
Comparative Law and the Task of Negative Critique

Pierre Legrand

Designed cover images: © STILLFX/Shutterstock

First published 2023

by Routledge

4 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge

605 Third Avenue, New York, NY 10158

a GlassHouse book

Routledge is an imprint of the Taylor & Francis Group, an informa business

© 2023 Pierre Legrand

The right of Pierre Legrand to be identified as author of this work has been asserted in accordance with sections 77 and 78 of the Copyright, Designs and Patents Act 1988.

All rights reserved. No part of this book may be reprinted or reproduced or utilised in any form or by any electronic, mechanical, or other means, now known or hereafter invented, including photocopying and recording, or in any information storage or retrieval system, without permission in writing from the publishers.

Trademark notice: Product or corporate names may be trademarks or registered trademarks, and are used only for identification and explanation without intent to infringe.

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library

ISBN: 978-0-367-72300-2 (hbk)

ISBN: 978-0-367-75296-5 (pbk)

ISBN: 978-1-003-16189-9 (ebk)

DOI: 10.4324/9781003161899

Typeset in Bembo

by Taylor & Francis Books

I	Safing difference	1
II	Budé, Baudouin, Bodin – <i>et les autres</i>	11
III	Beyond plethoraphobia, against epistemicide	64
IV	Legal relativism, or ‘One of us cannot be wrong’	182
V	More difference – the case of desire	250
VI	Appreciation	286
	<i>Index of matters</i>	288
	<i>Index of names</i>	297

Budé, Baudouin, Bodin – et les autres

A physicist and philosopher, Aurélien Barrau defends a compelling historiographical claim: ‘Our history is that of a phobia. It is, at least, readable as such. An obsessional phobia – almost obsidional – of disorder.’¹ Characteristically, Michel Foucault found himself resisting such fixation. As he propounded his practice of history, what he readily styled his ‘archaeology’, Foucault indeed commended complexity:

Archaeology does [not] arbitrarily invent differences. It strives only to take them seriously: to untangle their skein ...; in short it is about describing these differences If there is a paradox to archaeology, it is not in this that it would multiply differences, but in this that it refuses to reduce them.²

These epistemic concerns – both the aversion for disturbance and the demand to herald difference – animate the argument that I deploy in this essay.

*

History, even one’s ‘own’ history, is not at one’s disposal. If one is to engage in a restatement of the past, it is incumbent upon one vigilantly to draw on the available texts and on what their disclosive fabric may reveal. In the process, one is adamantly to eschew the kind of ostensibly self-serving account that would blemish intellectual integrity – which is not to claim, of course, that one can ever, even with considerable effort, inscribe an objective historical report (history is never ‘there’ as an object, and any pretence that one is in a position to operate transcendently would indicate, at best, a lingering metaphysical inflection). Moreover, I maintain that no understanding of history is confined to ‘the past’ in the sense that it would be strictly concerned with antecedents that would have little to do with the present as it is unfurling itself – and even less with the future as it will be unfolding. ‘The past’ always lives outside itself,

1 A Barrau, *Chaos multiples* (Galilée 2017) 340.

2 M Foucault, *L’Archéologie du savoir* (Gallimard 1969) 222.

it survives, it *lives on*: the past does not pass. As earlier phases have necessarily left traces in the overall accumulation of experience as it exists nowadays, and as it will exist tomorrow, there is, then, no present and no future developing outside the past. Consider comparative law: it is not so much that comparative law has history, but that it *is* history. If you will, the factual life of comparative law as it exists, and as it will exist, is thoroughly historical. In a crucial sense, knowledge of comparative law thus becomes knowledge of comparative law's history – a *historiognosis*. Observe that to defend the proper acknowledgement of the present's and the future's inescapable historical dimension is not to fall for historicism, that is, for some sort of fundamental surrender to historical servitude. It is, instead, to acknowledge, beyond its apparent invisibility or absence, the spectral presence of the past.

*

In their leading text, the book that has exercised 'aggressive' epistemic governance over comparative law since the 1970s,³ Konrad Zweigert and Hein Kötz offer a broad outline of what they regard as the origins and development of comparative law.⁴ In the process, they ascribe an inaugural role to the *Congrès international de droit comparé* that took place in Paris during the summer of 1900 – what Günter Frankenberg ironically styles comparative law's 'mythical moment'.⁵ And Zweigert and Kötz hold that Edouard Lambert and Raymond Saleilles, the conference organizers, must be considered as founding fathers of a new field of research, *droit comparé* (or comparative law).⁶ Within the brief compass of their exposition, Zweigert and Kötz refer to Lambert five times and to Saleilles thrice. They do not mention any other name. For Zweigert and Kötz, Lambert's and Saleilles's views can be summarized as follows: 'Comparative law must obliterate accidental differences in the laws, which separate from one another peoples at the same levels of civilization and economic organization.'⁷ In other words, differences across laws are deemed fortuitous and superfluous. Moreover, they would be factious. Lambert's and Saleilles's stance displays what Zweigert and Kötz call a sense of 'giddiness' and reveals, they claim, 'faith in progress', an idea that they expressly link to 'world unity'.⁸ Thus drawing on

3 D Kennedy, 'New Approaches to Comparative Law: Comparativism and International Governance' (1997) Utah LR 545, 627 n 19.

4 See K Zweigert and H Kötz, *Einführung in die Rechtsvergleichung* (3rd edn, Mohr Siebeck 1996) 1–4 and 47–61.

5 *ibid* 1–4 and 57–60. I quote from G Frankenberg, *Comparative Law as Critique* (Elgar 2016) 5.

6 At this writing, there is no doubt that 'comparative law has firmly established itself as a genuine field of study': *ibid*. Consider the disciplinary accoutrements that mark any academic field such as journals, chairs, specialized courses, postgraduate programmes, research institutes, professional associations, and the caravanserai of workshops, seminars, colloquia, symposia, and conferences.

7 Zweigert and Kötz (n 4) 2.

8 *ibid*. The argument connecting faith, progress, and 'world unity' is at *ibid* 58.

Lambert and Saleilles, Zweigert and Kötz hold that properly understood, '[comparative law] means seeing the grand commonality above all the singular divergencies and so a deepening of the belief in the existence of a unitary idea of justice'.⁹

I argue that Zweigert and Kötz's insistence on Lambert and Saleilles and the recitation they adduce of these French comparatists' argument partakes of a grand strategy of imputation of equivalence or commonality across laws (in effect, the machination and imposition of sham-equivalence or sham-commonality) – along with the configuration of a tool-box featuring instruments like 'functionalism' or the '*præsumptio similitudinis*'¹⁰ – that ostensibly purports to keep otherness-in-the-law in epistemic check. The way in which Zweigert and Kötz relegate difference to the domain of marginalia (they expressly call differences 'not relevant',¹¹ and they ascertain a finding of difference within comparative research as tantamount to shoddy work),¹² not to mention the manner in which they assert a causal connection between commonality and justice (supra), reveals a persistent devaluation of otherness, a disparagement of heterogeneity. In advance of any empirical examination or demonstration, Zweigert and Kötz choose to posit commensurability across laws and to mobilize uniformization as the primordial analytical interest that ought to detain comparatists-at-law.

As they invite comparative law to apprehend the other-in-the-law through the ideological framework they have devised, as they assert that foreign law ought to be delivered to comparatists through 'functionalism', the '*præsumptio similitudinis*', and assorted filtering mechanisms, so that, ultimately, at the point of arrival, not too much otherness should be seen to have survived the framing or calibration of the translative journey,¹³ as they effectively undertake to bracket all the singularity that might complicate the formulation of the equivalence or commonality they have determined to concoct and obtrude (I refer, again, to sham-equivalence or sham-commonality), as they articulate enforced replaceability or interchangeability across laws, Zweigert and Kötz would have their readership trust in the 'neutral' or apolitical character of their scholarly commitments,¹⁴ hence their incessant promotion of their brand of comparatism as 'scientific' (their assumption seemingly to the effect that science is somehow immune from value-choices).¹⁵ Meanwhile, after all the decisory motions in favour of oneness, there remains everything that Zweigert and Kötz have elected not to tell their readers – the *non-dit* of an argument carrying

9 *ibid* 3.

10 See *ibid* 31–35 and 39.

11 *ibid* 60.

12 See *ibid* 39.

13 See generally D Palumbo-Liu, *The Deliverance of Others* (Duke University Press 2012) 1–26.

14 Zweigert and Kötz (n 4) 11.

15 Zweigert and Kötz's references to science abound. See *eg ibid* 6, 14, 32, and 44–45.

significance, too, and silence being more usefully apprehended as ‘a positive expression of meaning’ than ‘an indiscriminate absence of language’.¹⁶

In the narrative they offer of the 1900 conference, for example, Zweigert and Kötz choose to cancel readily available and consequential information. Specifically, they undertake not to report on the fact that while Lambert and Saleilles may have extolled uniformization and rebuked difference (to such an extent that, for Lambert, civilians could not justify spending any meaningful time on studying the common law tradition),¹⁷ other eminent participants to the Paris gathering favoured the prioritization of difference over any agenda of assignment of equivalences or commonalities (I have in mind, once more, the contrivance and deployment of sham-equivalences or sham-commonalities). One of the most famous intellectual figures of late-nineteenth-century France, sociologist, psychologist, and philosopher Gabriel Tarde, holder of a chair at the prestigious *Collège de France* and author of such influential texts as *La Criminologie comparée*, *Les Lois de l'imitation*, and *Les Transformations du droit*,¹⁸ all addressing theoretical issues of direct relevance to comparatists-at-law, thus expressly advised against the danger of ‘misjudging the importance of many differences’ that one encountered as one moved from one law to another.¹⁹ Indeed, Tarde specifically warned comparatists not to ‘exaggerate’ the salience of equivalences or commonalities across laws, observing that even purportedly equivalent or common customs would not necessarily point to equivalent or common social conditions and noting that even when a country adopted the constitution of its neighbour it would impress a singular character to the text and subject it to an adaptation fit for its own usage.²⁰ For his part, a noted Sorbonne legal historian and professor of constitutional law, Adhémar Esmein, drew on his extensive experience in comparative research to remind his audience of the primordial differend between English and French law.²¹ In particular, Esmein castigated his fellow French jurists for spontaneously

16 B de Sousa Santos, *Toward a New Legal Common Sense* (3rd edn, Cambridge University Press 2020) 133.

17 See [E] Lambert, [‘Rapport’] in Congrès international de droit comparé, *Procès-verbaux des séances et documents*, vol 1 (LGDJ 1905) 49. For passages from the published proceedings of the conference capturing the thought of Saleilles, see [R.] Saleilles, ‘Sur l’utilité, le but et le programme du congrès’ 11; [R.] Saleilles, [‘Rapport général’] 143; [R.] Saleilles, ‘Conception et objet de la science du droit comparé’ 175 and 188–89. For an overview, see M Ancel, ‘La tendance universaliste dans la doctrine comparative française au début du XXe siècle’ in H Dölle, M Rheinstein, and K Zweigert (eds), *Festschrift für Ernst Rabel*, vol 1 (Mohr Siebeck 1954) 17–38. See also B Fekete, *Paradigms in Modern European Comparative Law* (Hart 2021) 67–70.

18 G Tarde, *La Criminologie comparée* (Alcan 1886); G Tarde, *Les Lois de l'imitation* (Alcan 1890); G Tarde, *Les Transformations du droit* (Alcan 1893).

19 [G] Tarde, ‘Le droit comparé et la sociologie’ in Congrès international de droit comparé, *Procès-verbaux des séances et documents*, vol 1 (LGDJ 1905) 439.

20 *ibid.*

21 For a detailed investigation of Esmein’s academic status and scholarship, see J-L Halpérin, ‘Adhémar Esmein et les ambitions de l’histoire du droit’ (1997) 75 *Revue historique de droit français et étranger* 415.

translating into the language and the forms of French law the data arising from the English legal model. In his words, comparative law, when practised in this way, would ‘distort the institutions instead of making appear their genuine character’.²²

Charitable interpretation *oblige*, I am not prepared to assume that Zweigert and Kötz or their assuredly excellent research assistants at Hamburg’s affluent *Max-Planck-Institut für ausländisches und internationales Privatrecht* – which, between them, they directed for nearly forty years as of the early 1960s – would not have been aware of the contributions of such distinguished figures as Tarde and Esmein. I would be insulting two eminent comparatists-at-law’s scholarly competence. After all, Zweigert and Kötz refer to the proceedings of the 1900 conference on the very first page of their book,²³ and Tarde and Esmein duly (and prominently) feature in these proceedings. I want to suggest, therefore, that the elimination Zweigert and Kötz are implementing, their erasure, must be studied through the lens of their abiding commitment to epistemic normalization within the field of comparative law – an undertaking they have been devotedly praising from the vantage point of influential positions at the helm of a leading research centre whose mission statement specifically includes the promotion, in the same institutional breath, so to speak, of ‘comparative law and unification of law’ (*der Rechtsvergleichung und der Rechtsvereinheitlichung*).²⁴ The effacement of Tarde’s and Esmein’s texts therefore intervenes as the implementation of a disciplinary mechanics aiming to draw an epistemic security apparatus around the field of comparative law with a view to *sprucifying* it – or so I want to argue.

Zweigert and Kötz’s decision to impose disciplinary compliance on the materials available to them is informed by what they deem an imperative of epistemic agreement with what they have, *ex ante*, ascertained as the only acceptable intellectual quest within the field of comparative law – the search for legal uniformization across laws. Because they offend against the construction of the discipline on these epistemic terms, Tarde and Esmein – it is no exaggeration to say – are effectively branded as deviant and suffer the fate that deviance typically attracts, that is, rejection. Observe that I am not claiming – how could I? – that the opprobrium visited upon Tarde and Esmein is the outcome of a fully conscious and deliberate programme targeting what Zweigert and Kötz would have carefully ascertained as a threat to the integrity of their epistemic comfort zone. The process whereby a tactical performance finds itself realized has a way of being more complicated than one may suppose. It remains, though, that claims like Tarde’s and

22 [A] Esmein, ‘Le droit comparé et l’enseignement du droit’ in *Congrès international de droit comparé, Procès-verbaux des séances et documents*, vol 1 (LGDJ 1905) 452.

