A Note on Incommensurability

Averroës cannot understand Aristotle's "tragedy" — he cannot make sense of the word — because the Greek "tragedy" does not resonate with anything in terms of the cultural equipment that he has at his disposal. Ancient Greek culture and XIIth-century-Arabic/Spanish culture have nothing in common. Each culture is unique or singular. This situation — the absence of a commonality — is properly described as an instance of incommensurability. The two cultures are incommensurable vis-à-vis one another — *i.e.*, they lack a common measure.

I argue that laws are incommensurable, too. For example, French law and Canadian law regarding religious attire in public schools have nothing in common. They each are unique or singular. French law speaks to French history, French politics, French society, French demographics, French fears, and so forth. And Canadian law speaks to Canadian history, Canadian politics, Canadian society, Canadian demographics, Canadian fears, and so forth. This is also the case as regards, say, the German law of acceptance and the Brazilian law of acceptance. Indeed, substitute any two laws on any topic: all these laws are unique or singular, and they all speak to different histories, different politics, and so forth. Incidentally, these claims are not simply theoretical: they are empirically verifiable, easily so. Accordingly, the point that Borges makes regarding Ancient Greek culture and XIIth-century-Arabic/Spanish culture is an argument that, in my opinion, applies to all configurations featuring more than one law. In other words, I reject the view that there are equivalences between, say, French contract law and US contract law. I reject the view, therefore, that an analyst can simply glide from one law to the next without further ado — the way Easterbrook CJ and Posner J claim to be able to do in *Bodum* (also Justice Breyer and Vicki Jackson). I am with Mary Ann Glendon: such comparative moves are "casual" and "disquieting".

How to compare, then? Evidently, if a comparison is to take place, there has to be an interface (or a commonality) between the two laws being compared. No comparison can be structured otherwise. But it is the comparativist who must design or devise that interface. Faced with the challenge of incommensurability, the comparativist has to operate in order to fashion a conversation between the two laws that interest him/her. There is a fancy expression to refer to this commonality, which is "tertium comparationis". The word "tertium" indicates a third element. There is French law, and there is Canadian law. But for the comparison to take place, there must be a third element, which is the interface. Again, the interface is not simply out there; rather, it must be designed — which means that it is the outcome of the comparativist's input.

For instance, how to design an interface allowing for the comparison of the French statute and the Canadian judicial decision, two law-texts having to do with religious attire in public schools? One possibility — the one I addressed in class — is for the comparativist to focus on "empowerment". Here, the comparativist would effectively show how Canadian law empowers the individual to assert his religious commitment despite the collective's attempt to suppress such public display of allegiance and how meanwhile French law empowers the collective to protect it from offensive displays of religious allegiance in the public sphere. A title for this comparative exercise could be formulated in the following terms:

The French and Canadian Laws on Religious Attire in Public Schools:
Two Approaches to Empowerment.

Again, the comparativist stages "empowerment" as the interface or the commonality to launch the conversation between two laws that have nothing to say to each other (French law is happening in France irrespective of Canadian law, and Canadian law is happening in Canada irrespective of French law).

Another interface or commonality — which I did not mention in class — could be "integration". This comparison would feature the Canadian approach to integration, which allows the observant Sikh to retain his religious identity even as he lives his life as a Canadian citizen, and the French approach, which would compel the Sikh to hide his Sikhness in the classroom and behave outwardly as a "typical", non-religious French citizen. In this case, the title of the comparative essay could read as follows:

The French and Canadian Laws on Religious Attire in Public Schools:
Two Approaches to Integration.

Of course, you can be interested in the two issues, empowerment and integration. If this is the case, you need to pitch your interface at a slightly higher level of abstraction. For instance, you could write the following:

The French and Canadian Laws on Religious Attire in Public Schools:
Two Approaches to the Dynamics Between Collectivism and Individualism.

Let me briefly mention another illustration, which I derive from the *Bodum* case. Let us say a senior partner at your firm has requested a three-page memorandum comparing the parole evidence rule in the United States with Article 1341 of the French Civil Code ("there is to be received no proof by witnesses against or beyond the contents of the documents" — "*il n'est reçu aucune preuve par témoins contre et outre le contenu aux actes*"). Once more, these two laws are singular and vis-à-vis one another, they are properly speaking incommensurable (thus, there is nothing in the French Civil Code provision allowing for an understanding of the US parole evidence rule, of its history, of its politics, of its philosophy, and so forth). My point is that you cannot simply launch into the comparison as if French and US law were speaking the self-same language, as if they were equivalent. That seamlessness is nowhere to be found. What you need to do is explain how you are structuring the conversation that you will stage between two laws that would otherwise not be interacting with one another. What could be, then, an interface or commonality across the two laws? Well, both seek to establish the sovereignty of the contractual text — and such could therefore be your interface:

French and Canadian Approaches to the Sovereignty of the Contactual Text:
A Comparative Study.

In sum, all laws are comparable. But because they are incommensurable (or singular) vis-à-vis one another, the comparativist needs to intervene and articulate the comparison around

a commonality or an interface. Of course, the quality of the comparative study will very much depend on the sophistication of the devised commonality or interface — which is very much a function of the comparativist's style. Consider these two examples involving what a US lawyer would call "mistake" (in Germany, "Irrtum", in France, "erreur"):

What Happens When One Gets One's Contract Wrong:
A Comparison of German and French Laws;

Contractual Delusion:
A Comparison of German and French Laws.

Note — and this is a crucial observation — that the comparativist's input is key. Now, such input assumes, of course, a solid understanding of the problematics at hand, which in turn assumes a sound acquaintance with the laws being considered. This is why Michel Foucault (an influential intellectual you came across earlier) writes that "[t]here is no resemblance without signature" and why he says of the realm of commonality that "[it] can only be a marked world" (*Les Mots et les choses*, p. 41). Foucault's argument is that it does not pertain to any entity (say, to any law) to be like another entity (say, another law). Far from constituting an essential characteristic, likeness is always an analyst's attribute. Hence, Foucault's contention that every commonality bears someone's imprint.

Again, then, such is the comparativist's threshold challenge: in the face of the incommensurability of laws (Borges illustrates the incommensurability of cultures), it is necessary to design a "connector" (a commonality, an interface) in order to allow the comparison to proceed and to unfold. Let me say it one final time: the comparativist's input — I mean his/her personal input — is key. For instance, two different US comparativists researching French and Canadian laws on religious attire in public schools will, in all likelihood, draw different interfaces across the two laws. Incidentally, both interfaces will pertain to interpretation — the comparativists' interpretations — and none will therefore be true. And this is why French philosopher Jacques Derrida writes that "[t]he way in which resemblances constitute or stabilize themselves is relative, provisional, precarious" (*Politique et amitié*, p. 112). If a commonality is the product of an analyst's interpretive input, one can indeed expect any ascription to depend on a specific interpreter, that is, to be liable to ongoing emendation and therefore inherently uncertain. Whether one interface proves more influential than an other in a certain place and at a certain time will very much depend on the readership's reaction, there and then. Ultimately, persuasiveness — rhetorics — will lead to adjudication in favour of one interface rather than the other, but not necessarily forever. Elsewhere or at later times, other comparativists, other interpretations, and other interfaces will manifest themselves — not to mention that a comparativist might well change his/her mind, say, on the basis of further research.