

Foreign Law in the Third Space

Pierre Legrand

In this text, I explore a central protocol governing the articulation of knowledge within the field of comparative legal studies. Specifically, I focus on the fabrication of the ‘interface’ allowing the comparatist to structure his interaction with the foreign laws with which he desires to engage after having forged the view (readily stigmatized by formalists) that they could hold a significant and indeed crucial measure of intellectual and normative relevance for academics, lawyers, and judges operating locally – not, to be sure, as binding law, but either as apposite information or persuasive authority.¹ I find it important to mention that the perpetration of the ‘interface’ by the comparatist intervenes against his constant appreciation that no law can be re-presented except through the mediation of indicative signifiers and therefore against his ‘construction’ or, more accurately, his ‘invention’ of foreign law. (Etymologically, ‘invention’ helpfully attests to the fact that the comparatist at once finds and creates foreign law, that he simultaneously discovers and configures it. In effect, what the comparatist names ‘foreign law’ in his report is what he inscribes as such, in words that he himself chooses and sentences that he himself crafts, having garnered ‘data’ from his necessarily selective aggregation out of the published information, his inevitably partial apprehension out of the amassed documentation, and his inescapably differential understanding out of the analyzed passages.² In the process, the comparatist readily depends on the views of individuals whom he is willing to regard as local experts – although it is far from clear how he judges a local author to be a reliable repository of knowledge in an area in which he himself, being from elsewhere, often cannot act as an authoritative source. Having found what he deems trustworthy texts, it is rare indeed that the comparatist pursues the chain of authority very far. In his urge to use material rather than verify it, he usually fails to seek a ‘first knower’, that is, he *satisfices*. The fact that so many statements are left uninves-

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- 1 Viewed from a local vantage point, foreign law arguably does not qualify as ‘law’. Cf. Peter Goodrich, ‘*Interstitium and Non-Law*’, in P.G. Monateri (ed.), *Methods of Comparative Law* (Cheltenham: Elgar, 2012).
- 2 Cf. Hans-Georg Gadamer, *Wahrheit und Methode*, 5th ed. (Tübingen: J.C.B. Mohr, 1990) at 302: ‘It is enough to say that one understands *otherwise, if one understands at all*’ [‘*Es genügt zu sagen, daß man anders versteht, wenn man überhaupt versteht*’] (emphasis original).

tigated in a context where the main material for comparative writing is other writing compels one to ask whether one ought not to be talking about the comparatist holding a belief about foreign law rather than knowledge of it. Be that as it may, it should be obvious that the comparatist's avowments regarding foreign law are framed as the outcome of adventitious and messy tactics. One important implication, of course, is that the comparatist is not at all extraneous to the intervention that consists in stating foreign law. Arguably, the foreign law that he avers is, in the end, *his* narration of foreign law and therefore *his* foreign law – which means, incidentally, that that law is not nearly as 'foreign' to the comparatist as is customarily assumed.³)

To return to the elaboration of the comparatist's 'commonality' across the laws under his gaze, it is little exaggeration to speak of it as a primordial comparative motion. Indeed, one can hold that one fashions oneself as a comparatist not only by rejecting the fixity of localized and (purportedly) homogenized understandings of the legal, though not denying each law's unique force and assurance, but by marking an 'intersecting' semantic location which is neither one nor the other, an enunciative site contesting the territories of both, an expressive glocalization *besides*. Throughout my argument, I track an elementary illustration as I assume a comparison written in English featuring the inscription of an 'assemblage' between 'Schuld' in the Austrian law of divorce ('Scheidungsrecht') and 'fault' in the Californian law of divorce through, say, the (non-unilateralist) notion of 'transgression'. It will be apparent that I am postulating a comparatist who is aware that his proposed 'commonality' ought not to be framed only in the language of one of the laws being addressed, that his 'comparison [...] must not be