23 See Zweigert and Kötz (n 4) 1.

24 Max-Planck-Institut für ausländisches und internationales Privatrecht <www.mpg.de/150195/privatrecht> [on file]. To illustrate their strong predilection in favour of standardization, recall, for instance, how Zweigert and Kötz maintain that there can be one comparative method only – theirs! – for ‘all comparative law’ and that this method must be kept ‘pure’: *ibid* 33.

Esmein's should be heard and, if one is so minded, countered. But they ought not to be confiscated or suppressed. It can only be very problematic indeed that Zweigert and Kötz's text has become an authoritative vessel of historical information within the field of comparative law even as it has sought to dissimulate its own historical choices, that is, its own historicity – to repudiate what it regards as impertinent history.

Now, Zweigert and Kötz's act of selective memorialization, their gesture of doctrinal clearance, goes much further than discriminating reporting on the contributions to the Paris conference, for these authors opt to obfuscate anything of significance that might have happened as regards comparative law before 1900 – as concerns, if you will, comparative law *avant la lettre*. Their exclusive preoccupation with the assignment of equivalences or commonalities across laws – what I style the fabrication and application of sham-equivalences or sham-commonalities – thus wishes conveniently to forget that '[e]verything begins before it begins'.²⁵ Meanwhile, fascinating manifestations of early-modern comparatism can be ascertained to have appeared throughout the sixteenth century, all being fully dedicated to the significance of the differend for comparative purposes, whether beyond the law or across laws. I emphasize, most interestingly from an epistemic perspective, that these innovative researches were consistently animated by a concern for difference. In particular, the numerous sixteenth-century scholars I have in mind never assumed that 'differences have no interest for thought', to borrow an extraordinary statement from philosopher Alain Badiou's, a lofty remark that strikes me as dull and narrow, an observation with which, at least as astonishingly, comparatists-at-law Zweigert and Kötz find themselves readily concurring.²⁶ In the eyes of sixteenth-century intellectuals, the examination of the differend was rather a salutary means of fostering a richer or more sophisticated appreciation of their world. Against those who, like Badiou, are keen to dismiss the valorization of difference as some postmodern affectation,²⁷ it emerges that differential analysis long ago enjoyed epistemic strength and was then very far from being regarded as the malediction that Zweigert and Kötz envisage. It is as if Renaissance scholars, as they pursued a rationalization of knowledge informed by a differentialist mindset, had already apprehended the distinction that would be drawn much later by a late-twentieth-century anthropologist between 'difference' and 'dichotomy': '[A difference] is a comparison ...; [a dichotomy] is a severance and it isolates.'²⁸

25 J Derrida, *Spectres de Marx* (Galilée 1993) 255–56.

26 A Badiou, *L'Éthique* (Nous 2003) 44. For Zweigert and Kötz's agreement, see *supra* 2.

27 See Badiou (n 26) 36–37.

28 C Geertz, *After the Fact* (Harvard University Press 1995) 28. In this excerpt, I omit Clifford Geertz's connection between 'comparison' and 'relation', which I find simplistic. According to my appreciation of the epistemic impasse arising between self and other, it is more apt to speak of an 'irrelation': P Legrand, 'Negative Comparative Law and Its Theses' (2021) 16 J Comp L 647, 656, and 672. And when the mood strikes, I use 'disrelation': P Legrand, 'The Guile and the Guise: Apropos of Comparative Law as We Know It' (2021) 16 Asian J Comp L 155, 173.

Zweigert and Kötz's repressive and exclusionary tactics are not unfamiliar to scholars who have wanted to investigate the attitude of orthodox academics determined to preserve their hegemony within a given field. In what continues to stand as one of his most influential texts, Michel Foucault thus holds that everywhere – and therefore also within the field of comparative law – 'the production of discourse is at once controlled, selected, organized, and re-distributed through a certain number of procedures', which are tasked with 'conjuring the powers and dangers' that might visit it, 'mastering the aleatory event' of such threats, and 'evading the heavy, redoubtable materiality' of these hazards.²⁹ Foucault percipitently adds that 'each discipline ... rebuffs, to the other side of its margins, a whole teratology of knowledge'.³⁰ Indeed, a discipline actively fosters an (often insidious) scheme of dominance/banishment over discursive formations that it repute abnormal, drawing on institutional support (ranging from professional affiliation to the publisher's imprint) for reinforcement and transmission of its decisory model. On the theme of Tarde and Esmein being the orthodoxy's negative image, Louis Althusser enters an important precision:

The invisible of a visible field is not ... the *whatever* exterior and foreign to the visible defined by this field. The invisible is defined by the visible as *its* invisible, *its* prohibition to see: the invisible is therefore not simply ... the outside of the visible, the exterior darkness of exclusion – but rather the *interior darkness of exclusion*, interior to the visible itself, since defined by the structure of the visible.³¹

In other words, the dynamic between comparative law's visible orthodoxy and the invisibility to which it confines Tarde and Esmein very much pertains to a proscription between *that* orthodoxy and *this* heterodoxy. If you will, Tarde's and Esmein's relegation is of a piece with the fashioning of the worthy (and pure) comparative ways that Zweigert and Kötz opine ought to inform the comparatist-at-law's epistemic predilections.³² It is in this sense that historian and theorist of history Donald Bloxham addresses 'the structuring role of absences', what he styles 'constitutive silences'.³³

Again, without ever assuming that I would be in a position to grasp events *wie sie eigentlich gewesen sind*, and not doubting for a moment that my thoughts and experiences are contingent products of my socialization or institutionalization or epistemologization – of my enculturation – I propose to recuperate traces of the

29 M Foucault, *L'Ordre du discours* (Gallimard 1971) 10–11.

30 *ibid* 35.

31 L Althusser, 'Du "Capital" à la philosophie de Marx' in L Althusser et al, *Lire Le Capital* (Presses Universitaires de France 2017 [1965]) 20–21.

32 The motif of 'purity' is a recurring theme throughout Zweigert and Kötz's exposition of their theoretical model. See eg Zweigert and Kötz (n 4) 6, 33, and 34.

33 D Bloxham, *History and Morality* (Oxford University Press 2020) 107 and 108.

story that Zweigert and Kötz have sought to annul through their reductionist, instrumental, and obtuse philology. I advocate an exercise in archaeology or genealogy with a view to countering the blinkered ‘history’ on offer in comparative law’s most established textbook, which I am seeking to disestablish. To acknowledge epistemically significant thematizations of difference as the apposite historical register whence to engage in the theorization and practice of comparison in general and of comparative law in particular ought to help undermine the prevailing conviction that the ascertainment of equivalences or commonalities across laws is (and requires to be) the inevitable ambition set by the comparative enterprise. In this sense, my contribution to the archaeology or genealogy of comparative law fulfils a critical role inasmuch as it purports to deflate the power of a dominant and enveloping discourse that has operated a normalization of sham-equivalence or sham-commonality and that has thereby ensured the operation of politically-conditioned, ideological criteria of epistemic acceptability disqualifying difference as a valid focus of investigation for the comparatist-at-law.

My text accordingly seeks to dissolve the comforting illusion that might be generated by assertions intimating how the role of comparative law would simply be to focus, broadly speaking, on processes consisting in ‘making-entities-look-equivalent’ or ‘making-entities-look-common’, that is, on the assignment of equivalences or commonalities that are, if I may be allowed to reiterate the point, but machinated and imposed sham-equivalences or sham-commonalities.³⁴ As it encourages comparatists, through their epistemic power of negation – by way of their critical ability to say no to the orthodox story – to recover some key historical manifestations of comparison-as-difference providing ready evidence of a historically legitimate alternative enunciatory site away from the prevailing and censoring discursive regimen,³⁵ my essay also wishes to stimulate re-imagination within comparative law. Through the intelligibility of the contrapuntal comparative theorization and practice that I propose, I aim to show that the present consensus, which Zweigert and Kötz’s views have long fostered,³⁶ is not nearly as foreordained as has become customarily accepted.

34 For an injunction to comparatists-at-law ‘to show that foreign law is not very different from ours but only appears to be so’, see BS Markesinis, ‘The Destructive and Constructive Role of the Comparative Lawyer’ (1993) *Rabels Zeitschrift* 438, 443.

35 Eg: J Bell, ‘English Law and French Law – Not so Different?’ (1995) *Current Legal Problems* (Part II) 63, 101, where the author, making reference to ‘much of western Europe’, mentions, on one single page, ‘common norms’, ‘common legislative and judicial institutions’, ‘a common endeavour’, ‘common features of the evolution of our societies’, ‘[c]ommon social problems’, ‘common political problems’, ‘[c]ommon values’, ‘common problems’, ‘similar solutions’, ‘common work’, ‘fundamentally common ways of thinking as lawyers’, ‘common materials’, and ‘a common system’.

36 I simply cannot understand why Rudolf Schlesinger would observe, admittedly without supporting evidence, that ‘[t]raditionally, comparative legal writings have tended to dwell more heavily on differences than on similarities’: RB Schlesinger ‘Introduction’ in RB Schlesinger (ed), *Formation of Contracts: A Study of the Common Core of Legal Systems*, vol 1 (Oceana 1968) 3 n 1. Precisely the opposite is

I maintain that the prioritization of congruence across laws – whether in allegedly descriptive terms or according to an openly prescriptive programme – is not at all as inevitable as the orthodoxy within comparative law would have comparatists believe on historical grounds. There were always materials ready at hand that pointed to the edification of a different argument or at least to the qualification of the orthodox contention. In other words, the archaeological or genealogical inquiry that I conduct seeks to remind comparatists-at-law who are so devoted to what ostensibly exists that what is said to exist has been made to occupy the epistemic terrain with a view to the consolidation of an ascertainable political agenda. Meanwhile, these comparatists are in serious danger of forgetting that a different discourse was always available, of overlooking the fact that there is another thesis that may not presently be said to exist, but that has discernibly existed and been dogmatically prevented from continuing to exist (at least within the field of comparative law).³⁷ The fixation on equivalence or commonality amongst orthodox comparatists-at-law must therefore be seen to be pertaining to anything but objectivity or truth. Rather, it demands to be understood as reflecting a deliberate ideological investment by leading comparatists-at-law and their adherents who, even as they actively involve themselves in the machination and imposition of equivalence or commonality (in effect, sham-equivalence or sham-commonality), elect to ignore substantial historical evidence standing in the way of their claim, an argument that they are keen to show as basically lying beyond contestation. What other mindset could animate the formulation of a *'præsumptio similitudinis'*, for example?³⁸

In pursuit of my expository goal, I deliberately confine my excavatory research to sixteenth-century France. I do not select this period or locus arbitrarily, for it is then and there that an important development in the history of (occidental) law took place as a group of prominent French jurists undertook to re-present Roman law as alien. This intellectual enterprise, which arguably proved to be '[t]he cradle of our knowledge' of comparative law (much more so, at any rate, than any declaration Lambert or Saleilles may have uttered in Paris in August 1900),³⁹ is substantially informed by the larger political and socio-cultural Renaissance movement whereby France sought to affirm its national identity. Recalling Jacques Derrida's insight to the effect that there is 'the non-legal or pre-legal origin of the legal',⁴⁰ I therefore want to trace sixteenth-century French legal discourse to the broader cultural text within which it is (inevitably) embedded. To quote legal historian Robert Gordon:

the case as the work of Lambert, Saleilles, or Zweigert and Kötz makes clear – to confine myself to some of the influential names that I have already mentioned.

37 I paraphrase M Constable, *The Law of the Other* (University of Chicago Press 1994) 151.

38 Zweigert and Kötz (n 4) 39.

39 *ibid* 2.

40 J Derrida, *Politiques de l'amitié* (Galilée 1994) 176.

[I]t [is] very hard to believe that autonomous legal forms are best understood as the product of a culturally isolated tribe of beings. ... It seems much more probable that the specific legal practices of a culture are simply dialects of a parent social speech and that studying the speech helps you understand the dialect and vice-versa.⁴¹

Yes. As I introduce this alternative archetype, I challenge the limiting assumptions that Zweigert and Kötz would no doubt harbour regarding the value of ‘earliness’, which they would envisage, to say the least, as less than an immediately pressing epistemic issue. I very much beg to differ. Early-modern comparative epistemology matters for today’s comparative law, significantly so. It can inform a re-orientation of the orthodox position. Concretely, it can – it *must* – animate the profound epistemic re-orientation that the integrity of the comparative enterprise demands and that negative comparative law propounds as it says ‘no’ to the mainstream historical narrative.

*

For the great Michelet, one of France’s foremost historians, the French Renaissance began on 31 December 1494, at 15h, as the French king, Charles VIII, entered Rome with his army.⁴² The first of a series of military campaigns throughout the sixteenth century that would aim to subjugate Italy, this expedition sought to validate the French king’s alleged entitlement to various Italian territories by right of inheritance. Although the gains would prove short-lived and the French army be forced to retreat to France in the fall of 1495,⁴³ this Italian foray contributed in crucial ways to the development of a French national sentiment by activating the sense of a ‘distinct geographical space’ and fostering the ‘awareness of belonging to a different culture’.⁴⁴ Indeed, the rejection of Italian culture as universal culture commenced in earnest in 1495 with Robert Gaguin’s history of France, an epoch-making retort to Petrarch’s controversial diatribe from more than a hundred years earlier.⁴⁵ In a letter to Pope Urban V written in 1368 soon after the pontiff’s return to Italy from Avignon, the

41 RW Gordon, ‘Critical Legal Histories’ (1984) 36 Stanford LR 57, 90.

42 See J Michelet, ‘Histoire de France au seizième siècle: Renaissance et Réforme’ in *Œuvres complètes de Michelet*, vol 7 (P Viallaneix ed, Flammarion 1978 [1855]) 113.

43 For a well-regarded summary of Charles VIII’s war against Italy, see E Le Roy Ladurie, *L’Etat royal: 1460–1610* (Hachette 1987) 134–47.

44 P Desan, ‘Nationalism and History in France During the Renaissance’ (1984) 24 *Rinascimento* 261, 261–62.

45 Originally published in Latin as *De origine et gestis Francorum compendium*, Gaguin’s text would soon be translated into French: R Gaguin, *Les Grandes croniques: excellens faitz et vertueux gestes: des tresillustres/tres chrestiens/magnanimes et victorieux Roys de France* (P Desrey tr, Galliot du Pré 1514). For a noted discussion of Gaguin’s reply to Petrarch, see M Schmidt-Chazan, ‘Histoire et sentiment national chez Robert Gaguin’ in B Guenée (ed), *Le Métier d’historien au Moyen Age* (Publications de la Sorbonne 1977) 245–48.

