XIII

The Negative, Applied

It will not have escaped the attentive analyst that the 2004 French statute prohibiting 'ostensibl[e]' ('*ostensibl[e]*') religious attire in public primary and secondary schools is, well, about schools rather than airports, hospitals, or museums.[1] For a French court aiming to interpret the word 'schools' ('*les écoles, les collèges et les lycées*'), this legislative predilection hardly demands to be justified. Indeed, while French judges set themselves the institutional and interpretive charge of ascribing normative meaning to the relevant statutory term, they need not ask themselves – and will, in fact, refrain from wondering – why schools instead of another institution. By contrast, the discerning comparatist-at-law must emphatically address this question if, of course, he proposes to ascribe deep or thick meaning to the French statute, if he is pursuing comparative research with a view to generating a significant interpretive yield regarding foreignness – which, I argue, he must in principle want to do.

A threshold requirement for the conduct of the kind of elucidating inquiry liable to produce a *meaningful* report (a report full of meaning) on the French statute is for the comparatist to accept that his work involves *making sense* of a legislative text that is (inevitably) thoroughly encultured. To be sure, the word 'schools' is culturally freighted and is indeed being deployed by the French legislature as a culturally freighted word. (Observe that I mobilize 'schools' as a convenient shorthand to capture the idea of pre-

[1] Statute no 2004–228 of 15 March 2004 enframing, in application of the principle of laicity, the wearing of signs or attire demonstrating a religious belonging in public primary and secondary schools, art 1 <www.legifrance.gouv.fr/loda/id/JORFTEXT000000417977/> [on file].

university public educational institutions – my foreignizing English translation of the French statute's '*les écoles, les collèges et les lycées publics*', even as I appreciate that the word '*lycée*', for example, is properly untranslatable.) Such enculturation entails that there is infinitely more to the term 'schools' than the letter or graphical surface of the statute might suggest. Positivism would, of course, squarely contradict this assumption. However, exegetical and formalistic ways are not at all suited to the brand of comparative investigation that I regard as compelling.

Because 'the' meaning of the word 'schools' is not, the comparatist must himself *enact* a meaning.[2] And in order to do so justly, he must elicit the relevant cultural encumbrances as so many constitutive elements of the law-text, unlike the aseptic view of the legal that orthodox comparatism has traditionally been peddling. Accordingly, the comparatist must prove himself determined to abide by a sophisticated appreciation of textuality and thus purport to *invent* – that is, find-and-fashion – articulable traces constitutively haunting the foreign law-text through infinitely complex networks of enmeshment, traces structurally partaking of the foreign law-text as the law-text that exists, there. Such is comparatism other-wise: a different comparatism from the model that has long prevailed within comparative law, a comparatism that tries to do re-presentative justice to the other law-text, that resolutely attempts to manifest interpretive wisdom vis-à-vis otherness-in-the-law, *a conjuration of the haunting of foreign law-texts*.

As the comparatist proceeds, he is himself acting as an encultured being, which means that his intervention into foreign law will inevitably be influenced by his own cultural freighting. For instance, what the comparatist says of 'schools' will turn on how

[2] See P Legrand, 'What Is That, to Read Foreign Law?' (2019) 14(2) J Comp L 294.

much information he holds about France and French culture (that is, his work will be contingent on his pre-understanding of foreignness). The comparatist's account will also have something to do with how easy it is for him to access authoritative documentation on French schools, not least texts in the French language (and, correlatively, his report will hang on how much effort he is willing to expand on researching sources that are not so easily accessible – which, in turn, will concern how rigorously he was instituted into comparative law and how much time he has at his disposal).

Most significantly, the shape of the comparatist's probe will hinge on his preparedness to trace the law-text to its cultural fabric on the understanding that such tracing, which effectively consists in archaeological or genealogical work, must produce an indisciplined assemblage of information to supplement the extant statutory text, the authoritative judicial decisions, and the recognized doctrinal commentary. No matter how excellent, though, the comparatist's report must pertain to interpretation rather than veridiction – because any tracing necessarily does, any tracing being a singular comparatist's singular tracing of a singular foreign law-text. And the account that the comparatist-at-law inscribes must be his (encultured) interpretation rather than a statement instantiating objectivity or truth. Indeed, it is unequivocally *his* response to foreignness that the comparatist is enunciating, not anyone else's (and certainly not some hypothetically neutral commentator's). Moreover, tracing is inherently critical – both in the sense that it is the comparatist himself who chooses the traces he is to elicit out of the range he can discern, and it is the comparatist himself who then follows a particular tracing itinerary until he decides to interrupt it.[3] But critique can also

[3] For a detailed exploration of tracing, see P Legrand, 'Siting Foreign Law: How Derrida Can Help' (2011) 21 Duke J Comp & Int'l L 595.

legitimately take the form of an express demurral to the legal commitments suffusing the foreign law-text under scrutiny.

Provided it abides by the principle of charitable interpretation and does not therefore dismiss the other-in-the-law as irrational or demonstrate contempt vis-à-vis him, on condition also that it attests to a genuine effort at understanding the other law's 'thereness' on its own terms, such oppositional interpretation pertains to the comparative *advantage*, to what distance allows and warrants – to what is, in sum, one of the very raisons d'être of comparative law. While ethnocentrism or juricentrism (say, as regards the French statute, one's Canadian multicultural inclination or one's sentiment as a colonized Québécois) must be kept steadily in check, it is legitimate that the comparatist's life experience, as it informs his rejoinder to foreignness, should possibly clash with the *Lebenswelt* of the law-text under examination. Subsequently, the comparatist's readership or audience, applying a suitably prudent (even wary) disposition, will adjudicate on the interpretive merits of the critical comparatism on display.

Note that the tracing culturalist at no time steps out of the law-box. Rather, the comparatist remains well inside the law-box throughout the interpretive process. Indeed, to pursue the archaeological or genealogical metaphor, he is earnestly digging within the law-box to ascertain the threads that have (been made to) come together in order to constitute the French statute. Bringing to bear an aesthetics of suspicious reading, he is meticulously deconstructing the legal construction in place. If you will, the comparatist is excavating the law (contrariwise, think of positivism as leaving foreignness *unexcavated*). To transpose an excerpt from Samuel Beckett's, the comparatist-at-law is 'drill[ing] one hole after another' into the foreign text 'until that

which lurks behind … starts seeping through', on the robust understanding that 'there [is no] reason why that terrifyingly arbitrary materiality of the word surface should not be dissolved'.[4] To the extent that they would want to resist tracing, cast it as counter-law rather than accept it as the hyperlaw that it is, perhaps denigrate it as some form of contemplative speculation mired in unjustifiable paralegal roundaboutations and divagations, orthodox comparatists-at-law would be contesting *what has always-already happened*,[5] for *the law-text has always-already been constituted through a myriad instances of jurimorphing*.

By way of illustration of the form that a habile tracing exercise can adopt as a matter of comparative law and the kind of revealing foreign information that tracing can elucidate as it engages in the task of making-sense, I suggest a vignette on 'schools' with specific reference to the French statute I am addressing. No more than a sketch, my report shows how information that orthodox comparatists would readily exclude as non-law assuredly and crucially belongs to the law – how it partakes of the very gist of the law, perhaps of the law's core of cores, because the French statute derives its very institutional pertinence from the very fact of the cultural reach of schools within France. (If schools did not mean what they mean in France as a matter of cultural fact, there would simply not have been promulgated into force a 2004 French statute on laicity.) As I embark upon my illustrative tracing of the legislative term 'schools' to its cultural

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[4] Letter from S Beckett to A Kaun (V Westbrook tr) in *The Letters of Samuel Beckett*, vol 1 (MD Fehsenfeld and LM Overbeck eds, Cambridge University Press 2009 [9 July 1937]) 518. Widely known as the 'German Letter', this document exists only as a corrected draft. Beckett wrote it in German himself. I adopt Viola Westbrook's translation.

[5] cf J Derrida, *La Voix et le phénomène* (Presses Universitaires de France 1967) 95: 'The living present springs forth on the basis of its non-self-identity … . It is always already a trace.'

fabric, at no point am I therefore in any way digressing from the law, never is the information I gather such as deserves to be relegated to the law's context, as warrants to be out-lawed. From the perspective of comparative law, it is not at all that there is a cultural context surrounding the statute; it is rather that the statute exists as culture, that the statute exists as a cultural statement, that the statute exists as an instance of French culture expressing itself legally (rather than, say, architecturally, literarily, or culinarily).

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Without further ado, let me maintain that it appears unreasonable not to agree with Robert Paxton, to refer to a particularly distinguished exponent of French culture, that the 2004 French statute is '[a] law [that] was unmistakably aimed at the Muslim *foulard*, or headscarf',[6] that this legislative text must therefore be read as denying French citizens who adhere to Islam the right publicly to express their faith, at least within schools. To be sure, the French commentariat readily tends to deny this denial and defend the statute's 'absolute neutrality' in religious matters.[7] But only wilful blindness, it seems, can overlook the fact that the implementation of the 2004 statute aiming to homogenize the public sphere along non-religious lines and purporting to draw an impermeable divide between the public and private realms was expressly favoured by a governmental task force, the Stasi Commission, which was just as expressly established

[6] RO Paxton, 'Can You Really Become French?' *The New York Review of Books* (9 April 2009) 54. While Robert Paxton mistakenly dates the French statute to 1994, he is evidently discussing the 2004 law-text.

[7] P Weil (with N Truong), *Le Sens de la République* (Gallimard 2015) 75. In France, Patrick Weil's opinion is exemplary.

in the wake of the *Conseil d'Etat*'s advisory opinions,[8] most prominently that of 27 November 1989,[9] and its adjudicative decisions on complaints against the state in cases such as *Kherouaa*, of 2 November 1992,[10] and *Yilmaz*, of 14 March 1994,[11] all of these asseverations having had specifically to do with the presence of Islamic headscarves in public schools.[12] (No doubt perplexingly from a foreign vantage point, the *Conseil d'Etat* is at once the provider of advice to the state regarding the legality of statutes and France's supreme administrative tribunal in litigation against the state in the guise of one or other of France's numerous public institutions.)