3 As the comparatist transports himself away from himself towards foreign law, as he puts himself outside himself, as foreign law becomes the medium of his expansion, he creates a space of co-existence, an interior, a solidarity, a sphere of intimacy embracing foreign law. In Peter Sloterdijk's language, the comparatist's exoteric mission resolves itself as 'an act of sphere-formation': Peter Sloterdijk, *Sphären*, vol. I: *Blasen* (Frankfurt: Suhrkamp, 1998) at 14 ['eine Sphärenbildung']. This situation, which has nothing to do with 'a merely dominating control by a subject over a manipulable object mass' (*Id.* at 40 ['(einer) bloß herrschaftliche(n) Verfügung eines Subjekts über eine manipulierbare Objekt-Masse']), involves the foreign law-text 'awaken[ing] to its destiny' of being ascribed a meaning through a breathing-in of interpretive life (*Id.* at 35 ['zu seiner Bestimmung (...) erwach(en)']). There takes place an arousal of the text to animated life such that it can be seen 'as a canal for breathing by an inspirator' (*Id.* at 39 ['(als ein) Kanal für Einblasungen durch einen Inspirator'] [emphasis original]). But a mutuality is at work since the foreign law-text also institutes the comparatist. In other words, 'a reciprocal, synchronously interchanging relationship between the two breath poles [the breather and the one breathed on] comes into effect as soon as the infusion of the breath of life into the [text] is complete' (*Id.* at 40 ['so tritt doch, sobald die Eingießung des Lebensatems in [den Text] vollzogen ist, eine reziproke, synchron hin und her gespannte Beziehung zwischen den beiden Polen der Hauchung (dem Hauchenden und dem Angehauchten) in Funktion']). In effect, then, 'there cannot possibly be such a sharp ontological asymmetry between the inspirator and the inspired' (*Ibid.* ['zwischen dem Inspirator und dem Inspirierten (kann) unmöglich ein so scharfes ontologisches Gefälle herrschen']). Think of 'a relationship of pneumatic reciprocity' (*Id.* at 41 ['ein Verhältnis pneumatischer Gegenseitigkeit']), of a 'pneumatic pact' (*Id.* at 44 ['pneumatische(r) Pak(t)']). Note that the 'intimacy of roundness' is addressed in Gaston Bachelard, *La Poétique de l'espace* (Paris: Presses Universitaires de France, 2011 [1957]) at 20 ['intimité de la rondeur'], as remarked by Sloterdijk, *supra* at [7]. Aspects of the Sloterdijkian idea of 'a hollow-bodied sculpture awaiting significant further use' (*Id.* at 33 ['eine Hohlkörperplastik, auf die eine signifikante Weiterverwendung wartet']) can already be discerned in Gadamer as he writes of the interpretive 're-awakening of the text's meaning': *supra*, note 2 at 390 ['Wiedererweckung des Textsinnes'].

conducted in the language of just one of the parties',⁴ that a comparative endeavour cannot resort to this kind of predatory approach and impose words, definitions, or categories on others that do not concern them – which, as regards my example, excludes that the comparison should be unfolding either out of the term '*Schuld*' or after the word 'fault' since these strategies would signify an unwarranted infliction of one law on the other. Observe that the mobilization of the notion of 'transgression' to articulate the 'commonality' is emphatically the work of the comparatist himself. On the basis of his understanding of the foreign laws that he is studying, which can never reach beyond the verge of the law,⁵ and in order 'to supplement, to substitute, and therefore to represent, to replace, to put an *Ersatz* in the place of that which the [comparison] inhibits or forbids' – that is, the foregrounding of only one of the laws – it is he who will have concluded that this form affords an optimal interpretive yield.⁶ His response is, unproblematically, contestable. For instance, one could maintain that 'transgression' effects an undue repression of one of the laws that the comparatist is bringing into play, into the play of language, into the play of the world.

Without further ado, I want to defend the claim that the Austrian and Californian laws are different from each other. They are different laws featuring different histories, different politics, different philosophies, different epistemologies, in sum, different cultures. Thus, they exist in different languages and their interpretive experiences or representations of 'the world' are therefore different.⁷ In effect, *the co-presence of more than one law – which means that there is not one law only anymore – must assume difference between them*,⁸ an insight which can be traced at least to Leibniz's argument for the inevitability of differential co-presence: 'By virtue of imperceptible variations, he wrote (in French, as it happens), two individual things cannot be perfectly similar'.⁹

4 Isabelle Stengers, 'Comparison As a Matter of Concern', (2011) 17 *Common Knowledge* 48 at 56.

5 On the question of vergency, see Pierre Legrand, 'The Verge of Foreign Law – With Derrida', (2010) 1 *Romanian Journal of Comparative Law* 73.

6 Jacques Derrida, *La Carte postale* (Paris: Flammarion, 1980) at 420 [*'suppléer, substituer et donc représenter, remplacer, mettre un Ersatz à la place de ce que la (comparaison) inhibe ou interdit'*] (emphasis original).

7 My contention is that there are different accesses to 'the world', a strictly epistemological assertion. I eschew the ontological dispute (is there 'the world?') though not without remarking that if there is 'the world' that exists irrespective of anyone's access or non-access to it, that is, if there is 'the world' that exists 'out of mind', it would have to be located beyond any possible ascription of meaning by the mind. Indeed, how could the mind make sense of anything which, *ex hypothesi*, would exist out of it?

8 I draw on Jacques Derrida, *Memoires*, 2d ed., transl. by Cecile Lindsay (Minneapolis: University of Minnesota Press, 1989 [1988]) at 15. The English translation was released before the French text and is more specific, hence this reference.

9 [G.W. Leibniz], *Nouveaux essais sur l'entendement*, in *Die philosophischen Schriften von Gottfried Wilhelm Leibniz*, ed. by C.J. Gerhardt, vol. V (Hildesheim: G. Olms, 1960 [1764]) at 49 [*'en vertu des variations insensibles, deux choses individuelles ne sauroient estre parfaitement semblables'*]. This text was written in 1704. An earlier formulation of the idea, also in French, is in [G.W. Leibniz], *Discours de métaphysique*, in *Die philosophischen Schriften von Gottfried Wilhelm Leibniz*, ed. by C.J. Gerhardt, vol. IV (Hildesheim: G. Olms, 1960 [1686]) §9 at 433: '[I]t is not true that two substances resemble each other completely' [*'il n'est pas vray que deux substances se ressemblent entierement'*].