Italian writer Francesco Petrarca had famously declared that it was idle to search for orators and poets outside Italy (*'Oratores & Poetae extra Italiam non quaerantur'*).⁴⁶ Both in terms of the information he collected and by way of the very book he undertook to write, Gaguin sought to reprove his illustrious predecessor.

The French orientation towards particularism and the resultant construction of a tradition based on a *mentalité* common to *la nation France* and different from that prevailing in other countries and informing other peoples – what Max Weber styles a *'Nationalgefühl'*, a sense of national selfness⁴⁷ – was soon heightened by reason of the anti-French writings that developed in Italian literature in the wake of the Franco-Italian wars.⁴⁸ (In his Milanese history, Bernardino Corio writes of the 'natural and continuous hostility' between the Italians and the French.⁴⁹) In particular, there would occur in the French national consciousness the drawing of 'a line of separation, of imprecation, of another world'.⁵⁰ For instance, this awakening would object to the fact that French history should be written by Italian historians who, because of their cultural hegemony, had been invited to various transalpine countries.⁵¹ Thus, Paolo Emili, of Verona, had started work at the court of France in 1499 at the behest of Louis XII and had undertaken the publication of his *De rebus gestis Francorum* as of 1517.⁵² In a context where possibly the most famous extant history of France (the *Commentarii de Bello Gallico*) had possibly been written by possibly the most famous Roman, Julius Caesar himself, there would progressively develop a gradual refutation of a purported cultural 'universalism' dominated by the Roman intellectual tradition.

The growing awareness of the necessity of enhanced cultural autonomy and the sense that French history had to be re-written from a French perspective is readily

46 F Petrarcae ..., 'Epistolarum De rebus senilibus' in *Opera quae extant omnia*, vol 1 (5th edn, J Herold ed, [Petri] 1581) bk 9, epist 1, 847.

47 M Weber, *Wirtschaft und Gesellschaft* (5th edn, J Winckelmann ed, Mohr Siebeck 1976 [1922†]) 242.

48 See generally L Sozzi, 'La polémique anti-italienne en France au XVIe siècle' (1972) 106 *Atti della Accademia delle Scienze di Torino: II. Classe de Scienze Morali, Storiche e Filologiche* 99.

49 [B Corio], *Bernardini Corii Mediolanensis Patria Historias* (Minutianum 1503) fol [17b]. A version in later Italian is in B Corio, *Storia di Milano*, vol 1 (E De Magri ed, Libraro 1855) part 1, ch 3, 104.

50 A Dupront, 'Du sentiment national' in M François (ed), *La France et les Français* (Gallimard 1972) 1446.

51 See eg E Pasquier, 'Pourparler du Prince' in *Des recherches de la France* (Trepperel 1567 [1560]) fol 99b; B de Girard [du Haillan], 'Epistre' in *De l'estat et succez des affaires de France* (L'Huillier 1570) fol [4b]; [H de La Popeliniere], 'Epistre' in *La Vraye et entiere histoire de ces derniers troubles: advenus, tant en France, qu'en Flandres, & pays circonvoisins* (Birckman 1571) fol 2b.

52 See D Hay, *Annalists and Historians: Western Historiography from the Eighth to the Eighteenth Centuries* (Methuen 1977) 120. Even as he founded the *Collège de France* in 1530 (then the *Collège des Trois Langues*), François I awarded many chairs to Italian professors. See H Busson, *Les Sources et le développement du rationalisme dans la littérature française de la Renaissance (1533–1601)* (Letouzey & Ané 1922) 202–3.

ascertainable, for example, in the work of Jean Le Maire de Belges, ‘the precursor of Gallic patriotism’.⁵³ In his 1509 *Illustrations de Gaule*,⁵⁴ Le Maire de Belges embarked on a resolute process of ‘cultural decolonization’.⁵⁵ In a letter to Jacques Cujas, the celebrated jurist, Etienne Pasquier, a friend of Ronsard’s and a well-known jurist in his own right, likewise claimed that he was on a quest for French antiquity.⁵⁶ This desire to unearth French history appears from a large number of sixteenth-century writings devoting themselves to the reconstruction of the French past, a concrete historical programme responding to a very localized requirement: the intellectual elevation of France, not least against Italy.⁵⁷ As the influential Guillaume Budé lamented, give France some French historians (with some encouragement from their kings), and it will soon boast achievements comparable to those of the Romans that Livy and Sallust praised.⁵⁸ The work

53 Desan (n 44) 281.

54 J Le Maire de Belges, *Les Illustrations de Gaule & Singularitez de Troye* (De Marnef 1512).

55 P Desan, *Naissance de la méthode* (Nizet 1987) 93.

56 See Letter from E Pasquier to [J] Cujas in *Les Lettres d’Estienne Pasquier* in *Les Œuvres d’Estienne Pasquier*, vol 2 (Compagnie des libraires associez 1723) bk 2, 38: ‘I have applied myself to researching the antiquities of France; & for this reason I have called my work, Researches.’ The letter is to Cujas in his capacity as *conseiller* to the *parlement* of Grenoble – a judge on the then Grenoble court of appeal – a position he held from 1573 to 1575. Writing of Pasquier, George Huppert notes that ‘the overall purpose of his researches ... is to define France’: G Huppert, *The Idea of Perfect History: Historical Erudition and Historical Philosophy in Renaissance France* (University of Illinois Press 1970) 64.

57 These texts include J Divry, *Les Triumphe de France* (Barbier 1508); [E de Monstrelet], *Le Premier [second, tiers] volume de Enguerran de Monstrellet. Ensuyvant Froissart... Avecques les grandes croniques des roys de France Loys XI... et Charles VIII*, 2 vols (Petit [1512]); [S] Mamerot, *Les Passaiges doultremer faitz par les Francoys* (Le Noir 1518); C de Seyssel, *La Grand’monarchie de France* (Galiot du Pré 1557 [1519]); P Poisson [de la Bodiniere], *Harangue au peuple de France sur les louanges des anciens François* (Cotinet 1588); G Le Rouillé, *Le Recueil de l’antique preexcellence de Gaule & des Gaulois* (1546); C Paradin, *Alliances genealogiques des rois et princes de Gaule* (De Tournes 1606 [1561]); *Recueil des effigies des roys de France* (Desprez [1567]); F de Belle-Forest [Belleforest], *L’Histoire des neuf roys Charles de France* (L’Huillier 1568); G Bernard, *Cronique sommairement traictee des faitz heroiques de tous les Rois de France, & des personnes et choses memorables de leurs temps* (Baudin 1570); F Hotoman [Hotman], *La Gaule françoise* (C Frémont ed, S Goulart tr from Latin, Fayard 1991 [1574]); B de Girard [du Haillan], *L’Histoire de France* (Sonnus 1576); C Fauchet, *Recueil des antiquitez gauloises et françoises* (Du Puy 1579); N Vignier, *Sommaire de l’histoire des Francois... Extraits de la Bibliotheque Historiale* (Nivelle 1579); [A du Verdier], *La Biographie, et prosopographie des roys de France* (Cavellat 1583). According to Corrado Vivanti, 657 history books were published between 1550 and 1610, including 343 during the period 1560–88 alone: see C Vivanti, ‘“Paulus Aemilius Gallis condidit historias?”’ (1964) 19 *Annales Economies Sociétés Civilisations* 1117, 1117.

58 See [G Budé], *Annotationes Gulielmi Budaei parisiensis, secretarii regii, in XXIII Pandectarum libros* (Gryphium 1546 [1508]) 325 [hereinafter *Annotationes*]. Budé makes this point even more emphatically in his later work known as *De l’institution du prince* fol 24b. Having written this text around 1519 for François I, Budé never sought to publish it in his lifetime. Posthumous editions are unfaithful to the

of the noted sixteenth-century French jurist Charles Du Moulin shows how the anti-Italian sentiment even led to the ascription of the great tradition of learning and religious doctrine to the Greeks rather than the Romans.⁵⁹

French differential comparatism – which often featured a petty patriotic undertone – emphasized at once the singularity and supremacy of local monarchical accoutrements. Jean Ferrault thus insisted on how the French king held at least twenty privileges that conferred upon him a precedence over all other sovereigns (a superior status he felt could somehow be framed as having been authorized by the Pope).⁶⁰ For his part, Barthélémy de Chasseneuz, the famous sixteenth-century Burgundian jurist, listed 208 French royal prerogatives and named the French sovereign ‘the living law on Earth’ (*lex animata in terris*).⁶¹ In the event, Charles de Grassaille’s list proved even more extensive, so much so that he sought to organize his data, running to more than 300 pages, according to forty categories.⁶²

Quite apart from the exaltation of the supremacy of the king of France vis-à-vis other European monarchs, not to mention the Pope,⁶³ the need to exhume

original. In the 1990s, before the era of digitization, I was able to examine (albeit with some difficulty!) François I’s own copy, which was to be found at the *Bibliothèque de l’Arsenal*, in Paris, under what was then call number Ms–5103. For a detailed study of the circumstances relating to this manuscript, see L Delaruelle, *Guillaume Budé* (Champion 1907) 199–201 and 231–45. Other authors take a stance analogous to Budé’s. Eg: G du Bellay, *Epitome de l’antiquité des Gaules et de France* (Sertenas 1556) fol 2b.

- 59 C du Molin [Du Moulin], *Sommaire du livre analytique des contracts, Usures, Rentes constituées, Interests, & Monnoyes* (Houzé 1586 [1547]) fol 13a–b: ‘And we Frenchmen, rightly ... must laud [the Greeks], since from them (& not from the Romans) our ancestors, after having housed & received them in Marseille, have primarily received the erudition of the belles-lettres & sciences And since then from the said Greek, that is to say, through their predication & ministry, [we] have received the holy & salutary Christian faith & true celestial philosophy, & not from the Romans, who tried with all their power & authority to extirpate it, which was the cause, through the just judgement of God, of the division & destruction of their empire so flourishing, & the ruin & the end miserable & ignominious of most of their ancient Emperors, persecutors of the Gospel.’
- 60 See J Poujol, ‘Jean Ferrault and the King’s Privileges’ (1958) 5 *Studies in the Renaissance* 15, 20–22. The relevant text is J Ferrault, *Insignia peculiaris christianissimi Francorum regni* (Petit 1520).
- 61 For Chasseneuz’s extensive list, see [B de Chasseneuz], *Catalogus gloriae mundi* (Vincencium [Vincent] 1546 [1529]) 112–20. The reference to the French king being the earthly living or breathing law (an embodiment that was understood to be conferred by the grace of God) is at *ibid*, s 182, 119.
- 62 [C de Grassaille], *Regalium Franciaë* (Galeotum Pratensem [Galliot du Pré] 1545 [1538]) *passim*. See generally G Leyte, ‘Charles de Grassaille et la monarchie française’ in M Boulet-Sautel (ed), *Pensée politique et droit* (Presses Universitaires d’Aix-Marseille 1998) 315–26.
- 63 For further discussion and references, see L Schilling, ‘La comparaison dans le discours juridico-politique français du XVI^e siècle’ in A Lefebvre (ed), *Comparaisons, raisons, raisons d’Etat* (Oldenbourg 2010) 16–18.

national titles of glory involved the decision to date French history as far back as possible so as to avoid another people articulating its history earlier. To return to the king of France, Du Moulin, writing in 1551, stated that the French monarchy was 1,632 years old, which made it the most venerable institution in Europe and more ancient than Christianity itself. Moreover, it was said to be the only monarchy to have enjoyed continuous existence since its foundation.⁶⁴ Effectively, the felt need to create or renovate cultural revendications prompted the ready construction of a wide range of myths of origins and the integration into national history of various legends that had already existed for centuries in literature.⁶⁵ Consider the deployment of narratives featuring the Trojan origins of France,⁶⁶ Hercules as the founder of the nation,⁶⁷ the Salic law,⁶⁸ or the Gauls.⁶⁹

- 64 C Du Molin [Du Moulin], *La Première partie du Traicte de l'origine, progres et excellence du Royaume & Monarchie des François, & Couronne de France* (A la Salemandre 1561) 27: 'Whereby the history is certain, that today, one thousand five hundred sixty & one, there is more than sixteen hundred thirty two years, that lasts & perseveres the reign of the French, what happens not to have occurred to other reign or Monarchy, nor whatever Republic.' Although the date of publication appears as 1561, the book was actually written ten years earlier. See DR Kelley, "'Fides Historiae": Charles Dumoulin and the Gallican View of History' (1966) 22 *Traditio* 347, 370.
- 65 See generally T Nicklas, 'Pouvoir, raison, comparaison: histoire et politique des origines en France au XVIe siècle' in A Lefebvre (ed), *Comparaisons, raisons, raisons d'État* (Oldenbourg 2010) 27–36.
- 66 For a sixteenth-century illustration of the literary use of the Trojan myth, see [P de] Ronsard, 'La Franciade' in *Œuvres complètes*, vol 1 (J Céard et al eds, Gallimard 1993 [1573]) 1021. For a general discussion of the Trojan myth, see Huppert (n 56) 72–87; Desan (n 44) 270–78; C Beaune, *Naissance de la nation France* (Gallimard 1985) 25–74.
- 67 See generally M-R Jung, *Hercule dans la littérature française du XVIe siècle* (Droz 1966); Desan (n 44) 284–88.
- 68 See generally Beaune (n 66) 357–92. For a specific discussion of the dissemination of the idea of the Salic law in the sixteenth century, see *ibid* 378–92.
- 69 In his celebrated *Recherches*, Estienne Pasquier devoted his first five chapters to the 'ancient Gauls' ('*anciens Gaulois*'): E Pasquier, *Les Recherches de la France* (Sonnus 1621 [1560]) 3–16. Pasquier's work moved away from mythology, and his apology of Gaul relied on historical documents. See J-F Maillard, 'Aspects de la tradition gallique dans les éditions des Recherches de la France' in [Aa Vv], *Etienne Pasquier et ses Recherches de la France* (Presses de l'École Normale Supérieure 1991) 9. Likewise, Ramus shied away from a metaphysical search for origins in favour of an exploration of the socio-economic, political, and juridical foundations of the present. In other words, he displayed his concern for culture. Eg: P de la Ramée [Ramus], *Traité des meurs et facons des anciens Gaulois* (M de Castelnau tr from Latin, Du Val 1581†) fol 4b, where the author refers to 'the Life, the Struggles, the Disciplines, the Religions, the Rights, & the Laws of the Republics of our ancestors' [hereinafter *Traité*]. The Latin text had been published as P Ram[us], [*Liber de moribus veterum Gallorum* (Wechelum [Wechel] 1562 [1559]). For further information on Ramus, see N Bruyère, *Méthode et dialectique dans l'œuvre de La Ramée* (Vrin 1984). See also WJ Ong, *Ramus, Method, and the Decay of Dialogue* (Harvard University Press 1983 [1958]).