Indeed, the *Conseil d'Etat*'s various pronouncements were widely criticized in France, especially in conservative circles, for having been unduly accommodating vis-à-vis religious pluralism,[13] hence a conservative president's decision to establish a

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[8] On 3 July 2003, French president Jacques Chirac named Bernard Stasi, French ombudsman ('*Médiateur de la République*'), as Head of an ad hoc 'Commission on the Consideration of the Application of the Principle of Laicity Within the Republic' ('*Commission de réflexion sur l'application du principe de laïcité dans la République*'). See Decree no 2003–607 of 3 July 2003 Bearing Creation of a Commission Charged With Conducting a Reflexion on the Application of the Principle of Laicity in the Republic <www.legifrance.gouv.fr/codes/texte_lc/JORFTEXT000000236506/2003-07-04> [on file].

[9] *Conseil d'Etat*, Section of the Interior ('*Section de l'intérieur*') no 346893 (27 November 1989) Advisory Opinion 'Wearing of Islamic Headscarf' ('*Avis "Port du foulard islamique"*') <www.rajf.org/spip.php?article1065> [on file]. I refer to a leading administrative-law journal for a reliable transcript as the *Conseil d'Etat*'s official website does not feature advisory opinions from the 1980s.

[10] Dalloz 1993 J 108, with a note by G Koubi.

[11] Dalloz 1995 J 135, with observations by B Legros.

[12] For a thorough and insightful examination of these opinions, see ET Beller, 'The Headscarf Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society' (2004) 39 Texas Int'l LJ 581.

[13] For variously disapproving reactions, see eg J Rivero, 'L'avis de l'Assemblée générale du Conseil d'Etat en date du 27 novembre 1989' (1990) 6 Revue française de droit administratif 1; G Koubi, 'De la laïcité à la liberté de conscience: le port d'un signe

commission of inquiry (under the leadership of a loyal senior civil servant) and entrust it with the power to make recommendations, which the panel did by advocating for prohibitory legislation.[14] Let me emphasize, then, that notwithstanding a widely circulating local stance holding firm to a contrary view, it is open to the comparatist-at-law, after mobilizing compelling empirical evidence, to ascertain the existence of a sequential link between the pronouncement of liberal institutional statements on Islamic dress at school, the reactive assertion of conservative values at the highest political level, the striking of an impromptu committee, the group's recommendation in favour of an interdicting statute, and the promulgation into force of a law-text precisely to this countermanding effect. Such is the position I (committedly) defend.

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As the favoured vehicle of long standing to channel state intervention with specific reference to the constitution of citizenship and the promotion of republican ideology, that is, as regards the fabrication of Frenchness, the school occupies 'a preponderant place' in France, so much so that the role of the school within French society is said to

d'appartenance religieuse' [1990/3] Petites affiches 6; J Minot, 'A propos de l'affaire du foulard' (1990) 43 Revue administrative 32; J-C William, 'Le Conseil d'état et la laïcité' (1991) 41 Revue française de science politique 28; F Altschull, *Le Voile contre l'école* (Editions du Seuil 1995); D Le Tourneau, 'La laïcité à l'épreuve de l'islam: le cas du port du "foulard islamique" dans l'école publique en France' (1997) 28 Revue générale de droit 275.

[14] In a report submitted on 11 December 2003, the Commission advocated for the enactment of a prohibitory statute on laicity at school. See <www.ladocumentationfrancaise.fr/var/storage/rapports-publics/034000725.pdf> [on file] (hereinafter Stasi Report).

represent 'an unprecedented social fact'.[15] According to the Stasi Commission, '[t]he first venue for the learning of republican values is and must remain the school'.[16] Otherwise put, the republican responsibility of the school is '[t]o teach France' so that at school, 'the nation becomes the framework and the finality of all learning, from history to morality, from botany to the rules of politeness'.[17] Indeed, it is 'a distinctive feature' of the French model that 'the state's interest in instilling culture in its citizens is considered an ever-present party to any conflict over conduct in the public schools. This is no mere civic education in the Anglo-American vein. Rather, in France, the state, not the parent, is seen to have the ultimate responsibility to educate a child.'[18]

Such conception of school education makes the schoolteacher – in French, the '*instituteur*'/'*institutrice*', that is, the person who 'institutes' or 'educates into the institution' – the most important agent of the state in the national acculturation enterprise, itself one of the state's most significant political and epistemological endeavours.[19] Indeed, as early as 1794, Napoleon established the *Ecole normale supérieure* – one of France's so-called '*grandes écoles*' (literally, 'great schools') – in order that the state could itself train teachers who, as civil servants, would then reliably

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[15] M Blanchard and J Cayouette-Remblière, *Sociologie de l'école* (La Découverte 2016) 3 and 11. Making specific reference to France, Cécile Laborde adverts to 'the centrality of education to the republican project': C Laborde, *Critical Republicanism* (Oxford University Press 2008) 49. For a notable historical panorama of the role of the school in France, see E Weber, *Peasants Into Frenchmen* (Stanford University Press 1976) 303–38. See also Laborde (supra) 49–55.

[16] Stasi Report (n 14) 51.

[17] A-M Thiesse, *Faire les Français* (Stock 2010) 70 and 73.

[18] Beller (n 12) 612.

[19] Eg: see Weber (n 15) 303. See generally M Ozouf, *L'Ecole de la France* (Gallimard 1984); J Ozouf and M Ozouf, *La République des instituteurs* (Editions du Seuil 1992); F Mayeur, *Histoire générale de l'enseignement et de l'éducation en France*, vol 3 (Perrin 2004).

foster state ideology in state schools.[20] Between 1880 and 1912, four more specialized 'normal schools' ('*écoles normales*') were created (a 'normal school' is meant to distil an institutional model, an institutional norm).

To this day, all schoolteachers graduating from a training school (there are now 'lesser' ones also) are invested with a legal mandate known as a 'mission of public service' ('*mission de service public*'): to educate the French people into republicanism, which must actively entail the reduction of individual difference or singularity to common national experience. In the words of French historian Mona Ozouf, the schoolteacher must 'striv[e] to … make [students] alike' (the French word is '*pareils*', a term that connotes identity).[21] Along the way, the state is effectively using the school to disable the edification of any potential critique, to defuse any possible rebellion against its institutional model. It has thus been cogently observed that the schooling process is destined 'to … "bastion" the [French] Republic' – that is, to allow for the building of an intellectual fortress protecting the state from attack or assault.[22] The highly prized character of their patriotic duty, joined with their status as civil servants (a valued and respected social role in France), confers on schoolteachers undeniable moral authority within French society. (Perversely, there is arguably an inverse correlation between ascendancy and salary. The fact that the pay is low – below Organization for Economic Co-operation and Development (OECD) average[23] – suggests a vocational streak that

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[20] See RJ Smith, *The Ecole Normale Superieure and the Third Republic* (SUNY Press 1981).

[21] M Ozouf, *Composition française* (Gallimard 2009) 105.

[22] J-F Chanet et al, 'Comment faire des Français?' in A de Baecque and P Deville (eds), *Mona Ozouf* (Flammarion 2019) 182. The words are Jean-François Chanet's.

[23] See Organization for Economic Co-operation and Development, *Education at a Glance 2020* (2021) 388 <https://read.oecd-ilibrary.org/education/education-at-a-

translates into moral purchase.) In his 1913 book *L'Argent*, Charles Péguy, the celebrated humanist, called schoolteachers 'black hussars', thus making implicit reference to Hungarian soldiers reputed for their efficacy and devotion, and wrote admiringly that the *Ecole normale supérieure* appeared to be 'an inexhaustible regiment' that was like 'an immense governmental depot of youth and civic-mindedness'.[24]

From the French official standpoint, the goals of the republican pedagogical project, which involves the 'diffus[ion] [of] a corpus of objective knowledge' about the republic[25] – in effect, knowledge *deemed* objective – are 'at once emancipatory and regulatory'.[26] While students must obviously be supplied with the tools destined to ensure the acquisition of a degree of intellectual autonomy, they also find themselves, paradoxically, as having their individuality disciplined into unconditional obedience to the nation-state – the mainstream (and counter-intuitive) French idea being that this process is to be apprehended as unfettering: 'The school liberates through closing and through regulating.'[27] In other words, the governing assumption is that through school, students are fortunately freed from whatever differential or singular circumstances – 'vaguely felt as evil'[28] – that might otherwise have affected the moulding of their educated selves into republican values. Meanwhile, they are corralled into a space of edification opened for them by the state on the state's own terms, with a view to

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glance-2020_69096873-en#page390> and 391 <https://read.oecd-ilibrary.org/education/education-at-a-glance-2020_69096873-en#page393>.

[24] C Péguy, *L'Argent* (Gallimard 1932 [1913]) 26.

[25] C Laborde, 'On Republican Toleration' (2002) 9 Constellations 167, 170.

[26] J Surkis, *Sexing the Citizen: Morality and Masculinity in France, 1870–1920* (Cornell University Press 2006) 18.

[27] C Kintzler, *La République en questions* (Minerve 1996) 72.

[28] V Descombes, *Le Même et l'autre* (Editions de Minuit 1979) 16.

becoming, in principle, within the public sphere at least, but reflective surfaces mirroring state ideology.

Intervening as comparatist-at-law, I claim that any deconstruction of the 2004 law-text – in particular, any re-signification orchestrated from a comparative angle – must be conducted in the light of two critical paramount observations. First, French republicanism is 'singularly ill-suited to look positively on contemporary demands for the recognition of cultural and religious differences in the public sphere'.[29] Consider the eminent politist Philippe Raynaud, who maintains that the 2004 legislative ban is 'an interdiction that is founded on the necessity to protect children or teenagers from a propaganda or a proselytism incompatible with the serenity of a public education'.[30] Even allowing for the deep-seated enculturation within which (and through which) Raynaud exists in the French world – in France, laicity incontestably pertains to the realm of culture[31] – it appears unduly expedient for this commentator to cancel religious identity, to reject 'a continuity between the interiority and the exteriority of the person',[32] and to proceed to do so in the name of 'serenity', as if religious allegiance and tranquillity were irrevocably antithetical values that could not countenance any form of conciliation whatsoever. Be that as it may, Raynaud's sub-text could hardly be

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[29] Laborde (n 15) 4. Laborde, a French politist who initially trained in France, readily acknowledges that her critique of the French model only became possible on the basis of 'the Anglo-American liberal philosophy [she] became acquainted with in the rigorous and inspiring atmosphere of British universities': ibid v.