Often labelled ‘Leibniz’s Law’, this statement stands for the proposition that only indiscernibles are identical or, if you will, that the diverse is necessarily ‘other than’ (or that distinct entities are never exact replicas of one another, that is, if we have X and Y, X is at least minimally something that exists as not-Y). Alfred North Whitehead famously extended Leibniz’s formulation to contend that ‘[n]o two occasions can have identical actual worlds’ – his claim being that no matter how faithfully situation B purports to mimic situation A, the fact is that when B comes along A has already taken place, which entails that event B features as one of its constitutive elements the pastness of event A and therefore, if on that ground alone, differs from event A.¹⁰ In other words, Austrian and Californian laws are separated by a differend, which is *what there is*. This differend is the very ‘there-iness’ of those laws-in-co-presence.¹¹ As such, it is ‘irreducible’.¹² It is the matter of fact: ‘In the beginning, difference; there is what happens, there is what has already taken place, *there*’.¹³

Importantly, the immanence I address is not found only within human awareness and is thus not to be approached strictly in terms of the psychological texture of the comparatist’s ‘own’ understanding. Rather, the differend acts as an interpellation in advance of any concern, appropriation, construction, and deployment by a comparatist as he undertakes to conduct his archeological probing and unconcealment of the foreign laws under examination (the governing precept being that ‘the way of access to the present necessarily takes the form of an archeology’).¹⁴ To be sure, such work of excavation, elicitation, and rendition intervenes *performatively* in the sense that the comparatist, as he targets his alertness towards the differend between laws – and, correlatively, towards the singularity of each law – as he enters the fray *qua* enabler of meaning purporting to bring the foreign laws into meaningful existence, as he registers specific captures and framings of those laws, always already enacts his ‘own’ re-presentation. Yet, it remains that the comparatist comes *to* the differend, which is not a figment of his imagination. Again, it is very much the comparatist himself who frames the comparable despite the incommensurability across laws that he faces. For example, what ‘commonality’ is asserted through the idea of ‘transgression’ remains the speculative outcome of the comparatist’s own translations/transactions. It is, then, the comparatist himself – and only him – who is forcing the Austrian and Californian laws to talk to each other, to engage in a *negotiation* with each other in a context where, at the outset, they have nothing to

10 Alfred N. Whitehead, *Process and Reality* (New York: Free Press, 1978 [1929]) at 210.

11 I borrow the word ‘differend’ from the English translation of Jean-François Lyotard, *The Differend*, transl. by Georges Van Den Abbeele (Minneapolis: University of Minnesota Press, 1988 [1984]).

12 Jacques Derrida, *Limited Inc* (Paris: Galilée, 1990) at 253 [‘irréductible’].

13 Jacques Derrida, ‘Deux mots pour Joyce’, in *Ulysse gramophone* (Paris: Galilée, 1987 [1984]) at 44 [‘*Au commencement la différence, voilà ce qui se passe, voilà ce qui a déjà eu lieu, là*’] (emphasis original). Though Derrida wrote his text in French, it initially appeared in English.

14 Giorgio Agamben, ‘Che cos’è il contemporaneo?’, in *Nudità* (Rome: Nottetempo, 2009 [2006]) at 29 [‘*la via d’accesso al presente ha necessariamente la forma di un’archeologia*’].

say to each other lest each law rehearse its own story in a language that the other can only imagine itself understanding. Not unlike Jacques Derrida,¹⁵ I use the word ‘negotiation’ rather than ‘dialogue’ because the Austrian and Californian laws are not speaking a common language: the Greek prefix ‘*dia*’ suggests the idea of ‘running through’, and here nothing is ‘running through’ since each law is uttering a monologue.¹⁶ But, as Charlotte Girard perspicuously observes, provided the comparatist can talk about more than one law, he can proceed to compare them without delay, that is, he can engage at once in the delineation of the ‘commonality’.¹⁷ The idea that a method, ‘the most effective and most durable anxiety reducing device’,¹⁸ would have to be followed in order to validate a given comparison or, worse, that a given method would have to be applied to the exclusion of all others, need not detain one except as a demonstration of the pervasive ‘theo-technical thought’ still informing orthodox comparative legal studies largely under the influence of the seemingly insatiable German homiletic yearning for a dystopian world where epistemological certainty would reign.¹⁹ Instead of manifesting itself through method (which, in any event, would fail to afford the objectivity vaunted by method’s infatuates since any method is but someone’s method),²⁰ as the outcome of a consecution of precepts, comparison emerges through experience – or ‘flair’²¹ – which the comparatist incessantly adjusts along the way, unceasingly seeking to make it more *just*. The absence of *ὀδοσ*, of *odos*, involves the much higher levels of self-consciousness that come with the comparatist’s assumption of responsibility, with his *response* to the foreign – at once aggressive and companionate, sustaining and unstable, an intimate bond through the defamiliarization of the commonplace. Yet, in order to organize comparability, it remains that the comparatist must do violence to the laws in co-presence by compelling them into a ‘commensuration’ which will inevitably be informed by his tacit fore-understanding and thus, to that extent at least, refract his own power.²² The comparatist’s perspective is indeed framed by his facticity, that is, by his ‘thrownness’ or by that into which (tradition, language, law... culture!) he has been ‘thrown’ in a given place at a given time – such that certain possibilities are

15 See Jacques Derrida (with Pierre-Jean Labarrière), *Altérités* (Paris: Osiris, 1986) at 85. The passage is Derrida’s.

16 Cf. Martin Heidegger, *Unterwegs zur Sprache* (Stuttgart: G. Neske, 1959) at 265: ‘[L]anguage is monologue’ [*die Sprache ist Monolog*] (emphasis original).