Using phonetic analogies, the illustrious linguist, astronomer, diplomat, and professor Guillaume Postel thus argued that France must claim first place amongst nations, because it was born from the first act instituting the cosmic order, that is, the separation of Earth and water to which the Hebraic word ‘Galliah’ would refer. According to Postel, the Hebraic term ‘Gallim’ pointed to the waters of the flood that the family of Noah had survived and out of which humanity had regenerated itself. And the Hebraic word ‘Gallal’ meant ‘cycle’ or ‘return’, and it indicated that what had been done must reproduce itself. For Postel, these three Hebraic expressions were linked to the ‘Galli’, that is, to the Gauls. It followed, or so went Postel’s argument, that the destiny of Gaul was to recover the first place inscribed in its name and for which it was meant.⁷⁰ The Gauls were the first philosophers,⁷¹ and they were responsible for the cultural colonization of Europe.⁷² Specifically, they had taught law to the English.⁷³ Meanwhile, Noël Taillepied castigated the Greeks for having appropriated Hercules in order to undermine the glory of the Gauls.⁷⁴

One manifestation of a heightened sense of the nation, or of the rehabilitation of national culture against the Italian universalist mold, was therefore the development of a rhetoric on the origins of things as the question ‘who am I?’ assumed the form ‘where do I come from?’ And the need to know, so strong as to require an explanation, any explanation, would go so far as to replace, seemingly without any compunction, the old Italian ‘universalism’ by a new one based on France’s particularism: the French nation would now claim ‘universal’ power.⁷⁵ Postel, for example, whom Lucien Febvre casts in the role

70 G Postel, ‘De ce qui est premier pour Reformer le monde’ in C-G Dubois, *Celtes et Gaulois au XVIe siècle: le développement littéraire d’un mythe nationaliste* (Vrin 1972 [1569]) 151: ‘[W]e call ourselves Gauls or Galls or Galli from the Sovereign Revelation or Discovery of the total earth, that was Named formerly and must be Named “Galliah” or Discovery Divine, that was made the First time upon Creation, when “Gallim” or the waters that thus in the Holy Language are named, like also their discovery and being removed from the Earth is said “Gallah”, and their revolution on the earth all around is said “Gallal”, whence in order to guard in our holy and Very-Ancient Sumname said “Galli” or “Gallim” the memory of the said Miracle, we are called Gauls, and our people Celtic or Gallic, and our Church Gallican.’

71 Eg: N Talepied [Taillepied], *Histoire de l’Estat et Republique des Druides, Eubages, Sarronides, Bardes, Vacies, anciens François, Gouverneurs des païs de la Gaule, depuis le deluge universel, jusques à la venuë de Jesus-Christ en ce monde* (Parant 1585) bk I, fol 69b: ‘[S]ince it is a maxim averred by all good minds ... that *Philosophia manavit à Gallis*: Philosophy had its origin from the Gauls.’ Taillepied knew Postel personally: see *ibid*, bk 1, fol 84b.

72 Eg: G le Fèvre de la Boderie, *La Galliade, ou de la revolution des arts et sciences* (Chaudiere 1578) fol 30a: ‘[A]ll the Arts first in Gaul [are] born.’

73 cf *ibid*, fol 85a: ‘Those from great Britain therefore, have not taught the laws to our Gallic Druids, but rather the Britons Albion or English, have learned from ours.’

74 See Taillepied (n 71) bk 2, fol 32b–33a.

75 See C-G Dubois, ‘Introduction’ in *Celtes et Gaulois au XVIe siècle: le développement littéraire d’un mythe nationaliste* (Vrin 1972) 17–21.

of ‘precursor amongst those questers for the Universal’,⁷⁶ now forcefully argued that the Gallic people could, through its ancient laws, pretend to the governance of the world.⁷⁷ Had the Gauls not reigned over the Orient?⁷⁸

In the words of Philippe Desan, ‘[t]he history of the Gauls, as it was written in the sixteenth century, expresses the frustration, resentment, envy, and rancour the French felt towards the cultural domination of Italy.’⁷⁹ Desan observes that at the time, ‘to be French (at least to consider oneself as French) comes essentially to affirm one’s difference in relation to other nations’.⁸⁰ Indeed, the issuance of safe-conducts and passports testified to an acknowledgement, in legal terms, of national identity and international otherness. Such documents contributed, not unlike Postel’s map of France,⁸¹ to the definition of the territory by reference to what was of it and what was not.⁸² That much is apparent from the extensive literature on geography released in France in the course of the sixteenth century against the background of the ‘discovery’ of the New World and, after 1543, when Copernicus published his *De revolutionibus orbium caelestium*, of a new celestial map where the Earth was no longer at the centre of the universe.⁸³ In 1570, Loys (or Louis) Le Roy thus noted as follows:

76 L Febvre, *Le Problème de l’incroyance au XVIe siècle* (Michel 1942) 118. See also P Mesnard, *L’Essor de la philosophie politique au XVIe siècle* (2nd edn, Vrin 1952) 452.

77 Eg: G Postel, *Les Raisons de la monarchie* (1551) ii, where the proem, referring to the Gallic people (*‘peuple Gauloys’*), mentions ‘its Law, & ancient Laws Whereby it must to the universe pretend’; G Postel, *La Loy salique* (1552) ch 6, fol 3, where the text states as follows: ‘As therefore the Gallic people is the first of the whole world, it is wholly certain that its law, whether Salic or Gallic one wants to call it, has been always the first temporal institution there be in this world’; G Postel, *Le Thresor des propheties de l’univers* (F Secret ed, Nijhoff 1969 [1564]) 65: ‘[T]he Gauls are the first peoples of the world, therefore for them, by way of demonstration of Providence which between all peoples occupiers of this world has elected and preferred one, to occupy very justly and sempiternally to possess the whole world.’

78 See G Postel, *L’Histoire memorable des expeditions depeux le deluge faictes par les Gauloys ou Francoys depuis la France jusques en Asie, ou en Thrace & en l’orientale partie de l’Europe, & des commodités ou incommodités des divers chemins pour y parvenir & retourner* (Nivelle 1552) fol 41b.

79 Desan (n 44) 283.

80 P Desan, *Penser l’histoire à la Renaissance* (Paradigme 1993) 133.

81 See G Postel, *La Vraye et entiere description du Royaulme de France et ses confins, avec l’adresse des chemins & distances aux Villes inscriptes es Provinces d’iceluy* (1570).

82 See D Nordman, ‘Sauf-conduits et passeports, en France, à la Renaissance’ in J Céard and J-C Margolin (eds), *Voyager à la Renaissance* (Maisonneuve & Larose 1987) 145–58.

83 See G Atkinson, *La Littérature géographique française de la Renaissance: répertoire bibliographique* (Picard 1927), where the author describes 524 works written in French and published before 1610. Adde: G Atkinson, *Supplément au Répertoire bibliographique se rapportant à la littérature géographique française de la Renaissance* (Picard 1936). See also F Lestringant, *Le Huguenot et le sauvage: l’Amérique et la controverse coloniale, en France, au temps des Guerres de Religion (1555–1589)* (Aux Amateurs de Livres 1990).

[F]or over one hundred years have not only come to evidence the things, that were earlier covered by the darkness of ignorance: but also many others known, that had been entirely ignored by the ancients: new seas, new lands, new manners of men, morals, laws, customs, new herbs, trees, gums, liquors, fruits, minerals, birds, fish, & other animals, new roads in the sky & the ocean not yet tried, new stars seen, new inventions found, like Printing, Artillery, & the use of the needle & of the magnet for the navigating.⁸⁴

In this vein, texts like André Thevet's *Cosmographie universelle* insisted on how 'the peoples that are born in diverse parts of the world, differ in complexions & way of living'.⁸⁵ In his *Recueil*, Johann Boemus also noted 'the great variety & difference ... between countries & regions'.⁸⁶ While François Desprez emphasized the difference in dress,⁸⁷ for Sebastian Munster diversity appeared particularly striking if one observed the way in which kingdoms were governed.⁸⁸ Along analogous lines, Pierre Ayrault remarked that just as men who live in various countries do not eat the same food, they are not governed by the same laws, constitutions, or customs.⁸⁹ And, as Thevet expressly underlined, it was through the awareness of difference that one could engage in comparison⁹⁰ – hence, a

84 L Le Roy, *Consideration sur l'histoire françoise, et l'universelle de ce Temps, dont les merveilles sont succinctement recitées* (Morel 1570) fol 9a.

85 A Thevet, 'Epistre au Roy' in *La Cosmographie universelle*, vol 1 (Chaudiere 1575) fol [2b]. See also A Thevet, *Les Singularitez de la France antarctique* (P Gaffarel ed, Maisonneuve 1878 [1558]) 255: '[T]here are found few animals of diverse species, that resemble one another entirely without some great difference.'

86 [J Boemus], *Recueil de diverses histoires touchant les situations de toutes regions & pays contenuz es trois parties du monde, avec les particulieres moeurs, loix, & ceremonies de toutes nations & peuples y habitans* (A des Goys tr from Latin [1539], Brillman 1540) fol 273a–b. 'Boemus' was Hans Böhm, the Bavarian humanist who died in 1476. cf P Belon, *Les Observations de plusieurs singularitez & choses memorables, trouvées en Grece, Asie, Judée, Egypte, Arabie, & autres pays estranges* (Cavellat 1555).

87 See F Deserpz, *Recueil de la diversité des habits, qui sont de present en usage, tant es pays d'Europe, Asie, Affrique & Isles sauvages, le tout fait apres le naturel* (Breton 1567). The name of the author was apparently misspelt: see J Céard, *La Nature et les prodiges: l'insolite au XVIe siècle* (2nd edn, Droz 1996) 278 n 23.

88 See [S] Munster, *La Cosmographie universelle de tout le monde* (F de Belleforest ed, Chesneau 1575 [1556]) col 1724. See generally G Chappuys, *L'Estat, description et gouvernement des royaumes et republicques du monde, tant anciennes que modernes* (Cavellat 1585).

89 P Ayrault, 'Preface avec un Discours de la nature, variete, et mutation des loix' in F Grimaudet, *Paraphrase du droit de retraits lignager, recueillie des coutumes de France, & glosateurs d'icelles* (Martin le Jeune 1567 [1564]) fol iia: 'Men live in all countries, but not of same meat & food: so is there no place, where they are not ruled & policed by laws, constitutions, & customs: but not similar & same laws or customs.'

90 A Thevet, *Cosmographie de Levant* (F Lestringant ed, Droz 1985 [1556]) 13–14: '[E]yes surpass all other senses of nature. That being so, one cannot deny that this sense so necessary shows us the differences of many things, & and that through it we reach comparison.'

book such as Postel's on Turkey or Belon's and Couillard's essays on idiosyncrasies across the planet.⁹¹

Correlatively, Ramus exclaimed: 'I love my country.'⁹² This patriotism found one of its chief expressions in the promotion of the French language, another powerful strategy to mark the line of demarcation vis-à-vis foreign cultures. In 1509, Claude de Seyssel thus issued an early request to the French king to 'enrich' (*'enrichir'*) and 'magnify' (*'magnifier'*) the French language (even as he also hoped that Latin would become as popular in France as had been the case in Italy).⁹³ Seyssel argued that the use of the French language would favour the cause of French political and cultural imperialism. Referring to William the Conqueror (Guillaume le Conquérant), he mentioned that an improved language would entice foreign countries to adopt it and keep it even after the fall of the empire. In England, he remarked, the English still used the language of Normandy centuries after the Norman Conquest.⁹⁴

In 1539, François I, having determined that a unified language would indeed promote the achievement of justice and further the strength of the kingdom as a whole, made French compulsory in the courts by way of the royal ordinance of Villers-Cotterêts.⁹⁵ This reform, hailed as a signal contribution to the development of the French language,⁹⁶ allowed François Hotman to stigmatize 'the silly & barbaric custom, that reigned still in France not long ago, to inscribe all acts & public instruments in the Latin language'.⁹⁷ Meanwhile, many authors chose to 'celebrate the language' – that is, French – so 'that

91 See G Postel, *De la republique des Turcs, & là ou l'occasion s'offrira, des meurs & loy de tous Muhamedistes* (De Marnef 1555); P Belon, *Les Observations de plusieurs singularitez & choses memorables, trouvées en Grece, Asie, Judée, Egypte, Arabie, & autres pays estranges* (Cavellat 1555); A Couillard, *Les Antiquitez et singularitez du monde* (Dallier 1557). See also Mamerot (n 57).

92 De la Ramée, *Traité* (n 69) fol 5a.

93 C de Seyssel, 'Prologue au Roy' in *Les Histoires universelles de Trogue Pompee, abbregees par Justin Historien* (C de Seyssel tr from Latin, De Vascosan 1559) fol iib: 'Work to enrich & magnify the French language.' The plea in favour of Latin appears at fol iiib. The date of publication seems misleading, since at fol iiia Seyssel remarks that he translated the book – and presumably wrote the foreword to it – in the same year as Louis XII invaded Venice, that is, in 1509.

94 *ibid*, fol iia–b. Seyssel was presumably referring to the so-called 'law-French'. In England, English became the official language of the law only upon the enactment of a 1730 statute: Proceedings in Courts of Justice Act 1730, 4 Geo II, ch 26.

95 'Ordonnance sur le fait de la justice' in [F-A] Isambert, *Recueil général des anciennes lois françaises*, vol 12 (Belin-Leprieur 1828) art 111, 622–23. See generally P Fiorelli, 'Pour l'interprétation de l'ordonnance de Villers-Cotterêts' (1950) 28 *Le Français Moderne* 277. A later, complementary ordinance is that of Roussillon in 1563: 'Ordonnance sur la justice et la police du royaume, additionnelle à celle d'Orléans' in Isambert, vol 14 (Belin-Leprieur 1829) art 35, 168.