[30] P Raynaud, *La Laïcité* (Gallimard 2019) 201. See also P Cabanel, 'Le principe de laïcité à l'école' in R Letteron (ed), *La Laïcité dans la tourmente* (Sorbonne Université Presses 2019) 172.

[31] See M Miaille, *La Laïcité* (3rd edn, Dalloz 2016) 309–11.

[32] P Mazet, 'La construction contemporaine de la laïcité par le juge et la doctrine' in J Baudouin and P Portier (eds), *La Laïcité, une valeur d'aujourd'hui?* (Presses Universitaires de Rennes 2001) 278.

clearer: the classroom must uniformly look the way classrooms used uniformly to look in the joyous era of '*la douce France*' (think Charles Trenet in 1947).

Secondly, because '[t]he French educational system … is very strongly centralized',[33] since the school is apprehended as 'an enterprise of civic integration',[34] and given France's normative 'refus[al] to recognize cultural diversity within the public space',[35] French students are reputed legally entitled to be spared any meeting at school with a headscarf-clad female classmate (or, much less plausibly, with a male fellow wearing a turban or kippah), the French state's correlative duty being to shield French students from any such aggravation. Public discourse thus leaves no room whatsoever for anything other than 'the [French] concept of privatized religious practices and the code of non-conspicuous dress … as universally acceptable expressions of modern life and … [a] narrative of the world within which [France] is anchored as the firm, normative center'.[36] Indeed, '[French] citizenship is conceived as an indivisible whole the legitimacy of which expresses itself in a direct relationship of the citizen with the

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[33] Blanchard and Cayouette-Remblière (n 15) 63.

[34] B Nabli, *La République identitaire* (Editions du Cerf 2016) 28.

[35] D Schnapper, *La République aux 100 cultures* (Arfuyen 2016) 83.

[36] G Frankenberg, *Comparative Law as Critique* (Elgar 2016) 143. I substitute 'French' and 'France' for 'Western' and 'the West'. As it expresses itself within a comparative framework, Günter Frankenberg's critique is an apt reminder that there have been a number of noteworthy comparative discussions embracing the French statute. Eg: JW Scott, *Sex and Secularism* (Princeton University Press 2018)[hereinafter *Sex and Secularism*]; ES Hurd, *Beyond Religious Freedom* (Princeton University Press 2015); AC Korteweg and G Yurdakul, *The Headscarf Debates* (Stanford University Press 2014); JW Scott, *The Politics of the Veil* (Princeton University Press 2007); JR Bowen, *Why the French Don't Like Headscarves* (Princeton University Press 2007).

state',[37] which entails that the state 'refuses any kind of official recognition of minorities as such, where individuals are identified with a minority group … for the purposes of state action (whether redistributive or affirmative)'.[38] On account of France's 'apocalyptic crusaders',[39] even the idea of 'tolerance for veiling' gets no traction at all.[40] Nor does a fortiori the argument favouring 'a woman's right to culture'.[41] Quite to the contrary, the French attitude 'deepens the polarity between self and other'.[42]

Because of French republicanism's hermetism in response to the stipulations of pluralism and its dogmatism in the extolment of monism, the comparative perspective – the comparative advantage – makes it possible, significantly, for an interpreter who is evaluating the French project from a critical (and multicultural and colonized) distance

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[37] Schnapper (n 35) 10. Recall that the Constitution expressly proclaims the French republic to be 'indivisible' ('*indivisible*'): <www.legifrance.gouv.fr/loda/id/JORFTEXT000000571356/> art 1.

[38] A Favell, *Philosophies of Integration* (2nd edn, Palgrave 2001) 71. Both the *Conseil d'Etat* and the *Conseil constitutionnel*, the body entrusted with the task of constitutional review, have stated repeatedly that group or collective rights are incompatible with the French constitution. Eg: *Conseil d'Etat* (30 October 2001) *Syndicat national des enseignements du second degré (SNES)* <www.rajf.org/spip.php?article465xxx> [on file]; *Conseil constitutionnel* no 99–412 (15 June 1999) *Charte européenne des langues régionales ou minoritaires* <www.conseil-constitutionnel.fr/decision/1999/99412DC.htm> [on file]; *Conseil constitutionnel* no 91–290 (9 May 1991) *Loi portant statut de la collectivité territoriale de Corse* <www.conseil-constitutionnel.fr/decision/1991/91290DC.htm> [on file].

[39] Frankenberg (n 36) 145 [capitals omitted].

[40] ibid 147.

[41] See LL Veazey, *A Woman's Right to Culture* (Quid Pro Books 2015) 31–44, in which the author discusses specifically French legislation on religious symbols. Linda Veazey castigates '[French] law's disproportionate impact on the symbols and dress of Muslim women' and observes that 'Muslim women's right to express their identity … through dress was curtailed in a manner which would [not] impact … Muslim men': ibid 44.

[42] Frankenberg (n 36) 148.

to contend that '[t]he ban on the hijab in schools … cannot be defended on any of the main grounds presented by official republicans'.[43] Even as the French state's position assumes that the public space, otherwise known as the 'republican space',[44] must remain the state's exclusive preserve so that it can occupy the entire ideological terrain and thus convey its republican message without any competition from an intellectual and spiritual counter-power such as Islam,[45] the comparatist is well placed to maintain that 'the demand that Muslism schoolgirls take off their headscarf is, in almost all contexts, wrong'.[46] (While I am pleased to quote Cécile Laborde, a shrewd analyst of French republicanism, I find the word 'wrong' to be problematically absolutistic, and I would rather encourage the deployment of more relativistic terms such as 'exaggerated' or 'excessive'.) From a comparative slant, the French state's determination not to allow its political postulates to be questioned out of an allegedly unimpeachable concern for the constitutional precept of 'equality' ('*égalité*') indeed deserves critical scrutiny.

At this juncture, I find it important to insist that comparative analysis must not withhold critique on the ground that comparatism ought somehow to be confined to a strictly descriptive remit. Even leaving to one side the fact that a 'strictly descriptive' enterprise pertains to the realm of fiction, I cannot discern any persuasive argument why the comparatist-at-law should censor himself and avoid, say, a reprobatory

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[43] Laborde (n 15) 14. Observe that even a foreigner who has lived and worked in France for many years can operate at a distance.

[44] Weil (n 7) 110.

[45] Eg: Chanet et al (n 22) 195, in which reference is made to 'the public space, that is to say, in France, the space of the state'. The words are Pierre Birnbaum's.

[46] Laborde (n 15) 14. The reservation addresses Turkey, 'where the wearing of hijab has been widely interpreted as the powerful and visible symbol of an Islamist onslaught on the secular republic': ibid 265n56. For a critique such as I invite in the body text by a prominent comparatist-at-law, see Frankenberg (n 36) 117–64.

response to foreignness as long, of course, as he manages to bring to bear a charitable interpretive disposition towards foreign law, that is, recognize and respect the fact that there is a rationality at work within foreignness rather than the unfolding of some sort of mental disorder. Also, I repeat that it is key for the comparatist-at-law to keep his enculturation on a tight epistemic leash.

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What Günter Frankenberg has termed a programme 'geared toward conquering the covered woman and unveiling her in the public sphere' has been exacerbated by the fact that the French state has somehow appropriated gender equality as a republican value so that the wearing of a headscarf at school has come to be seen not only as an intolerable religious indicator, but also as an unacceptable sign of female oppression – such conclusion apparently not being influenced by the fact that, amongst French women declaring themselves to be Muslim, as many as thirty-five per cent say they wear either the hijab or the niqab.[47] Along the way, there appears to have been but the scantiest appreciation for the complexity of the processes of identity construction that Muslim women bring to bear on their sartorial decisions.[48] Consider anthropologist Talal Asad's observations regarding the work of the Stasi Commission:

[47] See J Fourquet, *L'Archipel français* (Editions du Seuil 2019) 164. The figure I mention is from 2016. Jérôme Fourquet indicates that it was twenty-four per cent in 2003: see ibid. My quotation is from Frankenberg (n 36) 150.

[48] This lack of understanding is hard to separate from the fact that the Stasi Commission heard only two young hijab-wearing women and did so late in the course of its proceedings, that is, on the occasion of the very last day of auditions. See M Belbah and C de Galembert, 'Dialogue avec l'absentionniste de la Commission Stasi: entretien avec Jean Baubérot' [2008/68] Droit et société 237, 246. A member of the twenty-strong Stasi Commission, Baubérot was alone in not voting for the report; he abstained. The widely held view in France that Islam, and Islamic dress in particular,

> [S]olicitude for the 'real' desires of the pupils applied only to girls who wore the headscarf. No thought appears to have been given to determining the 'real' desires of girls who did *not* wear it. It is conceivable that some of them secretly wanted to wear a headscarf but were inhibited from doing so because of what their non-Muslim French peers and people in the street might think or say. Or that unconsciously they simply desired to be 'modern'. Appearance alone was sufficient for the Commission: the absence of a headscarf worn in public means the person concerned has no desire to wear it. 'Desire' – the root of agency – is not definitively discovered, but semiotically constructed.[49]

Meanwhile, 'the explosive concoction of feminist or secularist liberation fantasies combined with a republican modernization agenda and an [I]slamophobic imaginary,

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systematically effectuates the patriarchal oppression of women is deftly rebutted in E Bucar, *Pious Fashion* (Harvard University Press 2017), in which the author, deconstructing simplistic stigmatization, persuasively illustrates how, rather than express servile obedience to religious orthodoxy, the clothing worn by Muslim women engages with a range of aesthetic values as it displays local commitments to social distinction and self-empowerment. For different studies asserting the variety of re-signification processes at work and the ensuing intricacy of identitarian issues, see eg L Abu-Lughod, *Do Muslim Women Need Saving?* (Harvard University Press 2013); A Al-Saji, 'The Racialization of Muslim Veils: A Philosophical Analysis' (2010) 36 Philosophy & Social Criticism 875, 892–93; L Abu-Odeh, 'Post-colonial Feminism and the Veil: Considering the Differences' (1992) 26 New England LR 1527, 1535–36; H Adelman, 'Rights and the *Hijâb*: Rationality and Discourse in the Public Sphere' (2008) 8 Human Rights & Human Welfare 43, 48; AK Wing and MN Smith, 'Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban' (2006) 39 UC Davis LR 743, 757–71; C Killian, 'From a Community of Believers to an Islam of the Heart: "Conspicuous" Symbols, Muslim Practices, and the Privatization of Religion in France' (2007) 68 Sociology of Religion 305, 312–15; R Kapur, *Gender, Alterity and Human Rights* (Elgar 2018) 120–50; N Cox, *Behind the Veil* (Elgar 2019) 188–202.