17 Charlotte Girard, ‘L’énigme du lieu commun’, in Pierre Legrand (ed.), *Comparer les droits, résolument* (Paris: Presses Universitaires de France, 2009) at 316: ‘If we can speak of it, we can compare’ [*si nous pouvons en parler, nous pouvons comparer*] (emphasis original).

18 George Devereux, *From Anxiety to Method* (The Hague: Mouton, 1967) at 97.

19 Sloterdijk, *supra*, note 3 at 38 [*‘theo-technische(s) Denken*’].

20 Derrida insists that ‘any method [...] implies a kind of historicity’: Jacques Derrida, ‘La Langue et le discours de la méthode’, (1983) 3 *Recherches sur la philosophie et le langage* 35 at 36 [*‘toute méthode (...) implique une espèce d’historicité*’]. For an excellent critique of method and of its disputable enlistment as epistemological alibi, see Simone Glanert, ‘Method?’, in P.G. Monateri (ed.), *Methods of Comparative Law* (Cheltenham: Elgar, 2012).

21 Jacques Derrida, *De la grammatologie* (Paris: Editions de Minuit, 1967) at 233 [*‘flair*’].

22 See Wendy N. Espeland and Mitchell L. Stevens, ‘Commensuration As a Social Process’, (1998) 24 *Annual Review of Sociology* 313 at 332.

open to him and others foreclosed.²³ (It is a matter of great significance, for example, that the comparatist – or the individual determining to claim such status for herself – should have been instituted into French law through many years of alienation in a French law school.) The comparatist’s ‘commonality’, then, will indeed arrange and display itself as autobiography, that is, as an act of *life-writing*.²⁴ Consider Borges’s striking metaphorical expression of the ineliminability of the self’s inscription: ‘A man sets himself the task of drawing the world. As the years pass, he peoples a space with images of provinces, kingdoms, mountains, bays, ships, islands, fishes, rooms, instruments, stars, horses, and individuals. A short time before he dies, he discovers that that patient labyrinth of lines traces the image of his face’.²⁵ The ‘commonality’ I am discussing is thus, in effect, but a semblance of ‘commonality’. In order to delineate a so-called ‘commonality’, the comparatist operates through a process of prelation of information about the laws he is analyzing which allows him to ascribe formal similarity across the differend: he retains some data, which he channels into his new ‘common’ form, and he discards other, which allows him to preserve his ‘common’ form.²⁶ Properly speaking, therefore, through this organized subsumption, on account of this mock ‘fusion of horizons’ that will afford him the desired comparative opportunity,²⁷ the comparatist performs an exercise in formulaic reductionism – a manifestation of coercion vis-à-vis the laws under examination which demands to be acknowledged, if only because of its ethical implications. In fact, one could talk about ‘the ethics of the “and yet”’: one is not entitled to do violence to the foreign, *and yet* one must produce an ‘interface’ in order to allow for a comparative intervention.²⁸

I argue that while the fabrication of this ‘commonality’ is key to the unfolding of the comparison, the comparatist must, *as a necessary endeavour*, proceed beyond it forthwith. Indeed, all that the formulation of a ‘common’ feature by the comparatist-at-law

23 The notion of ‘thrownness’ (*Geworfenheit*) is Heidegger’s. For instance, see Martin Heidegger, *Sein und Zeit*, 18th ed. (Tübingen: M. Niemeyer, 2001 [1927]) at 383, who refers to the self ‘being dependent on a “world”’, [being] lost in the “they”’ [*angewiesen auf eine “Welt”/in das Man verloren*].

24 Derrida further observes how ‘[i]n a minimal autobiographical trait can be gathered the greatest potentiality of historical, theoretical, linguistic, philosophical culture’: Jacques Derrida, “This Strange Institution Called Literature”’, in *Acts of Literature*, ed. by Derek Attridge (London: Routledge, 1992) at 43. This text is the transcript of an interview with Derrida which took place in 1989. Cf. Devereux, *supra*, note 18 at 148: ‘All research is [...] self-relevant and represents more or less indirect introspection’.

25 Jorge Luis Borges, *El hacedor* (Madrid: Alianza Editorial, 2009 [1960]) at 128 [*Un hombre se propone la tarea de dibujar el mundo. A lo largo de los años puebla un espacio con imágenes de provincias, de reinos, de montañas, de bahías, de naves, de islas, de peces, de habitaciones, de instrumentos, de astros, de caballos y de personas. Poco antes de morir, descubre que ese paciente laberinto de líneas traza la imagen de su cara*]. Cf. Samuel Beckett, *The Unnamable*, in *The Grove Centenary Edition*, ed. by Paul Auster, vol. II (New York: Grove Press, 2006 [1958]) at 365-66: ‘I on whom all dangles, better still, about whom, much better, all turns’. This novel was initially written in French and subsequently re-written in English by Beckett himself.

