

NEGATIVE
COMPARATIVE LAW

A Strong Programme for Weak Thought

PIERRE LEGRAND



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India

103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781316511978

DOI: 10.1017/9781009051910

© Pierre Legrand 2022

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2022

A catalogue record for this publication is available from the British Library.

ISBN 978-1-316-51197-8 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

My Equipment

While I have no intention of honing comparative law to a fine utilitarian edge (nor to indulge gadgeteering), I hold that the comparatist is *homo faber* to the extent at least that he must choose his contrivances (through which he devises himself as comparatist-at-law) to fit in the tool-box he will have acquired from a fine online travel shop. For my part, whenever I embark on fieldwork I carry a kit comprising a dozen implements or so.

My devices include a large, state-of-the-art, multi-tasker differentiator (the high-end model easily recharges through my laptop so I can always have it at hand in a fully operational condition). When I activate the deconstructive programme, my differentiator proceeds to a critique of the foreign law under scrutiny. As I trigger the culturalist key, it re-signifies law-texts in terms of law-as-culture. If I launch the comparative application, my differentiator promptly singularizes foreignness. I also have a textograph (effectively achieving as regards texts the decomposition that a spectrograph attains for light). I invested in the ultra-sensitive, fine-point appliance featuring an innovative detector, which optimizes discernment of textual haunting between the lines – of enciphering – and is therefore best for elucidating the mnemonic and material textual tracery.

An indisciplinator, I have long come to realize, is necessary for the conduct of any meaningful cultural interpretation.¹ While all brands

¹ Indiscipline connects with singularity – a link that Samuel Beckett's customary perspicuousness allowed him readily to grasp (if in different language). Bringing to bear his interest in utensils (a further point of convergence with my work, then), Beckett has one of his characters exclaim how within a panoply of jades, each measurer tells the matter at hand differently, every disciplinary assay an exercise in singularization. I refer to S Beckett, *Endgame* (R McDonald ed, Faber & Faber 2009 [1958]) 31–33: 'It was an extra-ordinarily bitter day, I remember, zero by the thermometer. . . . It was a glorious bright day, I remember, fifty by the heliometer It was a howling wild day, I remember, a hundred by the anemometer. . . . It was an exceedingly dry day, I remember, zero by the hygrometer.' Observe how each disciplinary appreciation changes the 'day' being

boast an easy-to-handle dial greatly simplifying disciplinary motions or passages (either to one or more than one other discipline apart from law), I recommend the purchase of an integrated compass in order to facilitate orientation on unfamiliar disciplinary terrain, which can present awkward epistemological topography, vicissitudes ranging from tenebrous abysses to steep escarpments. In addition, I deem it important to take along a translator of the foreignizing type. Even if it is definitely more difficult to handle than the usual sort, it tends to generate just results by producing the most other-directed translations. I always bring with me a heavy-duty charitabler (indeed, my research experience suggests exigent mobilization of charitable interpretation).

And, of course, I make certain that I have a negator, too. I prefer the ultra-forthright version although it inevitably comes at a cost. The value combination, admittedly not so easy to deploy, allows the comparatist variously to say no to purity (of law or legal theory); no to translatability (of foreignness); no to understanding (of foreignness); no to method (in research); no to objectivity (in interpretation); no to truth (in interpretation); no to exactitude or correctness (in interpretation); no to the idea of one right meaning (in interpretation); no to representation (in interpretation); no to equivalence or commonality (across laws); no to ‘transplants’ (of laws); no to the assumption of a better law; no to universality; and no to what would be globalization, unification, or uniformization (of laws).²

I remain open to the acquisition of new gear. A few years ago, I bought an inventor. It works like a spell checker and searches my report on foreign

‘described’. However, there is no ‘description’, and each disciplinary evaluation is *constitutive* of what is said to be the ‘day’ that there is, there. Each discipline singularizes the ‘day’.