[49] T Asad, *Secular Translations* (Columbia University Press 2018) 53.

which radicalizes the colonial obsession with unveiling, uncovering and unmasking',[50] has prompted both the deepening of laic interventions at school and their expansion beyond the public sphere. In particular, a fifteen-year-old female Muslim student was denied access to her public secondary school on two occasions on account of the fact that she wore a black skirt deemed to qualify as 'ostensible' religious dress because of its length.[51] And, in the *Baby Loup* case decided in June 2014, the French *Cour de cassation* upheld the dismissal of a private day-care centre's female assistant director who had been employed for over ten years. The sanction for 'grave fault' ('*faute grave*') arose because the employee had insisted on wearing a headscarf at work on account of her religious convictions.[52] Already, in 2010, a statute had been enacted prohibiting face covering in public.[53] And in April 2021, pronouncing on further law reform, the Senate

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[50] Frankenberg (n 36) 148.

[51] C Chambraud and S Graveleau, 'Crispation à l'école sur les jupes longues' *Le Monde* (30 April 2015) 8. For further reports, see eg A Hardy, 'Jupe longue au collège: le vrai du faux' *Journal du dimanche* (30 April 2015) <www.lejdd.fr/Societe/Religion/Jupe-longue-au-college-ce-qu-il-s-est-vraiment-passe-730316> [on file]; AJ Rubin, 'French School Deems Teenager's Skirt an Illegal Display of Religion' *The New York Times* (29 April 2015) <www.nytimes.com/2015/04/30/world/europe/french-school-teenagers-skirt-illegal-display-religion.html> [on file].

[52] For an extensive examination of the decision, see S Hennette-Vauchez and V Valentin, *L'Affaire Baby Loup ou la nouvelle laïcité* (LGDJ 2014).The expression '*nouvelle laïcité*' ('New Laicity') purports to capture the semantic and ideological enlargement of laicity to the sphere of private relations that *Baby Loup* illustrates.

[53] Statute no 2010–1192 of 11 October 2010 Prohibiting the Concealment of One's Face in the Public Space <www.legifrance.gouv.fr/loda/id/JORFTEXT000022911670> art 1 [on file]. I find it noteworthy that, making specific reference to this reform, one of France's foremost writers – admittedly a particularly well-travelled one – castigates 'the drifts of this provincialism': JMG Le Clézio, *Quinze causeries* (Gallimard 2019) 46. For thoughtful observations, see G Baldi, '"Burqa's Avenger": Law and Religious Practices in Secular Space' (2018) 29 Law & Critique 31.

(French parliament's upper-house) voted to prohibit parents volunteering to accompany students during school excursions from wearing 'ostensibl[e]' religious attire (effectively targeting Muslim mothers); allowing public swimming pools to ban the 'burkini'; and prohibiting minors from wearing 'ostensibl[e]' religious attire anywhere in the public sphere.[54] In a searing autobiography, Kaoutar Harchi, a young Muslim female sociologist and writer, expressing both anger and fear, unsurprisingly exclaims how French Muslim women feel 'in their deepest [selves]' that there is a 'war [from] within' being waged against them and how they experience being 'publicly targeted'.[55]

As 'the denial of free will on the part of women and girls wearing modest dress' proceeds apace in France,[56] as the governance strategy on display continues to implement a rule-based (or nomothetic) approach rather than allow for facticity (or idiographics) to carry any normative value,[57] as '*faith in the state*' eschews any serious

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[54] The vote concerned Statute no 2021-1109 of 24 August 2021 Reinforcing Respect for the Principles of the Republic <www.legifrance.gouv.fr/loda/id/JORFTEXT000043964778/>. See <https://www.assemblee-nationale.fr/dyn/15/textes/l15b4078_projet-loi#>. The Senate's amendments ultimately did not make their way into the statute. I address the matter of the 'burkini' supra xx.

[55] K Harchi, *Comme nous existons* (Actes Sud 2021) 105, 105, and 107.

[56] Frankenberg (n 36) 146.

[57] By way of contrast, English law typically operates idiographically rather than nomothetically. In *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 (HL), a female student wanted to wear a full Islamic dress (or *jilbab*), which was inconsistent with the school's uniform policy in a context where the uniform had been designed to take into account Muslim beliefs given that eighty per cent or so of the students were Muslims. Lord Bingham, delivering the main opinion of the House of Lords, emphasized how '[i]t is important to stress at the outset that this case concerns a particular pupil and a particular school in a particular place at a particular time': ibid 107. (Quaere: how much more idiographic can a judgment get?) He added: 'It would in my opinion be

reconsideration of France's political project (the terrorist attacks that took place in Paris in January and November 2015 and in Nice in July 2016 having only served to reinforce reliance on the state),[58] there emerges a key line of interpellation (although it appears to be anything but compelling in the eyes of French analysts), which political theorist Wendy Brown expresses in terms that deserve quotation:

> If successful [occidental] women are not free to veil, are not free to dress like men or boys, are not free to wear whatever they choose on any occasion without severe economic or social consequences, then what

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irresponsible for any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgment on a matter as sensitive as this': ibid 117. Lord Hoffmann agreed: 'These are matters which the school itself was in the best position to weigh and consider': ibid 125. To return to the French framework, it features seemingly inevitable complexity. In the course of three fieldwork studies, Christophe Bertossi thus shows how even in such highly institutionalized spheres as those of the army and the hospital, French official public discourse has adapted its response to pragmatic imperatives. See C Bertossi, *La Citoyenneté à la française* (CNRS Editions 2015) passim.

[58] P Legendre, *Fantômes de l'Etat en France* (Fayard 2015) 219. Pierre Legendre also refers to 'the ingrained belief that *French laicity* be, in principle, a *universal democratic panacea*': ibid 212. In this regard, it bears mentioning public intellectual Régis Debray's view that a French citizen can be proud that his country has been able to 'concretize a regulatory idea of universal value': R Debray and D Leschi, *La Laïcité au quotidien* (Gallimard 2016) 150. In advance of empirical study, anyone who has lived in France over the last twenty years or so can easily confirm how such pride is widely held within the French citizenry irrespective of its factual merit (the French approach *evidently* has no claim whatsoever to universalism). Incidentally, Debray and Leschi purport to offer a guide-book explaining the practical resolution to various conflicts arising on a daily basis on account of the upholding of laicity in France. For another such 'instruction manual', see J Baubérot, *Petit manuel pour une laïcité apaisée* (La Découverte 2016).

sleight of hand recasts their condition as freedom and individuality contrasted with hypostasized tyranny and lack of agency?[59]

Brown adds: 'What makes choices "freer" when they are constrained by secular and market organizations of femininity and fashion rather than by state or religious law?'[60] She further observes: 'To acknowledge that we have our own form of compulsory feminine dress would undercut this identity of superiority: we *need* fundamentalism, indeed, we project and produce it elsewhere, to represent ourselves as free.'[61]

Or, one might say, occidentals require to produce desexualization elsewhere in order to uphold sexuality as an acceptable identity marker for themselves. Indeed, Joan Scott, the distinguished historian of France, holds that the free expression of sexual desire whereby, absent religious constraints on her attire, the Muslim woman would now become a self-conscious sexual agent, effectively secures her (occidental) subordination to man since sexual emancipation – or the liberation of the sex drive – proceeds to perpetuate the sexualization of women in a way that benefits males. In effect, the gender asymmetry and inequality that the Muslim woman would be escaping is preserved, if in another guise.[62] To enunciate this claim more concretely still, in a country like France the non-Muslim majority must brand Islamic dresswear for women as fundamentalist so that, meanwhile, by contrast, it can re-signify its deeply sexualized dress code for women (featuring skin-bearing and shapely clothes) as other than an imposition – as, indeed, a freedom for women to reveal their body advantageously. In effect, then, the ascription of fundamentalism is anything but disinterested as it

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[59] W Brown, *Regulating Aversion* (Princeton University Press 2006) 189. I substitute 'occidental' for 'American'.

[60] ibid.

[61] ibid.

[62] See Scott, *Sex and Secularism* (n 36) passim.

provides the (male) majority with an alibi allowing it to recast its views on female clothing in the public arena as other than constraining.

In addition to these questions and observations, one can legitimately wonder whether the idea of Frenchness as it currently stands – an 'arrogative republicanism' partaking of a heady absolutist heritage of uncompromising centralization and of the myths of Revolutionary citizenship and laicity,[63] 'insist[ing] heavily on an adhesion to exalted political values',[64] and prompting a correlative disavowal of the empirical fact of French society's heterogeneity – is having significantly more impact than fostering the ever-greater embitterment of the exasperated 'non-citizens' of the *banlieues*. An astute politist like Laborde has indeed contributed a perspicuous critique regarding 'the risks of state oppression involved in the imposition of a conception of the good life as self-determination or autonomy' and has flatly decried '[French] republican paternalism' as 'fail[ing] to respect the agency of those women it claims to emancipate in the name of an elitist, decontextualized and imperialist conception of individual autonomy'.[65] Historian Laurence De Cock's view is convergent: 'A tendency is asserting itself more and more in the school: to transform laicity into a repressive tool.'[66] For her part, Falguni Sheth maintains that the transparency being legally implemented is, in effect, 'a demand for "unfamiliar" strangers to present themselves as familiar, or at least, as unthreatening to the dominant, homogenous population – not merely through sincerity and collegiality,

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[63] F Khosrokhavar, 'Le djihad et l'exception française' *The New York Times* (19 July 2016) <www.nytimes.com/2016/07/19/opinion/le-djihad-et-lexception-francaise.html> [on file].

[64] ibid.

[65] Laborde (n 15) 101, 147, and 147. For Laborde's full critique of the idea of liberty with specific reference to 'female agency', see ibid 101–48.