26 Espeland and Stevens, *supra*, note 22 at 317.

27 The idea of ‘fusion of horizons’, of Hegelian inspiration, is in Gadamer, *supra*, note 2, *passim* [*Horizontverschmelzung*].

28 Jane Gallop, *The Deaths of the Author* (Durham: Duke University Press, 2011) at 72.

can be allowed to do is mark the requisite installation of a (constructed) ‘connector’ across the differend. To be sure, this ‘connector’ acts as the indispensable point of entry (or ‘*Sprengpunkt*’) allowing the comparative enterprise to materialize. However, if the comparatist permitted the ‘connector’ to do more work than that, the laws being compared would have their singularity and the differend that distinguishes them from each other effaced for the sake of a generalization which would then rapidly act as a hegemonic and totalizing dissimulation of what there is rather than as a disclosure of it. Through the ‘commonality’, the comparatist is, in effect, fostering a relation between his self-in-the-law and the other-in-the-law which is but a non-relation or a disrelation (something like a state ‘0’ of relation).²⁹ Since it is as inherently precarious as it is forced, the ‘constitut[ion]’ or ‘stabiliz[ation]’ of a ‘commonality’ must be seen as revealing a persistent tension and therefore as an ever-‘provisional’, rather than a once-and-for-all, mapping.³⁰ Again, I acknowledge that the ‘commonality’ at issue requires to make its necessity felt in order to provide a plausible launching pad into the comparison. Yet, it must accept its prompt displacement. Paradoxically, if you will, the ‘commonality’ has to be in place, but there can only be so much place for it. Swiftly continuing away from the edified ‘commonality’, the comparatist’s engagement with foreign law requires him assiduously to abide by the recommendation of Rudolf Bultmann, one of Martin Heidegger’s colleagues and influential disciples, who advocates ‘listening to [the] claim [of the text]’.³¹ Mobilizing heightened epistemological vigilance, the comparison must heed the foreign law’s ‘speaking-to-us’ that calls for the comparatist’s critical insights to show the laws being scrutinized recognition and respect to the fullest extent of their singularity, to abide by the differend.

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The fabrication of the transitional ‘commonality’ that I have been sketching involves a *thirthing* of legal knowledge.³² Think of the ‘commonality’ as a third space staging the differend between the more-than-one laws being brought ‘not-together’ by the comparatist’s ‘suturing’. I am not talking, of course, of a space which can be physically entered or left, but, metaphorically, of a space of contention and contestation, a translational space where local meanings are dismantled or deconstructed. Note that the third space – in my example, the demarcation of a third area of meaning by the comparatist-at-law

29 Cf. Whitehead, *supra*, note 10 at 228: ‘What are ordinarily termed “relations” are abstractions from contrasts’.

30 Jacques Derrida, *Politique et amitié*, ed. by Michael Sprinker (Paris: Galilée, 2011 [1993]) at 112 [‘*constitu(tion)*’/‘*stabilis(ation)*’/‘*provisoire*’].

31 Rudolf Bultmann, ‘Das Problem der Hermeneutik’, in *Glauben und Verstehen*, vol. II (Tübingen: J.C.B. Mohr, 1952 [1950]) at 228 [‘*Zuspruch*’].

32 In many respects, I follow Edward W. Soja, *Thirdspace* (Oxford: Blackwell, 1996) at 61 and *passim*, who fulsomely acknowledges his debt to Henri Lefebvre, *La Production de l’espace* (Paris: Anthropos, 1974). See also Homi Bhabha, ‘The Third Space’, in Jonathan Rutherford (ed.), *Identity* (London: Lawrence & Wishart, 1990) at 207-21.

through the notion of ‘transgression’ – is distinguishable from the laws being compared while not being equivalent to a composite of them. In the third space, there takes place an articulation projecting meaning beyond any signification obtaining in the situated laws themselves. The third space can properly be regarded as effectuating an othering of those laws beyond any simple logic of exclusion or inclusion of them. In effect, the third space introduces another other to the comparison-at-law (when it comes to comparison, one plus one makes three). Indeed, emerging beyond any antecedent information, beyond any ‘either/or’ or ‘both/and’ scenario (‘transgression’ is neither ‘*Schuld*’ nor ‘fault’ and it is not ‘*Schuld*’-and-‘fault’), the third space promotes a reconstitution which not only disrupts each law’s (locally) assumed totalization, but acts as a powerful locus of meaning productivity. In the third space, new knowledge is fabricated. It is therefore important not to think of the third space as a dialectical arrangement *à la* Hegel, which would be much too strongly predicated on ideal temporal sequencing and on the no less ideal unfolding of the thesis/antithesis/synthesis scheme suggesting the termination of a process. Instead, what we have in the third space is a *heterothesis*. Despite its specificity, it is important that the heterothesis being constructed out of preceding laws should generate a certain continuity of knowledge with those laws themselves. To that extent, then, the third space must be seen as an ordering which is, appropriately, not fully autonomous. It interrupts local knowledge through a re-inscription of *it as other*. It is the local laws’ host, but it is also hostage to them. Thus, the ‘commonality’ is informed by the trace of each foreign law, which means that it acts as an iteration of the local laws, that it repeats their singularity differentially.³³ (Later, as the comparatist will be deploying his account of the laws he is studying, he will find himself re-iterating this iteration.) Although the ‘commonality’ is other than the laws it embodies, its illeity is therefore also *of* them in the sense that it cannot be isolated from them any more than the present moment can be detached from the past. In fact, this consonance is an antidote to an ‘anything-goes’ comparison and helps to ensure that comparatists-at-law do not confuse the epistemological openness or hospitality characteristic of the third space with anarchy.³⁴