96 Eg: B de la Roche Flavin, *Treze livres des Parlemens de France* (Millanges 1617) bk 6, ch 35, 370.

97 F Hotman, *Antiitribonian ou Discours d'un grand et renomme jurisconsulte de notre temps sur l'etude des loix* (Perier 1603 [1567]) ch 13, 105–6.

foreigners will no longer call us Barbaric'.⁹⁸ These writers held that there was nothing that could not be expressed in French,⁹⁹ that there was no shame to be had for writing in French,¹⁰⁰ and that the use of French would, in fact, contribute to the restoration of France's honour.¹⁰¹ Pasquier therefore proudly declared in favour of his native tongue.¹⁰² One of the by-products of the movement promoting the use of French was the publication of a series of French grammars.¹⁰³ Also, many translations of Greek and Latin authors appeared in French.¹⁰⁴ Specifically, as of 1523, one Jacques Lefèvre d'Étaples, a leading French theologian, released large segments of the Bible in a French translation.¹⁰⁵ In fact, the movement extolling French was so strong that linguists have come to regard the sixteenth century as a key constitutive moment in the history of the language.¹⁰⁶

98 E Dolet, 'Espître a Monsieur de Langei' in *La Maniere de bien traduire d'une langue en aultre* (Chés Dolet mesme 1540) fol 2a and 3a.

99 Eg: [P] de Dampmartin, 'Au lecteur' ['Epistre'] in *De la conoissance et merveilles du monde et de l'homme* (Perier 1535) fol iiib.

100 Eg: J du Bellay, *La Deffence, et illustration de la Langue Françoisse* (L'Angelier 1549) bk 2, ch 12.

101 Eg: C Fauchet, *Recueil de l'origine de la langue et poesie française, ryme et romans plus les noms et sommaire des oeuvres de CXXVII poetes François, vivans avant l'an M CCC* (Patisson 1581) 40. See also J de Beaune, *Discours, comme une langue vulgaire se peult perpetuer* (De Tours 1548).

102 Letter from E Pasquier to A Loisel in *Les Lettres d'Estienne Pasquier* in *Les Œuvres d'Estienne Pasquier*, vol 2 (Compagnie des libraires associez 1723 [January 1586]) bk 2, 3: 'And for my part writing in my vernacular, at least do I write in the language to which I have been breastfed right from the nipple of my mother.' On Pasquier's defence of the French language, see generally C Demaizière, 'La situation linguistique et le plaidoyer pour la langue française d'Étienne Pasquier' in [Aa Vv], *Étienne Pasquier et ses Recherches de la France* (Presses de l'École Normale Supérieure 1991) 23–33.

103 For a detailed survey of sixteenth-century French grammars, see F Brunot, *Histoire de la langue française des origines à nos jours*, vol 2 (Colin 1967) 93–159. These works include L Meigret, *Le Tretté de la grammere française* (Wechel 1550); J Peletier du Mans, *Dialogue De l'Ortografie e Prononciation Française, departi an deus livres* (De Marnef 1550); [R] Estienne, *Traicté de la Gramaire Francoise* (Estienne 1569); J Bosquet, *Elemens, ou institutions de la langue Francoise, propres pour façonner la Jeunesse, à parfaitement, & nayvement entendre, parler, & escrire icelle langue* (Michel 1586); C Mermet, *La Pratique de l'orthographe francoise* (Bouquet 1583); A Matthieu, *Devis de la langue francoise* (Breton 1559); G Meurier, *Thresor de sentences dorees, proverbes et dictis communs reduits selon l'ordre alphabeticque* (Lescuyer 1578).

104 See generally F Hennebert, *Histoire des traductions françaises d'auteurs grecs et latins, pendant le XVIe et le XVIIe siècles* (Lesigne 1861).

105 See L Febvre and H-J Martin, *L'Apparition du livre* (2nd edn, Michel 1971) 411–12. With specific reference to the sixteenth century, see generally F Laplanche, *La Bible en France entre mythe et critique (XVIe–XIXe siècle)* (Michel 1994) 13–32.

106 Eg: [C-L] Livet, *La Grammaire française et les grammairiens du XVIe siècle* (Didier 1859) 1. See generally Brunot (n 103) 1–91.

In parallel, the long tradition of Gallicanism rooted in St Louis's (mythical) *Pragmatic Sanction* of 1268 – that is, the idea that there existed a French church with its own institutions independent from Rome – saw the consolidation of the independence of the Church of France vis-à-vis Rome through the concordat of 1516, which essentially put the church under the discretion of the French king and made him, as beneficiary and benefactor of Gallican liberties, its temporal leader.¹⁰⁷ For Du Moulin, the Gallican tradition thus acted as a countervailing power remedying the abuses of the Church of Rome.¹⁰⁸ The celebrated jurist emphasized the lack of a universal role for the Pope by stressing that the Church of Rome enjoyed no precedence over the Gallican church or the church of England or any other church anywhere in the world.¹⁰⁹

*

As the French effort to distinguish Frenchness from Italianity makes emphatically clear, the topos of difference is key to an understanding of the Renaissance. Desan goes so far as to suggest 'the elaboration of a new analytical paradigm'.¹¹⁰ The break with universalism – a purportedly 'universal' culture, Christianity, found itself challenged through the Reformation movement while a 'universal' language, Latin, was defied on account of the rise of scholarship in

107 See G Zeller, *Les Institutions de la France au XVIe siècle* (2nd edn, S Goyard-Fabre and P Magnard eds, Presses Universitaires de France 1987†) 351. For sixteenth-century assessments, see [P Pithou], *Les Libertez de l'Eglise Gallicane* (Patisson 1594); J du Tillet, *Memoire & advis... Sur les libertez de l'Eglise Gallicane* (1594 [1551]); C Fauchet, 'Traicté des libertez de l'eglise gallicane' in *Les Œuvres de feu M Claude Fauchet premier president en la cour des monnoyes* (De Heuqueville 1610†). Adde: [A Maillard], *Le Francophile* (1591).

108 cf C Du Molin [Du Moulin], *La Premiere partie du Traicte de l'origine, progres et excellence du Royaume & Monarchie des François, & Couronne de France* (A la Salemandre 1561) 98: '[T]he Kings of France have made Laws, statutes, & edicts out of ecclesiastical matters, principally to refrain abuses, & excesses from the people of the Church, even from Bishops, & from Popes.'

109 cf C Du Moulin, *Abus des petites dates, reservations, preventions, annates, et autres usurpations & Exactions de la Cour de Rome, Contre les Edictz & ordonnances des Roys de France* (Pour ledit Du Molin, 1564 [1554]) 352: '[T]he Roman Church is not other than the Gallican Church or of England, or any other church in the whole world.'

110 Desan (n 55) 14. The author, of course, borrows from TS Kuhn, *The Structure of Scientific Revolutions* (2nd edn, University of Chicago Press 1970). Note that Margaret Masterman shows how, in his book, Thomas Kuhn ascribes twenty-one different meanings to the word 'paradigm'. See M Masterman, 'The Nature of a Paradigm' in I Lakatos and A Musgrave (eds), *Criticism and the Growth of Knowledge* (Cambridge University Press 1970) 59. In his reply to critics, Kuhn acknowledges the ambiguity of his usage: TS Kuhn, 'Reflections on My Critics' in I Lakatos and A Musgrave (eds), *Criticism and the Growth of Knowledge* (Cambridge University Press 1970) 271–72. Desan's use of the word connotes the emergence of a general practice of cognitive mapping at variance with what had prevailed until the sixteenth century.

the vernacular – stands as a crucial epistemic feature of the period to the point where it has been said that diversity, perceived as a ‘positive value’, then acquired, through a ‘thought of difference’, nothing short of an ‘ontological status’.¹¹¹ The insistence on variety constitutes a major contribution that evidently characterizes Renaissance intellectual life, differential analysis being the new ‘common denominator’.¹¹² While the previous order of learning having governed the art of representation and guided the exegesis and interpretation of texts had based itself on the assignment of equivalence or commonality, in the sixteenth century this idea no longer prevailed as the primordial form of knowledge and was replaced by a sustained epistemic focus on difference.¹¹³ In fact, the assignment of equivalence or commonality was now readily branded as the epistemic danger to which one could be expected to succumb if one did not examine one’s materials properly.¹¹⁴

To differentiate in order to compare thus became the abiding intellectual strategy as places, events, things, and peoples were distinguished in ways that allowed the discernment of differences across cultures and the ascertainment of the singularities pertaining to each culture. Quite simply, to quote Desan once more, there was at work ‘a logic of difference’.¹¹⁵ In this respect, Descartes’s

111 J Lecoine, *L’Idéal et la différence: la perception de la personnalité littéraire à la Renaissance* (Droz 1993) 19, 16, and 17.

112 Desan (n 80) 21. For other authors foregrounding the differentialization of things as a fundamental Renaissance theme, see eg C-G Dubois, *La Conception de l’histoire en France au XVIIe siècle* (Nizet 1977) 85; F Charpentier et al, ‘Préliminaires’ in J Céard (ed), *La Curiosité à la Renaissance* (Société d’édition de l’enseignement supérieur 1986) 17.

113 See M Foucault, *Les Mots et les choses* (Gallimard 1966) 32–40 (on the assignment of equivalence or commonality) and 65–72 (on difference). While Foucault may be right to situate the beginnings of a new order of knowledge in the early part of the seventeenth century to the extent that there then takes place a passage from language-as-commentary to language-as-critique, he arguably minimizes the significance of the motif of difference for Renaissance writers. In fact, many critics have held Foucault to a serious error of interpretation in this regard. Eg: J-C Margolin, ‘Les figures du Même et de l’Autre’ in *Encyclopaedia Universalis*, sub Renaissance, vol 19 (Encyclopaedia Universalis 1989) 790, where the author takes the view that Foucault failed to grasp the centrality of differential analysis for the sixteenth century. See also I Maclean, *Le Monde et les hommes selon les médecins de la Renaissance* (CNRS Editions 2006) 111–21. Indeed, Ian Maclean firmly remarks ‘how wrong the Foucauldian characterisation of Renaissance thinking ... is’: I Maclean, *Logic, Signs and Nature in the Renaissance* (Cambridge University Press 2002) 167. See also I Maclean, ‘Foucault’s Renaissance Episteme Reassessed: An Aristotelian Counterblast’ (1998) 59 *J History of Ideas* 149. Adde: J-M Le Gall, *Défense et illustration de la Renaissance* (Presses Universitaires de France 2018) 22–23; ZS Schiffman, *On the Threshold of Modernity* (Johns Hopkins University Press 1991). Departing from Foucault in a number of fundamental respects, Zachary Schiffman shows how sixteenth- and seventeenth-century French Renaissance thinkers struggled with the accumulation of information regarding sharply different values, customs, laws, and so forth.

114 I paraphrase Foucault (n 113) 65.

115 Desan (n 80) 21.

early-seventeenth-century *Regulæ* consolidated the reorganization of thought according to criteria of difference that had crystallized in the sixteenth century: not only did his rules for the governance of the mind assert that knowledge must in principle be derived ‘from a comparison between two or more things’,¹¹⁶ but they also stigmatized the ‘habit’ that consisted, when people detected ‘some similarity between two things’, ‘of ascribing to the one what they find true of the other, even when the two are not in that respect similar’.¹¹⁷ In other words, the imputation of equivalence or commonality was now firmly subordinated to the naming of differences resulting from comparison. The first step for the analyst was therefore no longer to assign an equivalence or commonality across entities, that is, to go in search of ‘markers’ that might justify such attribution. Rather, the intellectual quest sought the determination of differences. As the elicitation of the differend animated philosophical or literary endeavours, ‘discernment impose[d] to comparison the primary and fundamental search for difference’; ‘to know,

116 R Descartes, *Regulæ ad directionem ingenii* in *Œuvres de Descartes*, vol 10 (2nd edn, C Adam and P Tannery eds, Vrin 1986 [1701†]) rule 14, 440 [hereinafter *Regulæ*]. I adopt and adapt the English translation suggested in R Descartes, *Rules for the Direction of the Mind* (D Murdoch tr) in *The Philosophical Writings of Descartes*, vol 1 (J Cottingham, R Stoothoff, and D Murdoch trs, Cambridge University Press 1985) 57 [hereinafter *Rules*].

117 Descartes, *Regulæ* (n 116) rule 1, 359. Again, I largely follow the English translation to be found in *Rules* (n 116) 9. As he refers to this passage, Foucault observes that ‘[t]he age of the similar is in the process of closing in on itself: Foucault (n 113) 65. For an analysis of Descartes on difference, see generally *ibid* 65–72. See also P Sabot, *Le Même et l’ordre* (ENS Editions 2015) 58–63. Francis Bacon, Descartes’s considerable contemporary, also extolled difference. See [F] Bacon, *Novum organum [scientiarum]* (T Fowler ed, Oxford University Press 1878 [1620]) bk 1, s 45, 214: ‘The human understanding, owing to its peculiar nature, easily presupposes a greater degree of order and equality in things than it finds; and although many things in nature be *sui generis* and most irregular, will yet invent parallels, and correspondences, and relations, that are not.’ See also *ibid*, s 55, 227. For a digitized copy of Fowler’s edition, see <books.google.fr/books?id=vZwNAAAAQAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false>. I draw on William Wood and Joseph Devey’s 1844 English translation from the Latin. For a digitized copy of this translation, see <oll.libertyfund.org/titles/bacon-novum-organum>. When, in 1603, King James I of England sought to achieve the Union of England and Scotland, including the rules of English and Scots law, Bacon, a philosopher, scientist, and barrister, who was also a parliamentarian and indeed the Crown’s main proponent of the project in Parliament, proceeded to draft some notes in the second half of 1604 suggesting that jurists from both jurisdictions should collaborate in the preparation of a digest where the laws of the two countries ‘may be collated and compared, and that the diversities may appear and be discerned of: [F Bacon], ‘Certain Articles or Considerations touching the Union of the Kingdoms of England and Scotland’ in *The Works of Francis Bacon*, vol 10 (J Spedding et al eds, Cambridge University Press 2011 [1868]) 230. Observe that Bacon’s focus is exclusively on differences. The Union, of course, would not be achieved for another century.