[66] L De Cock, *Ecole publique et émancipation sociale* (Agone 2021) 172.

but through submission and obedience'.[67] According to Sheth, '[t]he cooperative Muslim female subject must illuminate herself as having crossed over to the 'light side': the side of illumination, enlightenment … . Only when she can illustrate her crossover via her appearing transparent, can she be recognized as having been truly liberated – in short, a good female, mildly feminist, liberal subject.'[68]

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The French defence of the 2004 statute goes to remarkable lengths. For instance, a member of the Stasi Commission claims how '[i]t is not absurd to think that most Muslim families were relieved' on account of the enactment of the 2004 statutory prohibition.[69] Moreover, there is the view pertaining to France's *mission civilisatrice* that France's destiny is to teach others. Not only, then, is the French law-text to stand as 'an example' for Europe,[70] but it is rhapsodized as a 'very attractive' scheme 'worldwide'.[71] It is, in fact, claimed to be the legal arrangement 'of the future'.[72] Needless to say, there appears to be little French realization that, even as laicity continues to be promoted as a central element of the national republican programme of fully fledged cultural assimilation, 'French society … is … disintegrating under the pressures of globalization and cultural pluralism' so that, in effect, 'immigrants (and their children)

[67] FA Sheth, 'The Veil, Transparency, and the Deceptive Conceit of Liberalism' (2019) 9 philoSOPHIA 53, 53.

[68] ibid 67.

[69] Weil (n 7) 81. Is it unfair to discern in this enunciation (which fails to draw on any factual support) a characteristic illustration of self-projection so that Weil's statement would effectively stand as an expression of Weil's own relief?

[70] Raynaud (n 30) 226.

[71] Weil (n 7) 118.

[72] ibid.

[a]re asked to bear the burden of keeping alive an ideal of Frenchness on behalf of an insecure French … fearful of losing [their] national identity'.[73] Unsurprisingly, it is very hard to discern the slightest French political space for the implementation of a 'politics of non-domination' – a 'negative politics of non-domination' – that would accept the headscarf in schools with a view to removing obstacles to civic participation, to membership in the citizenry through 'the normalization and mainstreaming of Franco-Muslim identity'.[74]

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What have I done?

Ever since I engaged with law, my most constant interest has concerned the foreign. In terms of my scholarly commitments, nothing remains as absorbing and yet as incomprehensible to me, at once so very near and so distant, as foreign law. Assiduously, I devote myself to the texts of the other-in-the-law, and I attempt to respond (not react) to their singularity, their idiom, as they precede me. I try to do justice to the other-in-the-law and the other law even as I force foreign law-texts into a negotiation with my counter-words, with my counter-signature. But I can only proceed responsibly – ethically – by bringing to bear my 'own' singularity. Of course, what I style my 'own' singularity has very much to do with the socialization and institutionalization patterns – the enculturation (not least the epistemologization) – into which I was thrown or, later, allowed myself to be thrown. Since I read, interpret, and understand singularly, I read, interpret, and understand differently – which means that my reading, my interpretation, and my understanding, no matter how intrinsically worthy, are fated

[73] Laborde (n 15) 227.

[74] ibid 230, 252, and 252.

to stand at some variance both from the foreign law-text and from other readings, interpretations, and understandings of the foreign law-text. I have come to terms with the structural, empirical fact of this non-coincidence, of this contretemps. Specifically, I have accepted that my reading, my interpretation, and my understanding must be out of joint vis-à-vis foreignness.[75] Also, I have deferred to the fact that since I can neither claim objectivity nor truth, my work is doomed to the production of indeterminacy – my readership having to assess, in its own encultured ways, whether my proposed indeterminacy is more convincing than the other indeterminacies on offer. (I can easily imagine that a German jurist will approach the matter of my argument's persuasiveness differently from, say, an Australian reader.) In sum, I came to the 2004 French statute with keen curiosity and genuine enthusiasm even as I felt the need for epistemic humility and interpretive realism. While positivism features a dearth of positionality (the positivist is not an observer of the positivist-as-interpreter and even less an observer of the positivist observing the positivist-as-interpreter), I have consistently sought to maintain an aculeate disposition in order to obviate situational ignorance – an epistemic predicament liable to delude me into thinking that I had been engaging in veridiction.

Along the comparative way, I could not escape the perpetration of two salient acts of epistemological violence on the French statute. First, I had to ascribe meaning to the foreign law-text (note that I ascribed meaning *to* the text, because meaning is not to be found *in* the text). Otherwise said, I had to make sense of the text – I had to *make* sense (*I* had to make sense). Secondly, I had to effect closure. Accordingly, I enforced a limit on a process (reading/interpretation/understanding) that could have continued

[75] For an opportune exploration of the motif of disjointedness, see J Derrida, *Spectres de Marx* (Galilée 1993) passim.

endlessly for foreign law is unsaturable (there is simply no paraphrase able adequately to convey the entire semantic extension of the word that it is rewording). To be sure, the self-declaration that my treatment of the other's law must come to a halt at a given stage cannot dispense with a certain arbitrariness. And my decision to interrupt my investigation at a certain point rather than another features consequences as I must acknowledge, for instance, that various aspects of the foreign law-text's will therefore remain hidden from me, that the other's law will thus keep a secret from me.[76] Indeed,

[76] cf J Derrida, *Schibboleth* (Galilée 1986) 50: '[T]here is a secret there, in the background, forever shielded from hermeneutic exhaustion.' For his part, Edouard Glissant writes that there is not only a right to difference, but moreover a 'right to opacity', which is 'not imprisonment in an autarky impenetrable, but subsistence in a singularity non-reducible': E Glissant, *Poétique de la relation* (Gallimard 1990) 204. According to Jacques Derrida, the opacity – what he styles the secret, which etymologically means 'separation, dissociation' – qualifying the possibility of full transparency raises, of course, '[t]he risk of a misunderstanding': J Derrida, *Papier machine* (Galilée 2001) 398 and 306. However, Derrida observes that if a text was so clear as to be immediately fully understandable, there would be no room left for the interpreter to intervene, to inscribe his own signature. The negotiation that varied interpretations make possible, and indeed encourage, affords an occasion for a refinement of one's views and one's understanding, that is, for an enhancement of one's appreciation of otherness. Ultimately, the fact that there is more than one interpretation in co-presence makes every interpreter into a sharper analyst. Consider the 'opportunity' that the text offers the interpreter to express himself as a matter of hospitality: the text makes itself hospitable to the interpreter's reading and the interpreter's writing (or voice). See J Derrida and M Ferraris, *Le Goût du secret* (A Bellantone and A Cohen eds, Hermann 2018 [1994]) 38–39. The passage is Derrida's. Christine Elgin thus remarks on '[t]he value of disagreement for a community of inquiry': CZ Elgin, *True Enough* (MIT Press 2017) 117. This idea is already in Baudelaire. See [C] Baudelaire, 'Mon cœur mis à nu' in *Journaux intimes* in *Œuvres complètes*, vol 1 (C Pichois ed, Gallimard 1975 [1887†]) s 42, 704: 'The world works only through Misunderstanding.' cf S Beckett, *The Unnamable* (S Connor ed, Faber & Faber 2010 [1958]) 37: 'Dear incomprehension, it's thanks to you I'll be myself, in the end.' I advocate for a *principled* misunderstanding – that is, an acknowledgement that

there simply cannot be an interpretation, no matter how inventive or playful, how audacious or complicated, no matter how *prying*, that would do justice to the full meaning of foreign law. As I proceeded indisciplinedly to investigate the French statute, I found myself constantly oscillating between a 'tightening' of the law-text's semantic extension so as to render interpretation more secure, with the attendant danger of a correlative stultification of otherness, and a 'loosening' strategy with a view to enhancing the expression of otherness in exchange for more indeterminacy regarding imputation of meaning. I maintain that an absolute choice in this regard is absolutely impossible: there is at once an unresolved and unresolvable tension. Yet, I felicitously escaped the stasis that would characterize mimesis, if such were to be the comparatist-at-law's epistemological remit. Instead, there being no 'given' that is not a culturally constituted textuality that I constitute anew out of my enculturation, I had to contend with the epistemic risks attendant upon interpretive creativity and the demands of interpretive responsibility.

What, then, have I done?

Eschewing any pretence at mere description in favour of a resolutely opinionated, assertive, and critical stance – which is not to deny that even the most descriptively descriptive description also constitutes a form of critique – I have sought to bring to bear a genuine comparative perspective on what remains for me foreign law. (Even as I appreciate that, strictly speaking, 'foreign law' cannot exist for me, I have acted as if it can.) And I have painstakingly documented my argument. Was I thinking of Vladimir Nabokov, who liked 'footnotes reaching up like skyscrapers to the top of this or

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misunderstanding exists within comparative law as a matter of principle, and that this is a good thing, too.

that page so as to leave only the gleam of one textual line'?[77] At any rate, I left the law library for the main library more than once.

I have read much more than appears from these few pages. But I have been very selective as I retained some arguments (say, a qualitative claim like the social status of the teacher) and not others (for instance, quantitative information regarding how many teachers there are in France). Likewise, I elected to refer to certain authors and publications rather than others. What influenced my countless decisions to read these monographs and not others or these articles and not others? Primarily, I have been swayed by the substantive contentions I had come to associate with particular writers (most often through further readings) and by the way in which I thought these reasons provided insights that I found more pertinent than others, that supported my own interpretations or inflected them in ways I thought incisive. I know I also considered the author's credentials, say, his institutional affiliation or his publisher's academic standing (being well aware, however, that such indicia of authoritativeness need to be addressed with great prudence). I then proceeded to identify some passages, whether very brief or longer, that I wanted to partake of my text as quotations. And I arranged to weave those excerpts into my narrative with a view to optimal seamlessness (occasionally deciding not to keep a quotation after all or perhaps truncate it).

Along the way, I set both a tenor and a tone, a course of thought and an accent. My decision to mobilize Frankenberg and Laborde, for example, to refer to their work and quote from their publications at some length, bolstered what I had decided would be the interpretive inclination of my vignette. (To be sure, when I write that 'I had decided' to follow a certain line of interpretation, I refer – let me repeat – to an

[77] V Nabokov, 'Problems of Translation: "Onegin" in English' (1955) 22 Partisan R 496, 522.

encultured 'I', a socialized, institutionalized, and epistemologized 'I'.) And my decision to write, say, that a certain contention 'fails to draw on any factual support' – words that I could have omitted – indicates my attempt to invite my reader not to subscribe to the view being defended.