33 The motif of repetition-as-transformation is central to Derrida’s oeuvre. Using the lemma ‘iter’ that he derives from the Sanskrit ‘*itara*’ meaning ‘other’, Derrida coins the word ‘iterability’, a neologism connoting both ‘reiteration’ and ‘alterity’, that is, repeatability with a difference, which means that renewal of expression does not cancel singularity. See Jacques Derrida, *Marges* (Paris: Editions de Minuit, 1972) at 375. Again, Borges is helpful. Thus, Pierre Menard’s ‘admirable ambition was to produce a number of pages which coincided — word for word and line for line — with those of Miguel de Cervantes’. In the event, ‘[t]he Cervantes text and the Menard text are verbally identical, but the second is almost infinitely richer’: Jorge Luis Borges, ‘Pierre Menard, autor del Quijote’, in *Ficciones* (Madrid: Alianza Editorial, 1999 [1944] at 47 and 52, respectively [‘*Su admirable ambición era producir unas páginas que coincidirían – palabra por palabra y línea por línea – con las de Miguel de Cervantes? El texto de Cervantes y el de Menard son verbalmente idénticos, pero el segundo es casi infinitamente más rico*’].

34 Thus, the ‘interface’ is more akin to a ‘crossing of all [...] origins’ than to a ‘destruction [...] of all origin’. Somewhat paradoxically, the two statements were written by the same author within two years of each other: Roland Barthes, *S/Z*, in *Oeuvres complètes*, 2d ed. by Eric Marty, vol. III (Paris: Editions du Seuil, 2002 [1970]) at 263 [‘*croisement de toutes (...) origines*’]; ‘La Mort de l’auteur’, in *Oeuvres complètes*, 2d ed. by Eric Marty, vol. III (Paris: Editions

But the third space does not resolve the differend. Think of a French translation of *Hamlet*: whatever there is in the third space can neither be the original Shakespeare in XVIth-century English nor a French piece of literature. Within the third space, one indeed remains ‘confronted with at least two divergent systems of belongings that cannot be reconciled’.³⁵ Irrespective of what a word like ‘transgression’ may suggest on a superficial reading, the ‘negotiation of incommensurable differences’ that intervenes in the third space – a ‘negoti[ation] with the non-negotiable’ – ultimately fails to engender an economy of the same.³⁶ Not only is it the fact, therefore, that no idea of ‘transgression’ can overcome the differend, but the staging of the third space generates additional difference. While it purports to ‘bracket’ the differend between the localized laws, the third space finds itself effectively acting as a multiplier of difference. The result of intercultural tension, the third space becomes the source of further intercultural tension. In my illustration, a third-space notion such as ‘transgression’ can therefore helpfully be called ‘transdifferential’.³⁷ Consider, for instance, the differences between ‘*Schuld*’ and ‘transgression’ (if only because ‘transgression’ contains at least ‘echoes’ of ‘fault’, which ‘*Schuld*’ does not) and between ‘fault’ and ‘transgression’ (which contains at least ‘echoes’ of ‘*Schuld*’, which ‘fault’ does not)³⁸ – or, to return to the translation of *Hamlet*, the differences between *Hamlet* and the translation, on the one hand, and between the translation and French literature, on the other. Accordingly, the comparison requires comparatists-at-law to think *trialectically*. Observe that although the structure of power unfolding within the trialectic may prove difficult to read, it is never erased. Indeed, the comparatist-at-law’s ‘intervention in the here and now’ through the edification of a third space cannot be an innocuous act.³⁹

The identification of the foreign laws within the comparatist’s purview and their realignment according to what he deems them to have in ‘common’ is an intervention allowing for a deconstruction of the metaphysical opposition purportedly demarcating life and death. While not present as such within the ‘commonality’, the laws being compared are not simply absent either. Neither alive nor dead, at once alive and dead, the foreign laws *survive*.⁴⁰ Their revenance manifests itself on account of their traces ‘haunt-

du Seuil, 2002 [1968]) at 40 [‘destruction de (...) toute origine’]. For discussion, see Gallop, *supra*, note 28 at 32-33.

35 Britta Kalscheuer, ‘Encounters in the Third Space’, in Karin Ikas and Gerhard Wagner (eds), *Communicating in the Third Space* (London: Routledge, 2009) at 42.

36 Homi K. Bhabha, *The Location of Culture* (London: Routledge, 1994) at 218; Jacques Derrida, *Etats d’âme de la psychanalyse* (Paris: Galilée, 2000) at 83 [‘négoci(ation) (du) non-négociable’], respectively.