² At this juncture, the most recent negator on the market is the ‘*Vivitur ingenio*’, which displays on a small screen the main reasons justifying its engagement in negation with respect to any specific issue. For example, the caption negating method currently reads as follows (there are regular updates): ‘Arguably a sanitized choice masking a conservative normativity (in the sense at least of a fear of change and of a worry about contingency), in effect the imposition of a stagnant cloud of obscurity, the hardcore positivist canonization of method deceptively heralds a kind of predictability, which is also a mark of rigidity – at any rate, a linearity – even as comparative research’s meanderings pertain to convolutions and intricacies, to circumlocutions and intermittencies, to deviations and irregularities. Undeniably, “[m]ethod . . . is a system for offering more or less bankable guarantees. It hopes to guide us more or less quickly and securely to our destination, a destination that is taken to be knowledge about the processes at work in a single world. It hopes to limit the risks that we entertain along the way”: J Law, *After Method* (Routledge 2004) 9. But such ill-considered clockworkiness remains deceptively blind to the structurally winding and twisting character of any pathway to foreignness and to the no less structural secretness that the foreign is fated to harbour before the comparing mind.’

law to detect all textual manifestations of allegedly impersonal, impartial, neutral, objective, or true formulations that would shroud my input in the fashioning of the foreign law-text and in the fabrication of my account of it. I indulged the most expensive configuration (the ‘Take EpRep’ – which, according to the glossy brochure, stands for ‘Take Epistemic Responsibility’). Not only does this design identify the concealments, but it substitutes first-person singulars throughout the writing.³

I have a few more elementary instruments such as a Swiss-army knife, which allows me to cut through the epistemic nonsense without further ado. Also, I always keep a whistle on me – the closest I come to the deployment of what could potentially be regarded as an apotropaic contraption. I knew a distinguished Cambridge comparatist-at-law who used the strident sound to gain his students’ attention. For myself, I find it helpful to blow the whistle on diverse epistemic howlers. (Sporadically, perhaps because of the loud noise, I have been able to procure a readership and secure its interest or even its adhesion.) To be sure, I have a passport and, notwithstanding that I lay claim to being a resolutely heliotropic comparatist, I do not forget my umbrella – unlike Nietzsche, perhaps.⁴

³ To return to Beckett’s narrative (*supra*), it is important to appreciate that none of the statements he propounds is objective or true. To call the day ‘extra-ordinarily bitter’ or ‘glorious[ly] bright’ or ‘howling wild’ or ‘exceedingly dry’ is, each time, to offer a reading of it, an interpretation, which is also an intervention. On every occasion, Beckett’s character is ‘meaning in’. The day is not inherently ‘howling wild’ or ‘exceedingly dry’ so that everyone would be left merely to harvest these conclusions and agree to them. Only a reading, an interpretation, an intervention, can make the day ‘howling wild’ or ‘exceedingly dry’; can make sense of it as ‘howling wild’ or ‘exceedingly dry’; can invent it (find it/fashion it) as ‘howling wild’ or ‘exceedingly dry’. And other readers or interpreters or interveners might well regard the day as not ‘howling wild’ or not ‘exceedingly dry’, that is, they might disagree with the reading or interpretation or intervention that is being submitted to them. Take someone who was raised in Provence, where the famed *mistral* can blow at very high speed for a week, if not longer. For this person, in the light of where he has lived – of where he has been encultured – the Beckettian day might well fall quite short of being ‘howling wild’. Because fixity of meaning is not an option, there will plausibly arise a misunderstanding between, say, a *Provençal* and a resident of halcyon San Diego – a dispute that may well generate an enriching confrontation about the characteristics concerning a ‘howling wild’ day. (Contrariwise, if both readers or interpreters or interveners readily agree that the day is either ‘howling wild’ or ‘not howling wild’, no beneficial conversation will ensue.) See P Legrand, ‘What Is That, to Read Foreign Law?’ (2019) 14(2) *J Comp L* 294.

⁴ See F Nietzsche, ‘Nachgelassene Fragmente’ in *Digitale Kritische Gesamtausgabe* (G Colli et al eds, 2009 [1881]) <www.nietzschesource.org/#eKGWB/NF-1881,12> s 12. In English, Nietzsche’s entry in his notebook reads ‘I have forgotten my umbrella’. (One has to be mindful of the quotation marks.) cf J Derrida, *Eperons* (Flammarion 1978) 103–13.