Now, the elections I made about the materials, quotations, and wording that I sought to bring into *play* are literally innumerable.[78] (These choices include the key decision to refer to texts in French, which I have sought to translate other-wise on what I hope are just terms even as I know that some words are untranslatable or, to write it like Celan, '*unübertragbar*' – literally, 'un-carry-over-able'.[79] Of course, my translations are neither objective nor true in the sense in which they would be the unique, uniquely fixed, uniquely stable, and uniquely acknowledged translations of the French texts. In fact, objectivity or truth is as inapplicable to translation as would be the words 'serene' or 'kind' by reference to a carpet or cucumber. In other terms, the search for objectivity or truth is the pursuit of an imaginary goal thoroughly exogenous to the translative inquiry.) Note that the integration between the translator's self and the source-text runs deeper than co-extension, which assumes separability, measurability, divisibility, or identifiability. It is not that selfhood and texthood parallel or succeed each other, but that they tessellate each other, that they mingle to the point of indissociability. Otherwise said, the translator proceeds to a selfing of the source-text (and indeed of the host-language). The translating self textualizes itself: it inscribes itself – it writes itself –

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[78] Play is a salient and serious motif within comparative law. It '*includes* the work of meaning': J Derrida, *L'Ecriture et la différence* (Editions du Seuil 1967) 382. For a detailed consideration, see P Legrand, 'Jameses at Play: A Tractation on the Comparison of Laws' (2017) 65 Am J Comp L [Special Issue] 1, 110–20.

[79] P Celan, *Der Meridian* (B Böschenstein and H Schmull eds, Suhrkamp 1999 [1960]) 75, 145 , and 158.

into the source-text (or into the host-language), it marks the text so that a translation is ultimately resolvable as a quest for the expressive self.

Throughout the very many drafts in the course of which I constructed an argument deconstructing the statutory word 'schools' ('*les écoles, les collèges et les lycées publics*'), I pursued one goal only: as a comparatist, I wanted to offer a persuasive interpretation of the 2004 French statute with specific reference to the meaning of the law-text. In the absence of any textual 'is-ness', I could not tell the text as it is. At best, I could tell it as I honestly interpreted it without, needless to add, transgressing it.[80] To be sure, I started from the statute, therefore not at all ignoring the posited law. But I was unwilling to be content with textuality's graphical surface. Within a text, presence is not graphical only. It is more complex, and it comprises encyphering. In this regard, it did not matter to me that the statute does not expressly say 'given that pre-university public educational institutions are the primordial vector of republican values'. Crucially, as the interpreter includes the traces lurking between the statute's lines, encrypted in the text's fabric, he is still operating *sub specie scripturarum*.

Out of the many epistemic assumptions I deployed, two deserve emphasis. First, basing myself on the fact that normality – *especially* normality – is culturally freighted (public educational institutions instantiate normality in France), I implemented the view that the construct 'French legal culture' makes sense in the light of my research topic. Of course, the contours of the 'unit' will vary according to the comparative intervention at stake. In other terms, the location of culture depends on the specific question of concern to the comparatist-at-law. For example, the legal culture at issue

[80] cf J Derrida, 'Fidélité à plus d'un' [1998/13] Cahiers Intersignes 221, 262, in which Derrida refers to 'the law of the other text, … its injunction, … its signature'.

might be that of Corsica, of commercial courts in France, or of the fishery in Marseille.[81] In each case, the scales of the comparison will influence what will count as data or hold as interpretive material. But the 'unit' can also be – and indeed will often be – coterminous with French lawyers as a whole, that is, with the group of legal agents who, if you will, are French citizens (in other words, to write rapidly, who are 'French') or who practice law in France – although even notions like citizenship or practice can hardly claim impermeable intellectual borders and are not to be envisaged as totalizing structural formations.

French legal culture exists, then, as does French cheese. And this is the case even as one can easily imagine circumstances pursuant to which one will want the unit to be more precise so that one addresses *chèvres* or, more specifically still, *chèvres au lait cru*. But it remains easy to imagine that in given situations it shall make sense to address French cheese *tout court* – as distinguished from, say, Italian, Dutch, or English cheese. To return to law, the decision by a comparatist-at-law to emphasize one specific manifestation of culture only (say, the transmission of republican values through 'schools') cannot be taken as denying the legitimacy of cultural analysis.[82] Any research

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[81] For a detailed investigation of the fishery in Marseille, see F Grisel, *The Limits of Private Governance* (Hart 2021). Adde: F Grisel, 'How Migrations Affect Private Orders: Norms and Practices in the Fishery of Marseille' (2021) 55 L & Society R 177.

[82] For positivism, however, culture is a contravention of rational logic since law must persist in being unshadowed, clean, pristine. Law has to be conceived as bare, pure, essential even. As naked presence, it can only be confined to its own-nature and indulge its relentless habit of self-definition (the commentator says the law after the judge saying the law after the statute saying the law after the constitution saying the law) with a view to controlling the past, the present, and the future by evoking a transcendental power. In the process, the jettisoned cultural apparatus is left devoid of any intellectual significance and effectively reduced to the expression of 'atavistic "tribal" instincts': HK Bhabha, *The Location of Culture* (Routledge 1994) 250. Because positivism is obsessively in search of knowledge that is technically utilizable, culture

endeavour must ultimately contend, no matter how sorrowfully, with the matter of boundedness: there will be *tears* in the web of information. Otherwise, one finds oneself having to contend with the predicament of inutility, which Borges strikingly illustrates through the briefest of stories. There was an empire where the art of cartography had been developed to such perfection that the map of a single province occupied a whole town, and the map of the empire a whole province. In time, these enormous maps no longer satisfied, and the college of cartographers established a map of the empire the size of the empire, which coincided with it point for point. Subsequent generations reflected that this inflated map was useless, and they abandoned it.[83]

Secondly, I have eschewed method and its doctrinarian propensities. Indeed, '[i]t is important to recognise that comparison is not a method or even an academic

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simply does not register on the professional scale. For the positivist, positivism and culturalism are unredeemably incompatible. Indeed, positivism posits the deposition and the disposition of culture. Eg: R Michaels, 'Two Paradigms of Jurisdiction' (2006) 27 Michigan J Int'l L 1003, 1017, in which the author maintains that a comparative account of foreignness 'must remain within the law without taking recourse to general societal culture, because culture and its relation to the legal rules and institutions are unclear.' (I am unclear as to what this passage means – and I have read *Finnegans Wake*.) Closure, of course, is the condition of positivism. Eg: P Schlag, *The Enchantment of Reason* (Duke University Press 1998) 140: '[T]o be really good at "doing law", one has to have … a stunningly selective sense of curiosity.' Adde: P Goodrich, 'Law-Induced Anxiety: Legists, Anti-Lawyers and the Boredom of Legality' (2000) 9 Social & Legal Stud 143, 147 (review of Schlag supra), in which the author, referring to 'legal non-knowledge', observes that 'both structurally and sociologically law does not know the objects of its regulation'. Indeed, without positivism's fixation of boundaries, there could be no positivism. But what is necessary for the positivist system to behold is also fictitious: the discarded cultural alternative continues to operate in depth with the inevitability characteristic of the return of the repressed.

[83] See JL Borges, 'Del rigor en la ciencia' in *El hacedor* (Alianza Editorial 2009 [1946]) 119. For a set of observations also reaching the conclusion that the key to a map's success lies in its differentiation from the world, see B Latour, *Enquête sur les modes d'existence* (La Découverte 2012) 86.

technique; rather, it is a discursive strategy'.[84] In lieu of a consecution of precepts that would lead to a more or less inevitable outcome, my comparison has emerged through experience – or 'flair'[85] – which I have incessantly adjusted along the way, unceasingly seeking to make it more *just*. The absence of any '*οδος*' ('*odos*') has involved the much higher levels of self-consciousness that come with one's assumption of responsibility, with one's *response* to the foreign – at once bold and companionate, sustaining and contingent, a rejoinder through an invention (a finding-and-fashioning) of the foreign. No-method comparative law is evidently no excuse for sloppiness. There are protocols, as I style them, or 'directions for use'.[86] For the sake of intellectual and scholarly integrity, they require the comparatist-at-law to have 'a clear strategy for gathering evidence',[87] to engage in 'the attentive reading of texts, the reference to the original, patience, slowness'.[88] They also demand that the notes be authoritative and current, incisive and pertinent – which I have ensured they are.

Now, there is no doubt in my mind that I have been engaging in a comparative intervention even though my focus has been on French law only. In this respect, the fact that I offer a (long) note on English law is irrelevant, and my study would be just as comparative without it. But have I understood French law? No, I have not. And I have not, because I could not. And I could not, since the self cannot be the other, which means

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[84] B Anderson, 'Frameworks of Comparison' *London Review of Books* (21 January 2016) 18.

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

[86] J Derrida, *La Dissémination* (Editions du Seuil 1972) 303: 'No method: this does not exclude certain directions for use.'

[87] E Darian-Smith and PC McCarty, *The Global Turn* (University of California Press 2017) 130.

[88] J Derrida and M Ferraris, *Le Goût du secret* (A Bellantone and A Cohen eds, Hermann 2018 [1994]) 59. The words are Derrida's.

that the location of the foreign is – and must be – beyond epistemic grasp (I mean the very foreign that makes the comparative discourse of interest).[89] Certainly irreducible to calculable determinants,[90] the foreign escapes anyone's ability to recount it *as such*. 'I feel kept at word's length.'[91] What I wrote is not French law; it is my reading, my interpretation, and my understanding of French law: it is 'French law'.

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Perhaps a convenient point of departure for a further exploration of the key matter of understanding is to consider an excerpt from Patrick Glenn's *Legal Traditions of the World*, in which the author, in a manner that well exemplifies the orthodox view within the field of comparative law, assumes – particularly once different laws from different locations have been Englished within a space where disparateness now morphs into seeming linguistic equivalence or commonality – that there can be understanding across laws or legal cultures and that such understanding is ultimately uncomplicated. Writing with reference to Russian law, Glenn holds thus: 'If you are a western lawyer with no previous experience of Soviet or socialist law, there are no major conceptual problems

[89] cf Derrida (n 80) 226: 'One does not have access to the here-now of the other.' For an extensive investigation of understanding within comparative law, see P Legrand, 'Foreign Law: Understanding Understanding' (2011) 6(2) J Comp L 67.

[90] For a critique of the epistemological assumptions informing comparative law by numbers, see P Legrand, 'Econocentrism' (2009) 59 U Toronto LJ 215. For a thoughtful objection to the nefarious influence of law-as-economics generally on comparative law, see G Watt, 'The Poverty of Economics and the Hope for Humanities in Comparative Law' (2014) 9(2) J Comp L 166.