37 For an introduction to ‘transdifferencence’, see Helmbrecht Breinig and Klaus Lösch, ‘Transdifferencence’, (2006) 13 *Journal for the Study of British Cultures* 105. The authors insist that ‘[transdifferencence] fills an important gap by not pointing in the direction of an overcoming of difference’: *id.* at 106.

38 *Id.* at 112, where the authors emphasize the fact that the transdifferential term ‘contains at least echoes of the other’s voice’.

39 Bhabha, *supra*, note 36 at 7.

40 The idea of ‘survival’ is prominent throughout Derrida’s work. For example, see Jacques Derrida, ‘Living On’, transl. by James Hulbert, in Harold Bloom *et al.*, *Deconstruction and Criticism* (New York: Continuum, 2004) at 62-142.

ing' the 'commonality',⁴¹ the designation of which can therefore never be fully distinguished from an act of mourning. Because neither law is fully present as that 'commonality' (each law is at once more than that and less than that, each law is, inexhaustibly, *other* than that – the 'commonality' thus being structurally either deficient or excessive), the erection of the 'common' necessarily happens towards the foreign laws in play as artifice, act of fiction, montage or bricolage,⁴² but also, which I want to accentuate, as an act of violence, a countersignature.

In this regard, I claim that every signatory, even a countersignatory (perhaps *especially* a countersignatory), must show exigent loyalty to the texts being read and ensure that he does not expropriate and appropriate them in ways that suggest the grip of brute teleology. Interpretation cannot evade or renounce the contents of the text. For example, it must have the patience to generate an appreciation in terms not dictated by current ideological concerns: '[T]he reading [...] cannot legitimately transgress the text towards something other than itself',⁴³ for *there is the law of the text* and '[n]ot to shirk this law is thus to do everything not to betray, not to betray both the law and the other'.⁴⁴ In the illustration I develop here, 'transgression' is precisely the transgression that must be avoided as much as possible. As I have indicated, this configuration needs to be supplanted through a comparison disposing itself as differential, that is, a comparison responding to the differend — the abyss — across laws,⁴⁵ that is, assuming re-

Though Derrida wrote his text in French, this English version represents its initial publication in 1979. The essay later appeared in French as Jacques Derrida, 'Survivre', in *Parages* (Paris: Galilée, 1986) at 117-218.

- 41 Spectrality is a key Derridean motif. For one thing, a text, any text, is always already inscribed within a consecution. Derrida refers to 'a quasi-logic of the ghost that one ought to substitute, because it is stronger, to an ontological logic of presence': Jacques Derrida, *Force de loi* (Paris: Galilée, 1994) at 68 [*'une quasi-logique du fantôme qu'il faudrait substituer, parce qu'elle est plus forte qu'elle, à une logique ontologique de la présence'*]. The transcript of Derrida's well-known opening address at Cardozo Law School's conference on 'Deconstruction and the Possibility of Justice' delivered in October 1989, this text initially appeared, along with its English translation, as Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"', transl. by Mary Quaintance, (1990) 11 *Cardozo Law Review* 919. On what Derrida styles his '*hauntology*' [Jacques Derrida, *Spectres de Marx* (Paris: Galilée, 1993) at 31 ('*hauntologie*') (emphasis original)] and on the relevance of this notion for comparative legal studies, see Pierre Legrand, 'Siting Foreign Law: How Derrida Can Help', (2011) 21 *Duke Journal of Comparative and International Law* 595.
- 42 The ideas of 'deficiency' and 'excess' allude to José Ortega y Gasset, 'La reviviscencia de los cuadros', in *Obras completas*, 2d ed., vol. VIII (Madrid: Alianza Editorial, 1994 [1946]) at 493, who, writing about the limits of translation, uses the Spanish words '*deficiente*' and '*exuberante*'. The point regarding 'fiction' is excellently argued in Raluca Bercea, 'Toute comparaison des droits est une fiction', in Pierre Legrand (ed.), *Comparer les droits, résolution* (Paris: Presses Universitaires de France, 2009).
- 43 Derrida, *supra*, note 21 at 227 [*'la lecture (...) ne peut légitimement transgresser le texte vers autre chose que lui'*].
- 44 Jacques Derrida, 'Countersignature', transl. by Mairéad Hanrahan, (2004) 27/2 *Paragraph* 7 at 29 [*'Ne pas se dérober à cette loi, c'est donc tout faire pour ne pas trahir, pour ne pas trahir et la loi et l'autre'*]. I have modified the translation. As of 1 January 2012, this text, initially written in French in 2000, remains unpublished in its original version. I am grateful to Leslie Hill for supplying me with the French essay.
- 45 The abyss across languages has been noted by poets like Rilke and Celan. Cf. Rainer Maria Rilke, *Rilke Briefe*, ed. by Rilke-Archiv in Weimar, vol. I (Frankfurt: Insel, 1950 [1902]) at 41: 'And there stand those stupid languages, helpless as two bridges that go over the same river side by side but are separated from each other by an abyss. It is a mere bagatelle, an accident, and yet it separates...' [*'Und da stehen nun diese dummen Sprachen hilflos wie zwei Brücken, die nebeneinander über denselben Fluß gehen, aber durch einen Abgrund voneinander getrennt sind. Es ist*

sponsibility vis-à-vis the singularity of each law. Allowing for the emergence of a ‘commonality’, this response is possibilizing what remains, in effect, impossible – which is the composition of a *commonality*.⁴⁶