[was] to discern.’¹¹⁸ In his book on fish, Guillaume Rondelet thus stated that knowledge of fish could not be taught better than through the differences that distinguish them from one another.¹¹⁹ Rabelais, for his part, assured that sea shells offer so much variety, so many shapes, so many colours, so many traits and forms, as to be inimitable by art.¹²⁰ In Jean Jehasse’s crisp formula, for the sixteenth-century mind the world was to be understood in terms of a ‘dynamic of opposites’.¹²¹

In the light of this alliance between historical and geographical relativism illustrating an understanding ‘not only *ratione temporum* but *ratione regionum*’,¹²² I turn to address the matter of French law. Unsurprisingly, perhaps, given that, if Franz Wieacker’s insight is just, the sixteenth century remains the period when, more than any other, legal scholarship was ‘most determined by the general culture of its time’,¹²³ one finds the ethos of difference to be at least as central to law as it has been seen to be regarding society in general.

*

To sixteenth-century French jurists, Rome appeared as ‘an organized civilization existing in their immediate past and affecting the whole range of their life through the survival of its institutions, its ideas, its material remains and its documents’.¹²⁴ Inevitably, then, the French needed to position themselves vis-à-vis Roman legal culture. For medieval men, there had been no imperative to distinguish the past from the present, that is, to establish how the life of the past differed from that of the present. As a result, for example, ancient works such as the Digest had been surrounded with an extensive gloss or commentary under circumstances where interpreters often did not distinguish between text or

118 Foucault (n 113) 69.

119 cf G Rondelet, *L’Histoire entiere des poissons* (Bonhome 1558) part 1, bk 1, ch 1, 1: ‘The knowledge and consideration of fish could not by better means be taught, than by the differences through which the ones from the others are distinguished.’ See also P Belon, *La Nature & diversité des poissons* (Estienne 1555). In addition, Pierre Belon wrote on the diversity of birds. See P Bellon, *L’Histoire de la nature des oyseaux* (Cavellat 1555). Another text from the standpoint of the natural sciences is [Cardan], *De rerum varietate* (Petri 1557). ‘Cardan’ is Girolamo Cardano, an Italian philosopher who died in 1576. For an examination of Cardano’s thought, see Céard (n 87) 229–37.

120 See Rabelais, *Le Quart livre des faits et dictz héroïques du bon Pantagruel* in *Œuvres complètes* (J Boulenger ed, Gallimard 1955 [1552]) ch 58, 699. For an argument on the diversity of shells, see A Paré, *Des monstres et prodiges* (4th edn, Droz 1971 [1585]) 117.

121 J Jehasse, *La Renaissance de la critique: l’essor de l’humanisme érudit de 1560 à 1614* (Publications de l’Université de Saint-Etienne 1976) 6.

122 DR Kelley, ‘*Historia integra*: François Baudouin and His Conception of History’ (1964) 25 *J History of Ideas* 35, 53.

123 F Wieacker, *Privatrechtsgeschichte der Neuzeit* (Vandenhoeck & Ruprecht 1967) 167.

124 JGA Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge University Press 1987) 2.

opinion, and these texts had been studied with a view to adoption and application towards the resolution of contemporary phenomena. If you will, the passage of time in the form of many centuries had changed nothing to the fact that Justinian's compilation was regarded as an immediately valid and pertinent source of law, that is, as *ratio scripta* (or written reason). This approach, which had prevailed ever since the first glosses on the Digest had been written by law professors teaching in Bologna and elsewhere in the eleventh century, favoured the congruence of past and present or, in other words, emphasized the ways in which the two worlds were deemed epistemically continuous, that is, how they were effectively assumed to be one. The prevailing perspective therefore revealed the medieval jurists' general lack of awareness of any significant differences between their own society and the one for which the Digest had been compiled many hundreds of years earlier.¹²⁵ Bartolus (1313–57) and his disciples, for instance, whose interpretation of Roman law had become the reigning orthodoxy in fourteenth-century Italian law faculties (and who had come to be seen as foremost exponents of the so-called '*mos italicus*'), thus took the view that there was nothing anachronistic in regarding old Roman texts as being relevant for contemporary experience. However, in France, especially in the context of the Renaissance political and socio-cultural conflicts with Italy, there arose a clear desire to delineate the province of Antiquity more strictly.

A number of French jurists thus forcefully argued against what they regarded as the inconsequential abstractions into which the Italian glossators of Roman texts had been engaging. That the Roman texts firmly belonged to another era was an idea somehow coupled in the minds of these French dissenters with the need to address textuality's practical social and political uses. This French understanding entailed that the meaning of the ancient law-books could come only from the texts themselves rather than be ascribed to them through subsequent commentaries, a realization that implied the need to undertake extensive philological investigations. Although the French jurists advocating a particularly French way of thinking about Roman law – a '*mos gallicus*' – were mainly established in Bourges, they also developed a following in other French law faculties such as Toulouse's.¹²⁶ In the words of legal historian Donald Kelley, the concern that occupied these 'empirical, historical, and comparative studies' was 'to discriminate between rather than to accommodate or to assimilate ancient and modern law' – in other terms, to frame a differend.¹²⁷ Observe that the point for those who would collectively come to be known as the 'Humanists' was not to jettison the ancient works, but rather to approach

125 See JH Franklin, *Jean Bodin and the Sixteenth-Century Revolution in the Methodology of Law and History* (Columbia University Press 1963) 9.

126 For a detailed treatment of the more historical (and French) *mos gallicus*, including its specificity vis-à-vis the more dogmatic (and Italian) *mos italicus*, see J Gordley, *The Jurists* (Oxford University Press 2013) 28–127.

127 DR Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Harvard University Press 1990) 192.

them *as ancient works* in the knowledge of what they had meant for those who had written them at the time they had. Otherwise said, in sixteenth-century France a desire to differentiate law's past from law's present was asserting itself in earnest.

John Pocock, the distinguished historian of the early modern period, notes how this intellectual path to differentiation led to a profound paradox. As they purported to recover the integrity of the ancient law-books through sophisticated philological studies,¹²⁸ French jurists came to realize the depth of the connection between text and culture and to appreciate that the Digest, for example, while it could be understood as existing in symbiosis with the society whence it had arisen (although even that claim proved controversial on account of the artificial character of Justinian's compilation since the Digest did not embody a corpus of law that had ever been practised in Rome), it clearly did not meet the conditions of contemporary French society. The re-capture of the ancient text thus deprived it of any relevance for modern life by correlating it to a different world that had long died.¹²⁹ In the words of George Huppert, '[a]ll law was the product of history, of history and of nothing else. It was, therefore, always different and always unique, at all times a mirror held up to society'.¹³⁰ To quote from François Baudouin, a leading sixteenth-century French historian, specifically referring to the Digest: 'Who will deny that these fragments must be estimated first of all in terms of their origin and circumstances and that their understanding depends primarily on this?'¹³¹ Consider Pocock's assessment:

[I]n the name of pure scholarship [Renaissance jurists were] in effect denying European civilization the use of one of the principal canons by which she was accustomed to guide herself. That civilization had been shaped, in large measure, by the traditional interpretation of certain authoritative documents. In the name of a more accurate interpretation, a historical interpretation had been formulated; and in the name of historical interpretation, the relevance of the past to the present was apparently being denied.¹³²

128 Eg: P Stein, 'Justinian's Compilation: Classical Legacy and Legal Source' (1993) 8 Tulane Euro & Civil L Forum 1, 8–9: '[O]ne text discusses the liability of the tenant of a house whose slave falls asleep at the furnace, with the result that the house is burnt down (D.9.2.27.9). The problem arises from the fact that normally liability is based on doing something wrong, whereas in this case the damage arose from an omission. The traditional text began with the words, "*si fornicarius servus coloni ad fornacem obdormisset*", which implied that the slave had fallen asleep because of exhaustion from his sexual activities. The Humanists observed that the original text must have read *fornacarius* ... instead of *fornicarius* ..., i.e., the slave who fell asleep was a slave-stoker, assigned *ad fornacem*, to look after the furnace.'

129 See Pocock (n 124) 4.

130 Huppert (n 56) 153.

131 F Balduini [Baudouin], *De institutione historiae universae et ejus cum jurisprudentia conjunctione* (Wechelum [Wechel] 1561) 127.

132 Pocock (n 124) 11.

What was left? The answer given by French jurists to the search for an alternative theoretical memory revolved around the notion of French law understood as custom, which was regarded as ‘appropriate to the state of France in a way that the written law of Constantinople can never be’.¹³³ Guy Coquille was clear: ‘[O]ur customs are our true civil law.’¹³⁴ The desire to root national law into national institutions is also apparent from Baudouin’s:

If we are Frenchmen, or Britons, or Germans, or Spaniards, or Italians, and if we are to be able to speak of what is ours, it is necessary that we do not ignore the history of the Franks, Angles, Saxons, Goths, and Lombards.¹³⁵

The flourishing romanticism translating itself into the propagation of myths of origins easily accommodated custom. In fact, the immemorial custom was surrounded by the aura of mysticism that befits the source of authority.¹³⁶ But it was soon claimed that the diverse French customs ought to be written and, moreover, that they ought to be unified.

Du Moulin’s argument in this regard is well known. In 1546, he published his *Oratio, concordia et unione consuetudinum Franciae*, where he proved nothing short of emphatic: ‘Indeed there is nothing more useful and desirable for the entire commonwealth than the reduction of the highly diffuse and often most ineptly varying customs of this kingdom to a single, perfectly clear, and fully equitable consonance.’¹³⁷ To Du Moulin, whose antagonism to Rome meant that the ‘ultimate goal was establishing the legal independence – and the historical individuality – of the French monarchy’,¹³⁸ it was the case that ‘any disparagement of the cultural or institutional integrity of France ... was at once an act of aggression and a violation of history’.¹³⁹ As the idea of their redaction made headway, customs became subject to royal authority; indeed, they could only be recognized if they had previously been sanctioned by the king. While the first royal ordinance calling for the writing of customs was adopted in 1453 in Montils-les-Tours,¹⁴⁰ the process did not seriously begin until 1506 under Louis XII because the barons (or *seigneurs*), whose power the writing of customs would effectively curtail, remained too strong.¹⁴¹

133 *ibid* 14.

134 G Coquille, *Institution au droit des francois* (L’Angelier 1608† [1595]) 28.

135 Baudouin (n 131) 37.

136 See Pocock (n 124) 19.

137 [C Du Moulin], ‘Oratio, de concordia et unione consuetudinum Franciae’ in *Tractatus contractum et usurarum redituumque pecunia constitutorum* (D’Arsy 1572 [1546]) [809].

138 Kelley (n 64) 390.

139 *ibid* 392.

140 See ‘Ordonnances ou Etablissemens pour la réformation de la justice’ [Montilz-les-Tours, April 1453] in [F-A] Isambert, *Recueil général des anciennes lois françaises*, vol 9 (Plon) art 125, 252–53.

141 See ‘Ordonnance pour la révision et la publication des coutumes rédigées sous Charles VIII’ [Montilz-les-Tours, 28 May 1506] in [F-A] Isambert, *Recueil général*

From 1514 to 1539, François I enacted a series of ordinances with respect to the writing of customs, which makes the passage from orality to literacy very much a sixteenth-century phenomenon.¹⁴² As royal ordinances became more common, they were collated and systematized, thus further contributing to the king's assertion of authority.¹⁴³ The tension between the standardization of form resulting from customs being systematically put in writing over a period of time and the particularism of substance (that is, the retention by local customs of their often distinctive substantive features) appears, for example, from Du Moulin's compilation.¹⁴⁴ In other words, the fact that customs were now being subjected to a common formal treatment did not prevent them from remaining local law-texts and thus particularized law-texts. But the form/substance dichotomy suggests an unduly simplistic differentiation, for wherever it has taken place the statutory writing of customs has operated, at the substantive level itself, in a paradoxical way: it has fostered both a preservation and a perversion of customary discourse.

It is certain that the advent of the statute enshrined the survival of customs – their *living on* – even more powerfully than any private writings had been able to accomplish when they had succeeded oral traditions. But the phenomenon of nationalization that accompanied 'statutorization' marked an aspiration towards homogeneity and entailed that custom was to be severed from its regional roots. It would henceforth become freely modifiable and revocable by the king, a point that did not escape Montesquieu.¹⁴⁵ A decentralized and proteiform law was thus progressively replaced by the unique formulation of a sovereign will imposing itself hierarchically to all other law-producing agents.¹⁴⁶ CK Allen's 'two antithetic conceptions of the growth of law' are

des anciennes lois françaises, vol 11 (Belin-Leprieur 1827) 457. See also 'Lettres ordonnant la révision et l'approbation des coutumes du royaume' [Paris, 21 January 1510] in [F-A] Isambert, *Recueil général des anciennes lois françaises*, vol 11 (Belin-Leprieur 1827) 609.

142 See [F-A] Isambert, *Recueil général des anciennes lois françaises*, vol 11 (Belin-Leprieur 1827) 457 n 2. It is worth underlining that, although the writing and publication of French customs occurred for the most part in the sixteenth century (see JP Dawson, 'The Codification of the French Customs' [1960] 38 Michigan LR 765), there is at least one example of a custom being written as late as 1788. See J Coudert, 'La dernière rédaction de coutume avant la Révolution: la difficile réformation des usages de Hattonchâtel (1784–1788)' (1989) 67 *Revue historique de droit français et étranger* 237.

143 Eg: [B Brisson], *Code du roy Henry III Roy de France et de Pologne* (Nivelle 1587).

144 See *Les Costumes generales et particulieres de France et des Gaules, corrigees et annotees de plusieurs Decisions, Arrests & autres choses notables, diligemment & fidellement par M Charles du Moulin Advocat en la Cour du Parlement, & autres Jurisconsultes*, 2 vols (Houzé 1604 [1581]).

145 See Montesquieu, *De l'esprit des lois* in *Œuvres complètes*, vol 2 (R. Caillois ed, Gallimard 1951 [1748]) bk 28, ch 45, 862–65.