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

in understanding it.'[92] I profoundly disagree. (I so easily imagine how the late Bernard Rudden, whose expertise lay precisely in Soviet or Russian law, would have responded to such a jejune declaration.) My decades of comparative law scholarship prompt me to maintain that the understanding Glenn assumes possible on the comparatist's part simply cannot be made to happen (even assuming fluency in the Russian language – which, in Glenn's case, is an unduly generous concession, since he did not have that skill). What is on display in Glenn's text, I find, is but the pathological, irrational, and

[92] HP Glenn, *Legal Traditions of the World* (5th edn, Oxford University Press 2014) 348. Glenn's book is replete with such inane observations. Since they address understanding, a few of his remarks on translation can be helpfully quoted. For Glenn, understanding across languages generally speaking does not appear to raise challenging issues. '[E]ven in our own language', he writes derisively, '[s]ome people, and professors, are just impossible to understand': ibid 49. In any event, he opines, superficially, that '[t]he translation industry in the world stands as testimony to [the fact of translatability]': ibid. And he submits a flippant pronouncement to the effect that '[i]f you don't like translations, … you can always learn the other language': ibid. In response, James Whitman understandably writes that '[l]overs of serious scholarship are sure to dislike this book', 'a poorly executed, self-indulgent piece of work': JQ Whitman, 'A Simple Story' (2006/4) Rechtsgeschichte 206, 206. I feel bound to record that in June 1997, having been invited to assess Glenn's typescript in order to break a deadlock between two reviewers, I wrote to Christopher Rycroft, a commissioning editor at Oxford University Press, that 'the design of [Glenn's] project is fundamentally misguided and epistemologically flawed'. I added that '[t]his book was doomed to be derivative and superficial'. Moreover, I commented that 'even if one was to accept the merits of [this] brand of comparative scholarship, it remains that this *particular* book is poorly structured, poorly written, and poorly researched'. Specifically, I pronounced that '[b]y and large, the text is convoluted and rambling' [on file]. A lady from the press later contacted me by telephone to ask if publication as a student text rather than under the scholarly 'Clarendon' imprint would address my concerns (which, she appeared to concede, were not completely devoid of merit). Evidently, Oxford University Press was determined to publish that book, and it did, and it apparently proved a good marketing decision since it underwent five editions in less than fifteen years – and, at the end of the day, a publisher is not the Red Cross.

ultimately paralyzing illusion of mastery or control over otherness, which can only be assumed and enunciated because a comparatist is prepared to elide, repress, reject, or disavow any limits on the epistemological reach of the self's understanding – an arrogance that effectively harbours the makings of an imperial or colonial mindset. Instead, I easily side with Ludwig Wittgenstein who, talking about someone offering an explanation and remarking that an explanation must always beget a further one, exclaims: '[I] still don't understand what he means, and never shall!'[93] I discern much intellectual integrity in this humble admission.

The empirical fact of the matter is that the comparative mind, which is structurally operating at a distance from foreign law – again, the self cannot be the other – is only capable of coming so close to foreignness. If you will, the inadequacy of the comparison has always-already begun, because of an otherness that outstrips all possible access and holds the comparatist-at-law, at best, to adjacency or alongsideness.[94] *While the comparatist never ceases to cross the border, he never arrives on the other side*. Call it a question of *vergency*.[95] And if the comparative mind is then going to report on what it will have encountered, it will only be able to do so by

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[93] L Wittgenstein, *Philosophical Investigations* (4th German-English edn, PMS Hacker and J Schulte eds, GEM Anscombe et al trs, Wiley-Blackwell 2009 [1946–49]) s 87, 45e.

[94] cf M Heidegger, *Sein und Zeit* (Niemeyer 2006 [1927]) 239: 'We … are at most always only "nearby".'

[95] See P Legrand, 'The Verge of Foreign Law – With Derrida' (2010) 1 Romanian J Comp L 73. For her part, Gayatri Spivak refers to 'a patient and provisional and forever deferred arrival into the performative of the other': GC Spivak, *Death of a Discipline* (Columbia University Press 2003) 13. cf Letter from S Beckett to MM Howe in *The Letters of Samuel Beckett*, vol 1 (MD Fehsenfeld and LM Overbeck eds, Cambridge University Press 2009 [13 December 1936]) 397: 'It has turned out indeed to be a journey from, and not to, as I knew it was, before I began it.'

mobilizing the stock of available words in the language in which the account is now finding itself couched, these words being, structurally, quite simply unable to capture the infinite complexity of foreign law typically unfolding in a foreign language. Even if he were to coin new words so as to ameliorate his interpretive yield, the comparatist would still have to use extant prefixes or suffixes – which means that he would continue to be faced with the structural problem I address. This difficulty from the standpoint of representation is nothing less than primordial: both the comparative mind and the comparatist's words are fated to fall short of otherness and therefore to short change otherness (and to change it by falling short of it). Being inherent to the way in which mind and words operate, these limitations cannot be remedied, which means that *there must be failure*.[96] In effect, through the use of 'his' mind and of 'his' language, the comparatist-at-law denies himself the very possibility of access to the foreign. But what else can he do? On account of thrownness, he must operate with 'his' mind and language, and there is no denying such fact.[97]

Envisage further the fraught correlation between word and world. To be sure, the consideration of this dynamic boasts influential antecedents, not least Beckett's *Watt*. In his singular novel, Beckett unfolds an epistemological claim to the effect that despite the porousness of any borders between self and world, the self's language is ultimately unable to make referential contact with world – thus, the word 'pot', Watt's utterance, cannot *name* Mr Knott's 'pot'.[98] Otherwise said, the signifier's significatory

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[96] cf Beckett (n 76) 133: '[T]hat's all words, they're all I have, and not many of them, the words fail, the voice fails.'

[97] cf J Derrida, *Hospitalité*, vol 1 (P-A Brault and P Kamuf eds, Editions du Seuil 2021 [1996]) 213, in which Derrida observes that although 'I am certainly at home in my language', yet 'I remai[n] paradoxically a guest, a host, a foreigner welcomed in his home' – which means, concretely, that I cannot do whatever I want with 'my' language.

[98] See S Beckett, *Watt* (CJ Ackerley ed, Faber & Faber 2009 [1953]) 67.

capacity is intrinsically limited, so much so that, in effect, a word cannot account for a world (even as a world is seen to be constitutive of a self rather than extending outside of it as Cartesianism has been unpersuasively contending): signifier and signified ultimately fail to coalesce. It follows that instead of the comfortable conjunction positivism unexaminedly expects and assumes, one must accept an exigent disjunction – a conclusion that must obtain notwithstanding any manifestation of intentionality to the contrary. Since, to quote Maurice Blanchot, 'a word is not the expression of a thing, but the absence of this thing',[99] in effect, 'the division, the dis-junction, *is the relation*'.[100] Otherwise said, there is 'a relation of relationlessness',[101] an *irrelation* – say, between the comparatist and the foreign law. And such irrelation is structural. Vis-à-vis (the foreign law's) 'world', the empirical fact of the matter is that (the comparatist's) 'word' is missing something (a letter, at least).

Limitations on the power of reference as it expresses itself through language – '[i]t is the world of words that creates the world of things'[102] – must also inevitably mark the comparative investigation and, to paraphrase Blanchot (supra), the comparatist's words are not the expression of foreign law, but stand for the absence of

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[99] M Blanchot, *La Part du feu* (Gallimard 1949) 68.

[100] J Derrida, *Mémoires* (Galilée 1988) 110. cf F Ponge, 'La pratique de la littérature' in *Méthodes* in *Œuvres complètes*, vol 1 (B Beugnot ed, Gallimard 1999 [1961]) 678: 'I think that these two worlds [the world of words and the external world] are watertight, that is to say, without passage from one to the other. One cannot pass.' In French literature, the idea that language silences the object readily evokes Mallarmé's thought on the flower: 'I say: a flower! and … there arises … the one absent from all bouquets': [S] Mallarmé, 'Avant-dire au "Traité du verbe" de René Ghil' in *Préfaces* in *Œuvres complètes*, vol 2 (B Marchal ed, Gallimard 2003 [1945]) 678.

[101] R Jaeggi, *Entfremdung* (Suhrkamp 2016) 20 [emphasis omitted]. Rahel Jaeggi devotes an entire chapter to this problematique. See ibid 20–70.

[102] J Lacan, *Ecrits* (Editions du Seuil 1966 [1953]) 276.

foreign law. Given that language operates as a site of ontological disclosure – because of the basic 'linguisticality' of thought[103] – and since no experience is amenable to the circumvention of language, the comparatist must contend with his structural inability to establish a stable referential relationship between his words and the worldly foreign law that his words wish to inscribe. It follows that the process of textualization, that is, the strategy whereby the comparatist effectively attempts, often in a hesitant, stuttering way, to convert foreign life-in-the-law into words, into the words that are available to him within 'his' language, can best be approached as a necessarily compromised effort. Even as the comparatist strives, often exhaustingly so, to foreignize his text in order loyally to account for the foreignness of foreign law, he is effectively, and not at all insignificantly, fashioning a text that very much textualizes his 'own' self-in-the-law.

Note that the comparatist's presence within the language of the comparison goes beyond the fact that he operates in 'his' language and concerns the further fact that within 'his' language, he proceeds to select 'his' preferred words. Indeed, the words that the comparatist harnesses to tell the foreign are very much his words of choice. Because these words are the comparatist's selection out of the words available to him within 'his' language, words within which the comparatist dwells, words that haunt him, they are words that he will now haunt as he marshals them towards the expression of his comparative narrative. And this haunting *squared* is one further reason why, irrespective of any assertion of intentionality to the contrary and no matter how insightful the comparative study at hand, the comparatist's presentation of foreign law

[103] cf D Davidson, 'On the Very Idea of a Conceptual Scheme' in *Inquiries into Truth and Interpretation* (2nd edn, Oxford University Press 2001 [1973]) 185: '[S]peaking a language is not a trait a man can lose while retaining the power of thought.'

cannot be a faithful representation of it. In Wittgenstein's parlance, a statement can be taken to represent foreign law except that it lacks what it must have in common with foreign law in order to be able to *represent* it.[104] At best, then, the comparatist's report will consist just of a re-presentation and, one very much hopes, of a just re-presentation. Therefore, the comparatist's words, because they are of 'his' language, but also since they attest to his discursive partialities, will necessarily fail the foreignness of the law that the comparing mind decides to inscribe. *C'est ainsi*. Yet, electing not to heed this epistemic fact, orthodox comparatists (like Glenn) consistently behave as if access to foreign law was possible and as if foreign law was available as such then to generate supposedly ad idem reporting. For my part, as I was researching the French statute and writing on the edge of it, I remained aware at all times that Frenchness (had to) lay beyond my understanding.