Any comparatist who is at all concerned with ethical responsibility, and thus with the debt, with what one owes the other (including the other law-text), with *justice*, has in fact little choice in the matter for one is simply not entitled to attempt an effacement of the differend across laws through a dissimulation of the singularity of each law. *What would be the comparatist’s warrant?* Indeed, the comparatist’s abiding task is to bear witness to the differend across laws and to the foreign laws’ singularity. It is this ‘[thought] [that] conditions *respect* for the other[-in-the-law] as *what he is*: other. Without this acknowledgment, which is not a knowledge, let us say without this “letting-be” of a being (other) as something existing outside me in the essence of what he is (first and foremost in his otherness), no ethics would be possible’.⁴⁷ And this commitment cannot just be about ‘making room’ for otherness, but demands acknowledging the very structuring of one’s comparative intervention by otherness which, in the end, ‘subsists, [...] persists[,] [which] is the hard bone on which reason breaks its teeth. [There is] what might be called the incurable *otherness* from which *oneness* must always suffer’.⁴⁸ (Meanwhile, given the structuring role that the comparatist occupies through his invention of foreign law, there is also, to paraphrase Machado, the incurable *oneness* from which *otherness* must always suffer – which means that the act of mourning, as it digests the other, fails, in the end, to abide by the other’s infinite otherness.)

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I have sought to advance two principal claims. First, I have argued that the bringing of local legal knowledge into the public phenomenality of the ‘commonality’ must be seen for the coercive intervention that it is. Even the most allegedly faithful ‘interface’ constitutes a response — and a responsibility — involving an act of violence, that is, some-

*nur eine Bagatelle, ein Zufall, und es trennt doch ...’]. In this letter written from Paris, Rilke was commenting on the impossibility of communicating with Rodin on the occasion of his visit to him. The word ‘abyss’ (‘*Abgrund*’) also appears in Celan’s correspondence with specific reference to the separation between languages: James K. Lyon, *Paul Celan and Martin Heidegger* (Baltimore: Johns Hopkins University Press, 2006 [1960]) at 37.*

46 Cf. Jacques Derrida, *L’Autre cap* (Paris: Editions de Minuit, 1991) at 43.

47 Jacques Derrida, ‘Violence et métaphysique’, in *L’Écriture et la différence* (Paris: Le Seuil, 1967 [1964]) at 202 [‘(cette pensée) conditionne le respect de l’autre comme ce qu’il est: autre. Sans cette reconnaissance qui n’est pas une connaissance, disons sans ce “laisser-être” d’un étant (autrui) comme existant hors de moi dans l’essence de ce qu’il est (d’abord dans son altérité), aucune éthique ne serait possible’] (emphasis original).

48 Antonio Machado, ‘Juan de Mairena – Sentencias, donaires, apuntes y recuerdos de un profesor apócrifo’, in *Poesía y prosa*, ed. by Oreste Macrí, vol. IV: *Prosas completas (1936-39)* (Madrid: Espasa-Calpe, [1989]) at 1917 [‘*subsiste, persiste; es el hueso duro de roer en que la razón se deja los dientes. (...) como si dijéramos en la incurable otredad que padece lo uno*’] (emphasis original). For a discussion of the ineliminability of the self/other dynamic with specific reference to Derrida’s thought, see Pierre Legrand, ‘Jacques in the Book (On Apophasis)’, (2011) 23 *Law and Literature* 282.

thing like an infidelity.⁴⁹ Because the ‘commonality’ exists in a suspended relation to meaning – since the fashioning of the third space suspends its readership⁵⁰ – the invisibilization of the comparatist must be invisibilized. Secondly, I have contended that no thirding of knowledge can overcome either the fact of the differend across laws or that of the singularity of the foreign law, that no resignification can ever be total. Indeed, no thirding of knowledge ought to seek to achieve a complete disjointure with local knowledge since this strategy would oblige the comparatist to accept the kind of falsification that goes much beyond the distortion required by any anterior solicitation from the foreign justifying his intervention. As it seeks to address the unsaturable demands of the differend and of singularity, strictly speaking, then, as a matter of duty to the integrity of the comparative inquiry, the ‘interface’ or ‘commonality’ should, on account of its catachrestic character, be written *sous rature*. Not at all a fly in the formal ointment, this inscription would point to the personal, passionate, and prejudiced attributes of any comparison-at-law, to what, in sum, makes comparative legal studies comparative legal studies.

Pierre Legrand is Professor of Law and Director of Postgraduate Studies in Globalization and Legal Pluralism at the Sorbonne, Paris; Board of Visitors Distinguished Visiting Professor, University of San Diego Law School; Senior Fellow, University of Melbourne Law School; and Visiting Professor, Faculty of Law, National University of Singapore.

49 Derrida speaks of an ‘unfaithful fidelity’: Jacques Derrida, *Points de suspension* (Paris: Galilée, 1991 [1990]) at 331 [‘*fidélité infidèle*’].

50 See Derrida, *supra*, note 24 at 48.