or arrival, no transmitter who is bereft of any indigenous dimension either, which is why the comparatist's task is effectively to interrogate and appreciate *dissonance* – say, the dissonance between the US rule of law and the US/Japanese or US/Indonesian 'rule of law'. (I may add that 'legal transplant' is a phrase having most detrimentally infected the field of comparative law by suggesting, as this metaphor inevitably does, that law can exist, and thus travel, in detachment from any singular culture. Now, anything even resembling such a shallow appreciation of the legal deserves to be roundly rejected as bereft of elementary comparative sophistication. When it comes to law, there can be, quite simply, 'no transportation without transformation'.[196])

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No legal/doctrinal entity operates independently of the gammut of predilections or predispositions embedded within a law's or a comparatist's enculturation – hence, the slogan that must hold as the

[191]Povinelli (n 164) 326.

[192]See eg, Paul B Stephan, 'The Futility of Unification and Harmonization in International Commercial Law' (1999) 39(3) Virginia Journal of International Law 743; Paul Schiff Berman, 'The Inevitable Pluralism Within Universal Harmonization Regimes: The Case of the CISG' (2016) 21(1) Uniform Law Review 23.

[193]Humphreys (n 41) 220–221. See also Hurd (n 46) 19.

[194]ibid 221. The expression 'peculiar colour' is in Dicey (n 48) 418.

[195]Brooks (n 60) 2285.

[196]Bruno Latour, *Aramis ou l'amour des techniques* (La Découverte 1992) 104. For a repudiation of the 'legal transplant' thesis, see eg, Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4(2) Maastricht Journal of European and Comparative Law 111; Sujit Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law', in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 19; Gary Watt, '"Comparison as Deep Appreciation"', in Pier Giuseppe Monateri (ed), *Methods of Comparative Law* (Edward Elgar Publishing 2012) 93; David Bellos and Kim Lane Scheppele, 'Translating Law Across Cultures and Societies: A Conversation with David Bellos and Kim Lane Scheppele', in Elizabeth Mertz, Stewart Macaulay, and Thomas W Mitchell (eds), *The New Legal Realism*, vol 1 (Cambridge University Press 2016) 286. The relevant words are Scheppele's.

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comparatist's injunction if his comparison of laws is to prove creditable: Always culturalize![197] And the culturalization of comparison – the striving to do foreign law's singularity interpretive and re-presentative justice – must prompt differential analysis so that foreign law can signify otherwise (that is, differently) or, more accurately, *other-wise* (that is, in a manner showing enhanced sensitivity to otherness, to its complexity, its singularity). In sum, I argue for a heterodidactic approach to comparative law, and I urge comparatists-at-law to desist from proceedings that associate legal developments on the transnational stage with denigration of singularity (and culture), that is, to renounce their epistemically calamitous pursuit of illusory meta-languages. Even as the comparatist contends with ineffability (foreign law being singular, the range of its local embeddedness remains beyond full comparative understanding), his foremost task is to marshal his 'own' singularity so as to afford the highest possible interpretive yield out of foreign law's singularity. To assume his primordial condition of being-towards-another-law, indeed of being *for* another law, of speaking on behalf of another law by re-telling its story justly, the comparatist must get wise as regards the fact that otherness is unconducive to apprehension through fictitious meta-languages, on one hand, and as concerns the reality of otherness's claims for recognition and respect, on the other. Again, he must compare *other-wise*. Certainly not pointing to a method (inevitably mendacious), but to a disposition towards the interpretation of foreignness featuring at once, aporetically, distance from the other law and intimacy with it (the comparatist is always too far to access the foreign's foreignness and never far enough to be objective about it), this strategy can easily harbour as its motto a four-word exhortation: 'Singularize, write, singularize, write'.

To say of a law that it is singular is the least that one can say of it short of asserting nothing meaningful at all. No two laws have ever been or will ever be anything other than singular vis-à-vis one another. Yet, readings and writings obdurately marginalizing the singularity of legal foreignness have become unusually dominant within fields concerned with legal matters across national borders such as comparative law, so that it is now something of a rarity to encounter a theoretical or practical response to the legal that defers the moment of purposive co-optation. As I seek to mobilize the comparative project's ethical resources so as to ensure the comparatist's commitment to reasonable and responsible dealings in foreignness, I hold that one must *equip* oneself to contain epistemic betrayals of singularity.[198] (Is it necessary to add that, even against the background of my aversion to 'the annoying seeing-like and making-level [that] is the mark of weak eyes',[199] I am not suggesting that what is local is inherently good, progressive, or emancipatory, that I easily resist such essentialization? Should I have to indicate that I can readily conceive of a repressive local order?)

Bearing in mind that '[t]he ultimate cunning … to divert or skirt difference is the dialectical analogy that binds in resemblance',[200] I commend primordial resistance to the totalizers (and totalitarians) of all ilk in the form of an adamant insistence on immanence and acculturation, of a primordial solicitude for recognition of difference and respect for the differend – whether a comparison addresses contract law, criminal procedure, or taxation, whether it concerns environmental, artificial intelligence, or counter-terrorism regulation. The exigency of dispersion informing laws must finally be matched by something more than the dispersion of exigency that has marked comparative law – and the time is long overdue for comparatists tightly to shut the knobs of their

[197] cf Fredric Jameson, *The Political Unconscious* (Cornell University Press 1981) 9: 'Always historicize!'; Susan S Friedman, *Mappings* (Princeton University Press 1998) 130: 'Always spatialize!'. Advantageously, the prescription that I advocate comprises both dimensions.

[198] cf Rachel Kleinfeld, *Advancing the Rule of Law Abroad* (Carnegie Endowment for International Peace 2012) 76: '[Reform] must grow out of an understanding of a unique country with unique circumstances'.

[199] Friedrich Nietzsche, *Die fröhliche Wissenschaft* [1887] III, §228, in *Digitale Kritische Gesamtausgabe von Nietzsches Werken und Briefen* (Giorgio Colli, Mazzino Montinari & Paolo d'Iorio eds) <http://www.nietzschesource.org/#eKGWB/FW-228> accessed 20 October 2020.

[200] Jacques Derrida, *Le Calcul des langues* (Geoffrey Bennington & Katie Chenoweth eds, Editions du Seuil 2020† [c1973]) 35.

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memetic machine. I so argue even as I appreciate that the comparatist's cognitive access to the other-in-the-law is limited, that otherness will always keep a secret from the inquiring self's comparative mind. As a comparatist who cannot do other than keep comparing on, only in *deferring* to singularity can I be on my way to redeeming foreign law's legitimate claim to justice while I attently hearken to foreignness and respond to it through interpretation and re-presentation.

Throughout this article, I work from original texts. Unless I indicate otherwise, emphases are original, too, and translations are mine.

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