146 In this regard, Jean Bodin (1530–96) proved a leading scholarly figure. See JH Franklin, *Jean Bodin and the Rise of Absolutist Theory* (Cambridge University Press 1973). I return to Bodin at some length *infra* 42–57.

here clearly apparent: on one hand, as is the case with customs before they metamorphose into written law, 'law is spontaneous, growing *upwards*, independently of any dominant will'; on the other, in contrast to this Hayekian image, customs having been transmuted into *jus scriptum* establish how 'law is artificial: the picture is that of an omnipotent authority standing high above society, and issuing *downwards* its behests'.¹⁴⁷

The movement in favour of the writing of customs did not mean that the French no longer harboured any interest whatsoever for Roman law. Rather, the Roman model preserved an appeal as it came progressively to be seen as a legal system that, like others, could supply ideas of value against the backdrop of the society in which the law in force had then materialized.¹⁴⁸ Pasquier's account is representative: 'We do not recognize at all the law of the Romans save from time to time inasmuch as their laws conform to a common sense from which we can make our profit.'¹⁴⁹ Clearly, though, the assertion of the prevalence of French law, or of French custom, was the result of a break with the intellectual authority of Rome, which in turn involved a specification of the differences between Roman law and Roman society, on one hand, and between French law and French society, on the other. If you will, attempts to clarify a Roman practice were made by contrasting it with its French counterpart and vice versa. In Pasquier's *Recherches*, for example, French civilization is defined throughout the book by contrast with the Roman configuration. The differences between France and Rome effectively stand as the basis of the author's comparative enterprise, and these distinctions repeatedly earn his praise.¹⁵⁰ For Pasquier, the diversity of laws arose from the diversity of mores, which itself emerged between peoples according to the diversity of regions. In the same way as a physician would change his medication according to the age and 'complexion' of his patients, legislators acted with reference to the different peoples they governed.¹⁵¹ Pasquier adds that given such variety, a primordial rule applied: no matter how much diversity there is between laws,

147 CK Allen, *Law in the Making* (7th edn, Oxford University Press 1964) 1.

148 See Franklin (n 125) 27. Adde: *ibid* 39.

149 Letter from E Pasquier to [B] Brisson in *Les Lettres d'Estienne Pasquier* in *Les Œuvres d'Estienne Pasquier*, vol 2 (Compagnie des libraires associez 1723) bk 9, 225. This letter was written to Brisson as president of the *parlement* of Paris, the then Paris court of appeal. Brisson held this post from 1588 until his death (by hanging) in 1591.

150 See Huppert (n 56) 65–66.

151 Letter from E Pasquier to L'Eschacier in *Les Lettres d'Estienne Pasquier* in *Les Œuvres d'Estienne Pasquier*, vol 2 (Compagnie des libraires associez 1723) bk 19, 554: 'The diversity of laws comes from the diversity of morals, that arise between peoples according to the diversity of Regions, & of the air: ... as the Physician changes remedies, in regard to the lands, to the ages, to the complexions of his patients; also the similar do the wise legislators towards the peoples they govern; giving prudently very much through their laws, to the character of the places they propose to govern.' L'Eschacier was a Paris lawyer.

one must live according to the law of one's country.¹⁵² In other words, Pasquier's relativism heralds a keen willingness to resolve the many discrepancies coming to light between Roman and French laws in favour of French customary law.¹⁵³

This nationalist turn had begun in earnest with Guillaume Budé in the form of a deliberate engagement in a comparative venture through the 'almost compulsiv[e] ma[king] [of] parallels between ancient institutions and those of modern France'.¹⁵⁴ In the process, Budé lay great emphasis on the peculiarities of Roman law while showing, on the whole, 'a greater interest in French institutions than in their ancient counterparts'.¹⁵⁵ Drawing his inspiration from a handful of fifteenth-century Italian jurists like Crinito, Poliziano, and, above all, Lorenzo Valla, who had rebelled against the ancient ways,¹⁵⁶ Budé, like his colleague Andrea Alciato, a young Milanese jurist who had come to the university of Bourges in 1529, attempted to establish how regrettable it was that French law was so deeply rooted into Roman law even as it boasted its own original customs and mores, a fact that must lead French jurists to undertake a separation from ancient legal culture and orient their treatises towards the recuperation of the origins of French history with a view to offering the French king rewarding lessons for the future. For Budé, Justinian's compilation (which he regarded as clumsily massive) had to be seen to include many texts specific to Roman/Byzantine conditions, and the Digest had therefore to be taken to correspond to specific and contingent historical circumstances – hence, the need for French jurists to undertake a keen actualization of their legal culture.¹⁵⁷

Eguinaire Baron, François Le Douaren, François de Connan, Hughes Doneau, and Baudouin were amongst the leading French jurists who would follow in Budé's footsteps in 'question[ing] whether it was really appropriate to try to apply Roman law at all to contemporary problems'.¹⁵⁸ Even Rabelais would mock the Bartolist way 'that is style of a chimney-sweeper or of a cook

152 *ibid.*: '[I]n the midst of so much variety, I do not see a rule that must be more inviolably observed, than this one: that is to say, that whatever diversity of laws there be, one must live according to that of the country to which one has accustomed oneself.'

153 For an excellent treatment of this question, see J-L Thireau, 'Le comparatisme et la naissance du droit français' (1990) 10–11 *Revue d'histoire des facultés de droit et de la science juridique* 153. See also J-L Thireau, 'L'avènement de la comparaison des droits en France' in P Legrand (ed), *Comparer les droits, résolument* (Presses Universitaires de France 2009) 597–618. There is a reference to Pasquier's relativism in Schilling (n 63) 23.

154 DR Kelley, 'Guillaume Budé and the First Historical School of Law' (1967) 72 *Am Historical R* 807, 823.

155 *ibid.* 824.

156 Budé expressly acknowledged Valla's inspiration: see Budé, *Annotationes* (n 58) 39 and 43. For an assessment of Valla's work, see generally DR Kelley, *Foundations of Modern Historical Scholarship* (Columbia University Press 1970) 19–50.

157 See generally DJ Osler, 'Budaeus and Roman Law' (1985) 13 *Ius commune* 195.

158 I quote from Stein (n 128) 9.

and scullion, not juriscult’.¹⁵⁹ According to Rabelais, Bartolus and his disciples would readily produce ‘silly and unreasonable reasons and inept opinions’.¹⁶⁰ François Hotman repeated Budé’s charge against the literal application of Roman law in France in his *Antitribonian*, published posthumously.¹⁶¹ Referring to ‘the great & enormous diversity that is in the condition of our France & that of the Romans’,¹⁶² he concluded that ‘one sees clearly the little utility that inures to our youth from the study of the books of Justinian’.¹⁶³ Since ‘the cognizance of the Roman state cannot serve for the government of France, the form of the two republics not being at all similar’,¹⁶⁴ Hotman held that ‘those who recommend to us so affectionately the study of the books of Justinian as a fountain of all political science seem (to speak of it naively) to present us for drinking, water from a fountain quite murky’.¹⁶⁵ For Hotman, Roman law was simply the law of the Roman people.

To return to Budé, his ambition was thus to institute a new approach to the legal past of his country and construct French legal culture as being more autonomous from Roman law than it had heretofore been re-presented to be – which is not to say that he ‘sounded the “death knell” of Roman law as a “living law”’.¹⁶⁶ Budé based his historical work on the fact of the otherness of Roman law, which he would study in order better to foster, by contrast, the emergence of French customs. While, in his celebrated study of Roman coinage, Budé had acknowledged the supremacy of Italian scholarship over all other peoples (*Italia omnium gentium magistra*),¹⁶⁷ he was now determined to establish the literary credentials of the French. To that end, he claimed a tradition going back to the Gauls, expressly arguing that ‘once, the Gauls were capable in letters’ (*olim Galli literis apti fuerunt*).¹⁶⁸ Moreover, Budé was scathing towards those who, in their fondness for Roman antiquity, neglected their own heritage – individuals whom he stigmatized as ‘*gallomastiges*’, ‘*Francomastiges*’, or ‘*misopatrides*’.¹⁶⁹ To be sure, the challenge to the habitual ways was serious for

159 Rabelais, *Pantagruel* in *Œuvres complètes* (J Boulenger ed, Gallimard 1955 [1532]) ch 10, 216.

160 *ibid.*

161 See [F Hotman], *Antitribonian ou Discours d’un grand et renommé jurisculte de notre temps sur l’étude des loix* (Perier 1603† [1567]).

162 *ibid.*, ch 3, 13.

163 *ibid.*, ch 3, 21.

164 *ibid.*

165 *ibid.*, ch 13, 107.

166 JW Cairns, ‘Introduction’ in PJ du Plessis and JW Cairns (eds), *Reassessing Legal Humanism and Its Claims* (Edinburgh University Press 2016) 6.

167 [G Budé], *De Asse et partibus ejus* (1527 [1514]) fol 177b.

168 *ibid.*, fol 19a.

169 *ibid.*, fol 18b, 140a, and 177b. The first two epithets offer a variation on ‘rascals’ from the Latin ‘*mastigia*’, while the third term is derived from the Greek ‘*misein*’, ‘to hate’. On Budé’s patriotism, see generally Delaruelle (n 58) 120–26. On the measure of Budé’s anti-Italianism in his *De asse*, see *ibid.* 160–66.

the imprint of Antiquity on France ran deep. Indeed, Montaigne would later exclaim: 'I had knowledge of the matters of Rome, long before I had it of those of my home. I knew about the Capitol and its grounds, before I knew the Louvre: and the Tiber before the Seine.'¹⁷⁰ For his part, Pasquier suggested an anthropological interpretation of both societies as he emphasized different conceptions of law and state. He sought to grasp a civilization by way of its manifestations and its needs – and through that framework, to stress intrinsic difference between Roman and French laws.¹⁷¹ Insisting that Roman and French circumstances were peculiar to each people,¹⁷² Pasquier observed that the Romans appeared to have established their laws according to economic concerns aiming to promote the value of individualism, while French law featured measures based on political considerations that were destined to favour the family.¹⁷³

The fight for 'French truth',¹⁷⁴ cast in terms of the 'geographical, cultural, and historical variables of human behavior',¹⁷⁵ involved the formation of a collective memory entailing a renewal of the vision that French society had of its own past.¹⁷⁶ One ambition was to show that the difference then being extolled had always been perceived. Pasquier, for example, argued that the study of Roman law had forever been a questionable endeavour for the French as they had always been afraid that through these investigations, the French people would fall victim to foreign ascendancy: 'I will tell you that moreover from the beginning the study of the law of the Romans was suspect to us, fearing that by its means one subjugate the Frenchman under a foreign domination.'¹⁷⁷ In a series of texts, meanwhile, the eminent jurist Loys (or Louis) Le Caron (self-styled Charondas) insisted on the significance of local knowledge as he proceeded to praise French law in contradistinction to Roman law.¹⁷⁸ In the spirit of Budé, Le Caron recognized that 'the dissemblance and diversity of human actions & inconstancy of things cannot bear a single constitution & always similar'.¹⁷⁹ He thus inscribed his 'desire that according

170 Montaigne, *Les Essais* (J Balsamo et al eds, Gallimard 2007 [1595†]) bk 3, ch 9, 1042.

171 See C Vivanti, 'Les Recherches de la France d'Etienne Pasquier' in P Nora (ed), *Les Lieux de mémoire*, vol 2(1) (Gallimard 1986) 228.

172 E Pasquier, *Le Second livre des recherches de la France* (Trepperel 1567) fol 110b: 'The Romans had their peculiar considerations, also our Frenchmen had theirs.'

173 Pasquier (n 149): '[O]n two diverse foundations, the Roman & the Frenchman seem to have established their laws; that one on a consideration more economic for the preservation of the wills of everyone in one's individuality; this one on a more political, for the sustenance of families in their entirety.'

174 DR Kelley, *François Hotman* (Princeton University Press 1973) 332.

175 Kelley (n 127) 195.

176 See Vivanti (n 171) 222.

177 Pasquier (n 69) bk 9, ch 37, 891. This chapter is a posthumous addition to the book. See *ibid* fol iiib.

178 Eg: L Charondas le Caron, *Responses du droit françois, confirmées par arrests des Cours souveraines de France, & rapportées aux loix Romaines* (Norment 1579); L Charondas le Caron, *Memorables observations du droit françois, rapporté au romain, civil et canonic* (Morel 1604).

179 L Le Caron, *Les Dialogues* (Longis 1556) 22.

to the diverse circumstances the law similarly be changed'.¹⁸⁰ Noting how 'it is suitable so as to understand French judicial decisions well, to conjoin Roman law with that of France',¹⁸¹ Le Caron vindicated Pierre Belon's observation that 'one must search for the truth of things unknown through those one knows'.¹⁸² Other authors likewise engaged in the exercise of comparison by way of contrapuntal observations – that is, by practising differential comparatism. As they outlined Roman law, they proceeded to name the characteristics of French law and insisted on the ways in which the law of France differed from that of Rome.¹⁸³ Given that, as one French jurist underlined, 'Justinian has never set foot in France with [his] army',¹⁸⁴ such differences ought not to be cause for surprise. Hence, Pasquier's observation concerning 'the Civil Law of the Romans, which from the beginning was to us Alien'.¹⁸⁵

One of the most influential applications of Budé's ideas is to be found in Jean Bodin's work, particularly in his 1566 *Methodus* and 1576 *Six Livres de la République*,¹⁸⁶ but also in the lesser-known *Juris universi distributio* of 1578.¹⁸⁷

180 *ibid.*

181 L. Charondas Le Caron, 'Epistre' in *Pandectes ou Digeste du droit françois* (Veyrat 1596). This proem is dated 1587.

182 Belon (n 91) fol 3b.

183 Eg: J Duret, *L'Harmonie et conference des magistrats Romains avec les officiers François, tant laiz, que Ecclesiastiques* (Rigaud 1574); [P] Ayrault, *De l'ordre et instruction judiciaire, dont les Anciens Grecs & Romains ont usé en accusations publiques* (Du Puits 1576); E Pasquier, *L'Interprétation des Institutes de Justinian* ([C] Giraud ed, Videcoq 1847 [c 1609]). On the original date of publication of Pasquier's text, see [C] Giraud, 'Introduction: notice sur Étienne Pasquier' in E Pasquier, *L'Interprétation des Institutes de Justinian* ([C] Giraud ed, Videcoq 1847 [c 1609]) xcvi.

184 B Automne, *La Conférence du droit françois avec le droit romain, civil et canon*, vol 1 (4th edn, Chastelain 1644) 2.