The abiding ethical exigence for me as I researched the French statute and purported to write about it was to make the other-in-the-law present, even as I knew that I could not make the other-in-the-law present. Observe that the interpretive logic at work is not that of either presence or absence, but of *both presence and absence*: the foreign law that is the focus of the comparative study is indeed at once present and absent. The foreign is 'out there', in France, but it is not 'in here', in the comparatist's text. The aporia – etymologically, the absence of passage (*a/poros*) – cannot be avoided, and any movement aiming for a coincidence between self-in-the-law and other-in-the-law would be futile: the distance is irreducible, and whatever *irrelation* the comparatist fashions with foreign law, he must articulate from the space of this interruption. In this

[104] I draw on Wittgenstein's *Tractatus*: L Wittgenstein, *Tractatus Logico-Philosophicus* (German-English edn, CK Ogden ed and tr, Routledge 1981 [1922]) s 4.12, 79. I refer specifically to the first paragraph.

crucial sense, in the way in which it features such inherent representational limit, this structural inability to overcome the fissure between the self's language and the other's law, the comparatist's intervention upon foreign law stands as a primordial *negative*: it cannot make full contact; rather, it undoes the foreign that it is meant to uphold as it compels it to manifest itself through comparative speech. But just as in photography positive prints appear out of a negative, rewarding insights into the foreign may be generated out of the negative comparative account. Indeed, there is at work a power-effect (think of a performative scenography): the word produces a world, and propositions (about foreign law) enact a 'reality' (said to be 'foreign law'): a form of 'out-thereness is accomplished or achieved',[105] a form, then.

I find it important to insist that a key consequence of the intervention of a singular interpretation of a singular law-work – this singular assemblage of interacting singularities – concerns the structural impossibility of any possible interpretive guarantee. The comparatist-at-law has no choice: he must compare along with this in-built insecurity rather than chase the vain hope of ascertaining something like the stable meaning of a text that would exist more or less immovably within it and that he could then reproduce just as solidly in his own interpretive work.[106] It is not, therefore, that the comparatist cannot connect at all with the legal singularity that there is, there, but that his irrelation pertains to a correspondence that must find itself interrupted.[107]

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[105] J Law, *After Method* (Routledge 2004) 38.

[106] Eg: J Derrida, *Béliers* (Gallimard 2003) 45: 'The certainty of a reading assured would be the first inanity.'

[107] The move to irrelation may appear radical, but there is no choice. Indeed, 'I do not see any possibility of relationship, friendly or unfriendly, with the unintelligible': Letter from S Beckett to T McGreevy in *The Letters of Samuel Beckett*, vol 1 (MD Fehsenfeld and LM Overbeck eds, Cambridge University Press 2009 [16 September 1934]) 227.

What takes place thus shows how the comparatist's interaction with the foreign is not structured through affirmative statements that would mirror or represent it, but by way of assertions that are necessarily at variance from the existential actuality of the foreign. What unfolds is effectively a non-accordance, an irrelation – hence a forceful negative. Note, crucially, that it is this very irrelation that saves the other from appropriation or assimilation and ultimately allows him to remain as other: '[T]he [o]ther is only other precisely because I am effectively without relation with it.'[108] And since the comparison of laws assumes more than one law, the irrelation I address is, in effect, ensuring the structural safeguarding of comparative law – arguably not an unworthy cause!

I require to enter a few additional reflections. The recognition of a foreign law's singularity – the comparatist's response to what is the case – has nothing to do with a kind of ghettoization of legal knowledges gesturing towards the essentializing assumption that a foreign legal culture is to be deemed co-extensive with one territory only and that such foreign legal culture can therefore stand for that one territory and its people only (and correlatively that no other territory and its people could have anything whatsoever to do with that legal culture). And the idea of legal singularity does not suggest an alignment of the politics of location with the identitarian enclaves that one readily associates with identity politics. Also, I accept that a thoroughly singular law would be, strictly speaking, unreadable. Even as I am addressing a ciphered singularity, I am therefore never concerned with a pure singularity (I happily leave *Reinheit* to Kelsen).[109] What happens, complicatedly, is that 'the singularity irreplaceable and

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[108] F Jullien, *Si près, tout autre* (Grasset 2018) 161.

[109] D Attridge, *The Singularity of Literature* (Routledge 2004) 63: 'Singularity is not *pure*; it is constitutively impure.'

untranslatable of the unique is iterable'.[110] It can be restated, but with a difference; and each restatement, being a given comparatist's iteration, is singular.

It is Tocqueville who wrote that 'without comparisons to make, the mind does not know how to proceed'[111] – a statement I am tempted to paraphrase as follows: without a critique to make, my mind does not know how to proceed.[112] I have thus engaged in a critique of the French model with a view to promoting the politics of pluralism and defending the decolonization of thought – the delinking of comparatism from imperialism or colonialism – as, I am intimately convinced, befits an other-wise vigilant comparatist.[113] Such critique cannot be about sententiously teaching the other-in-the-law the error of his ways, and it cannot be about instituting oneself as referent either. Moreover, it is not destined to encourage the French model to converge with others and in time dissolve itself into some sort of uniform configuration in line with Konrad Zweigert and Hein Kötz's argument to the effect that comparative law's future lies in a giant leap backwards returning us to where we were more than 300 years ago,

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[110] cf J Derrida (with D Attridge), '"Cette étrange institution qu'on appelle la littérature"' in T Dutoit and P Romanski (eds), *Derrida d'ici, Derrida de là* (Galilée 2009 [1989]) 262. The words are Derrida's.

[111] Letter from A de Tocqueville to E de Chabrol in *Correspondance à divers* in *Œuvres complètes*, vol 17 (F Mélonio and A Vibert eds, Gallimard 2021 [7 October 1831l 1. cf TS Kuhn, 'The Trouble with the Historical Philosophy of Science' in J Conant and J Haugeland (eds), *The Road Since Structure* (University of Chicago Press 2000 [1992]) 115: '[I]n [the] absence [of the Archimedean platform], comparative evaluation is all there is.'

[112] cf Letter from S Beckett to G Duthuit in *The Letters of Samuel Beckett*, vol 2 (G Craig et al eds, Cambridge University Press 2009 [11 August 1948]) 95: 'Nothing for me will ever be sufficiently against.'

[113] For guidance, see WD Mignolo, *The Politics of Decolonial Investigations* (Duke University Press 2021) 458.

to a period that they identify as the 'era of natural law' ('*Zeit des Naturrechts*').[114] Instead, my critique purports to exercise what I regard as my entitlement qua comparatist-at-law to question certain assumptions – ideological, epistemological, and so forth – while realizing and accepting how the postulates I am addressing are (singularly) encultured, and how I myself am operating from the standpoint of a (singularly) encultured self.

My comparative analysis of the 2004 French statute is, structurally, inadequate. There was more to say, and I could have written more. Perhaps I could have attempted to specify the distinctive meanings of '*collèges*' and '*lycées*'. And I might have been able to elucidate further the semantic extension of '*les écoles, les collèges et les lycées publics*' by making reference to the German '*öffentliche Grundschulen, Mittelschulen und Gymnasien*' (although, while seemingly transparent and agreeable, this German translation raises insuperable problems and ultimately unfolds *monologically*). I must accept that, structurally, *der Vergleich hinkt*.

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I have articulated a constitutive engagement with foreign law rather than any dualist detachment from it. I have intervened performatively: I have found the other law and fashioned it into 'my' words (the very English words I have chosen to tell French-law-in-French, *these words* and not others), I have invented it – I have actively made sense of it. My wordy arrangement, while it does not seek to dispense with statutes and judicial decisions, boldly twists itself out of positivism. To be sure, it remains fragmentary rather than totalizing, but it has no choice. And it is a self-portrayal rather than a

[114] K Zweigert and H Kötz, *Einführung in die Rechtsvergleichung* (3rd edn, Mohr Siebeck 1996) 44.

withdrawal, and there is no option in this regard either, for I am thoroughly in the comparison and in the comparative text, indiscerptible from both configurations. While it is not a matter of simplistically identifying a given statement as straightforward self-portrayal, the fact of the matter is that no assertion can convincingly be said to have safely escaped all autobiographical input. Incidentally, I would also be advancing this claim if I had written on the French civil code's provisions on termination of contract or if I had expounded on the rights of minority shareholders under French law. In these instances, too, I would be thoroughly and indiscerptibly in the comparison and in the comparative text. *Where else could I be?*

Instead of entrapping ideas like method, objectivity, and truth, this clanking caravanserai erringly and eerily suggesting the existence, the accessibility, and the reproducibility of the 'is-ness' of foreign law (as in the phrase 'what the law is'), I claim that comparatists-at-law indisciplinedly require to acknowledge law as culture, culture as trace, and trace as law. As a matter of justice, I have therefore tried to offer a just interpretation of foreign law. Along the way, I have confirmed yet again that as he approaches foreignness, the comparatist cannot separate himself from his enculturation and that the foreign law-text is also inseparable from its enculturation. I have also confirmed that the comparatist-at-law is separated from the foreign law-text so that he never accesses it: he remains at a necessary distance from otherness-in-the-law and is therefore confined to an interpretation of it, his task being to yield the most felicitous response possible (the separation, though, not being so thoroughgoing as to prevent any making-sense whatsoever). I have therefore confirmed a comparative intervention as consisting in the intertwinement of three separations, two that cannot be and one that must be. Pace positivism, which assumes that the comparative mind and the foreign

can agree, I have confirmed that ultimately the motif of separation – a key variation on the theme of negative comparative law – irremeably informs the theory and practice of comparison-at-law.[115]

[115] My theoretical commitments suffuse my work on foreign law even if I do not expressly think about them on the spur of the comparative moment and although I only tend to formulate them at length either ex ante or ex post. To capture this modus operandi, Derrida helpfully articulates the idea of 'distracted theory': J Derrida, *Psyché*, vol 1 (2nd edn, Galilée 1998) 9.