185 Pasquier (n 69) bk 9, ch 33, 879. This chapter is a posthumous addition to the book. See *ibid.*, fol iiib.

186 See [J Bodin], *Methodus, ad facilem historiarum cognitionem* in *Œuvres philosophiques de Jean Bodin* (P Mesnard ed and tr from Latin, Presses Universitaires de France 1951 [1566]) [hereinafter *Methodus*]; J Bodin, *Les Six Livres de la République* (Du Puits 1576) [hereinafter *Six Livres*]. All my references to the *Methodus* are to Mesnard's authoritative French translation. For an interesting argument to the effect that Bodin's decision to write the *Six Livres* in French had much to do with the 1539 royal Ordinance of Villers-Cotterêts making French the only language of the law, see O Keohane, 'Bodin on Sovereignty: Taking Exception to Translation?' (2015) 38 Paragraph 245. There were ten editions of the *Methodus* in Bodin's lifetime and twenty-four of the *Six Livres*, including five Latin translations as of 1586.

187 See J Bodin, *Exposé du droit universel* (Latin-French edn, L Jerphagnon tr, Presses Universitaires de France 1985 [1578]) [hereinafter *Exposé*]. All my references to the *Juris universi* are to Lucien Jerphagnon's authoritative French translation. It is known that this work had already been conceived in 1566, because Bodin describes its structure at some length in the foreword to the *Methodus*. See [J Bodin], 'Épître dédicatoire' in *Methodus* (n 186) 274. For a thorough discussion of the *Exposé*, see S Goyard-Fabre, 'Commentaire philosophique' in J Bodin, *Exposé*, 83–170.

These three texts reveal ‘a very early and permanent commitment to the deepest problems of the *mos docendi Gallicus*’.¹⁸⁸ Also, they show how ‘[p]olitical and social thought was now more heavily oriented towards historical examples and comparisons than in any period of classical antiquity’.¹⁸⁹ Regarded even in his day as ‘one of the most exceptional minds of his century’,¹⁹⁰ and more recently as ‘the Max Weber of his time’,¹⁹¹ Bodin was a polymath who knew history, geography, philosophy, mathematics, astronomy, not to mention philosophy of history and political economy. He was also at ease with the natural sciences, notably physics, natural history, and medicine. He practised numismatics and diplomacy. He could use source material in Latin, Hebrew, Greek, Italian, Spanish, and German. Despite its long title suggesting otherwise, the *Methodus*, said by French Chancellor d’Aguesseau, an erudite eighteenth-century French jurist and politician, to be the best of all books written on the reading of history,¹⁹² is more about law than history.¹⁹³

188 Franklin (n 125) 60. Indeed, Bodin’s fidelity to Budé and his world manifests itself even earlier than Franklin suggests. In his very first published work, a Latin translation of Oppian’s third-century treatise on hunting, Bodin thus peppered his accompanying commentary with references to Budé’s *Annotationes*. See generally [J Bodin], *Oppiani De venatione libri IIII* (Vascosanum [Vascosan] 1555).

189 Franklin (n 125) 84. See also CI Smith, ‘Jean Bodin and Comparative Law’ (1964) 25 *J History of Ideas* 417; P Mesnard, ‘Jean Bodin fait de l’histoire comparée la base des sciences humaines’ (1966) 3 *Organon* 181. For general observations on sixteenth-century thought and its focus on history and comparison, see E Fournol, ‘Sur quelques traités de droit public du XVI^e siècle’ (1897) 21 *Nouvelle revue historique de droit français et étranger* 298.

190 S de Sainte-Marthe, *Eloges des hommes illustres, qui depuis un siecle ont fleury en France dans la profession des Lettres* (G Colletet tr from Latin, De Sommaville 1644 [1596]) 447.

191 Huppert (n 56) 105. See also [F] de la Croix du Maine, *La Bibliothèque... Qui est un catalogue general de toutes sortes d’Auteurs, qui ont escrit en françois depuis cinq cent ans & plus, jusques à ce jourd’huy* (L’Angelier 1584) 205, where the entry on ‘Jean Bodin’ describes him as a ‘man very learned in languages, well-versed in all sorts of histories’; H Baudrillart, *J Bodin et son temps: tableau des théories politiques et des idées économiques au seizième siècle* (De Guillaumin 1853) 16, where the author calls Bodin ‘the highest and most complete representative of political science in that era’. More recently, Bodin has also been termed ‘[the] greatest of French political philosophers’: B Barret-Kriegel, *Les Chemins de l’Etat* (Calmann-Lévy 1986) 35.

192 See [HF] D’Aguesseau, ‘Instructions sur les études propres à former un magistrat: Deuxième instruction’ in *Œuvres de d’Aguesseau*, vol 2 (Chaix 1865 [1716]) 113. For Huppert, the *Methodus* is ‘an example of the most daring thinking of the time’: Huppert (n 56) 106.

193 cf [H de] La Popelinière, ‘Premier livre de l’idée de l’histoire accomplie’ in *L’Histoire des histoires, avec l’idée de l’histoire accomplie; Plus Le Dessein de l’Histoire nouvelle des François* (Orry 1599) 29, where the author observes that Bodin applied himself to the writing of ‘a Method of a law’. Julien Freund underlines that the idea of ‘*methodus*’ is not to be understood in the current meaning of orderly steps with a view to reaching a definite goal, but rather in the now obsolete sense of a mode of classification of essential themes under determined headings. It is clear that Bodin is not writing a text on how to do historical research or how to narrate

For Bodin ‘history is registration of the variations of the law’.¹⁹⁴ This abiding interest for law finds its explanation in the fact that in the 1540s Bodin had been a law student in Toulouse, where he had trained in the *mos gallicus*. Many years later, after he had himself taught at the Toulouse law faculty and practised at the Paris bar,¹⁹⁵ it is this ‘increase [in] the sense of historical distance’ between the ancient texts and their sixteenth-century interpreters that he would transport beyond the confines of Roman-law studies to a wide range of other laws.¹⁹⁶ Although, as I noted, Bodin primarily sought to address the issues being canvassed and debated within the *mos gallicus*, his allegiance to the French approach was not unconditional. By the 1560s, as he was engaged in the writing of his *Methodus*, he had come to resent the historicist and antiquarian tendencies that he perceived in the proponents of the *mos gallicus*, whom he thought were obsessed with philological niceties (hence, his attack on Cujas in the foreword to the *Methodus* in 1566 and again in the preface to the *Six Livres*, ten years later). Although he took the view that Roman laws had been enacted by specific individuals at a specific time in order to address specific needs, and thus as easily resisting any attribution of a universal destiny, Bodin also maintained that the Roman model was far from being dead, useless, or unimportant.¹⁹⁷

history. If you will, his focus is not on the *métier d'historien*. Rather Bodin’s standpoint is that of a reader of historical texts, who can be baffled by the disorder within the discipline or disconcerted by the dispersion and multitude of writings and their disparate contents. Reading historians in the leisure given him by his practice at the bar, Bodin overcame his disarray by forging a general view of history for himself, and it is his approach that he wanted to share with his contemporaries. His aim was to give those interested in history a global view, ordered and synthetic, so as to facilitate their enhanced knowledge of the discipline. Indeed, the title of the book makes use of the formulation ‘*ad facilem ... cognitionem*’. See generally J Freund, ‘Quelques aperçus sur la conception de l’histoire de Jean Bodin’ in H Denzer (ed), *Jean Bodin: Verhandlungen der internationalen Bodin Tagung in München* (Beck 1973) 105–7. As Bodin himself wrote, ‘the variety and the complexity of human matters is so great, so great the abundance and the mass of narratives, that if historical facts and human affairs are not distributed over well-established classes it will be impossible to understand anything to history or to keep for a long time its memory’: Bodin, *Methodus* (n 186) 287. See generally M-D Couzinet, *Histoire et méthode à la Renaissance: une lecture de la Methodus de Jean Bodin* (Vrin 2000); JL Brown, *The Methodus ad facilem historiarum cognitionem of Jean Bodin: A Critical Study* (Catholic University of America Press 1939); M-D Couzinet, ‘On Bodin’s Method’ in HA Lloyd (ed), *The Reception of Bodin* (Brill 2013) 39–65.

194 Dubois (n 112) 22.

195 For a thorough biographical investigation, see HA Lloyd, *Jean Bodin* (Oxford University Press 2017). For a detailed bibliography of Bodin’s work, see *ibid* 265–66.

196 Q Skinner, *The Foundations of Modern Political Thought*, vol 1 (Cambridge University Press 1978) 207.

197 It is on account of Bodin’s refusal to deny all sixteenth-century pertinence to Roman law that Pocock locates him within ‘neo-Bartolism’: Pocock (n 124) 22–25.

Before I return to his argument that Roman law had not become irrelevant in post-classical society, I want to emphasize how Bodin was concerned to range beyond Rome and pursue a more extensive study of the customs of peoples in the most famous kingdoms and republics, a research endeavour that he wanted to be deeply humanistic. In this regard, Bodin's lamentation was explicit:

[I]f most people admire the variety of the lands, of their fauna and of their flora, the ruins of the monuments and of the pyramids, the gnawed monies of the Ancients, they do not on the contrary make any case of the law of the peoples they visit, of their constitutions and of their revolutions, the only elements capable of inculcating into them the firm wisdom required for the government of the city.¹⁹⁸

According to Bodin, it was necessary 'to supply an inductively grounded account of all the variables which, although beyond human control, can be shown to affect the destiny of commonwealths, and are thus "of great weight and importance for the appraisal of legislation"'.¹⁹⁹ In this key sense, Bodin was breaking with the Italian tradition that had defended the preeminence of antique values and immersing himself within the social and political events of his day. Because his assumptions must depend on the collection and arrangement of an important quantity of data, Bodin, proceeding armed with the fundamental premiss that 'human affairs ... are varied and changing',²⁰⁰ engaged in an extensive geographical inquiry that was designed to allow him 'to elucidate the *differences* that distinguish the peoples between them'.²⁰¹ Making specific reference to the peoples' laws, 'Bodin [was] eminently sensitive to the differences that geography and history reveal[ed] to him through the thousand quaint narratives he [had] read'.²⁰²

Despite his insistence on the singularity of the Roman legal experience and his express statement to the effect that he wished to move away 'from those who have only dispersed here and there the limbs extracted and lacerated from Roman law',²⁰³ Bodin never completely abandoned the concepts and

198 Bodin, *Methodus* (n 186) 295.

199 Skinner (n 196) vol 2, 292. At the end of this quotation, Quentin Skinner refers to Bodin's dedication ('*Épître dédicatoire*') to the *Methodus*. See Bodin, *Methodus* (n 186) 276, where the author writes, regarding the consideration of these 'variables' (Skinner's word), that this information is 'so important for the appreciation of the laws'.

200 Bodin, *Methodus* (n 186) 335. See generally Bodin, *Six Livres* (n 186) bk 5, ch 1, 516–43.

201 [J Céard], 'Rome dans la "Méthode de l'histoire" de Jean Bodin' in Association Guillaume Budé, *Actes du IX^e Congrès*, vol 2 (Les Belles Lettres 1975) 765 [my emphasis].

202 S Goyard-Fabre, *Jean Bodin et le droit de la république* (Presses Universitaires de France 1989) 181.

203 Bodin, *Exposé* (n 187) 9.

categories that Roman doctrine and Roman law had elaborated.²⁰⁴ As regards Rome and indeed other centres of Antiquity, he sought to operate by way of examples, and he thus committed himself to a massive excavatorial effort.²⁰⁵ For instance, in his 1596 *Universae naturae theatrum*,²⁰⁶ he referred to humanists, jurists, historians, travellers, mathematicians, astronomers, theologians, and physicians; and he cited Arab, Hebrew, Greek, and Roman thinkers.²⁰⁷ It could be said that Bodin's work was therefore based on discontinuity, on rupture; in effect, he promoted an aesthetics of detail that proceeded both diachronically (the difference between past and present laws) and synchronically (the difference between laws in co-presence). In this latter regard, Bodin's conviction was that 'one must diversify the state of the Republic [according] to the diversity of locations: [after] the example of the good architect, who accommodates his building to the matter that he finds on location'.²⁰⁸

The illustrations that Bodin collected were deliberately meant to show oppositions and antinomies. And it is through these contrasts, which were presented at length over many pages, that Bodin felt able to define the singularity of peoples vis-à-vis one another with respect to their 'ways of thinking',²⁰⁹ that is, beyond mere numerical (and rudimentary) information. In the proem to the *Methodus*, Bodin thus noted how history reveals 'that element so important for the appreciation of the laws, that is, the mores of the peoples'.²¹⁰ Remarking on how Bodin had conducted 'a discrimination of the basic differences in constitutions in order to compare them and

204 See MP Gilmore, *Argument from Roman Law in Political Thought 1200–1600* (Harvard University Press 1941) 93 and 130–31; R Chauviré, *Jean Bodin: auteur de la 'République'* (Champion 1914) 106. See also W Wolodkiewicz, 'Bodin et le droit privé romain' in *Jean Bodin: actes du colloque interdisciplinaire d'Angers*, vol 1 (Presses de l'Université d'Angers 1985) 319, where the author asserts that 'in the final analysis [Roman law is] treated [by Bodin] as a genuine *ratio scripta*'. cf [A] Stegmann, 'L'apport antique dans la réflexion de Bodin sur l'Etat' in Association Guillaume Budé, *Actes du IXe Congrès*, vol 2 (Les Belles Lettres 1975) 741, where the author writes that for Bodin, Roman law was a 'reference point, not [a] rule'. It rapidly becomes difficult therefore to understand the statement that Bodin elected 'to break absolutely with the Romanist tradition': J Moreau-Reibel, *Jean Bodin et le droit public comparé* (Vrin 1933) 29.

205 cf Desan (n 80) 169, where the author presents Bodin as an 'archaeologist of history'.

206 See J Bodin, *Le Theatre de la nature universelle* (F de Fougerolles tr from Latin, Pillehotte 1597) [hereinafter *Theatre*]. This text, which consists of a dialogue between master, 'Mystagogue', and disciple, 'Theorus', initially appeared as *Universae naturae theatrum* in 1596. All my references to the *Theatre* are to Fougerolles's authoritative French translation. See generally A Blair, *The Theater of Nature: Jean Bodin and Renaissance Science* (Princeton University Press 1997).

207 See F Berriot, 'Le Théâtre de la nature universelle ou le tableau du monde' in Y-C Zarka (ed), *Jean Bodin: nature, histoire, droit et politique* (Presses Universitaires de France 1996) 4–5.

208 Bodin, *Six Livres* (n 186) bk 5, ch 1, 518.

209 Goyard-Fabre (n 202) 67.

210 Bodin, *Methodus* (n 186) 276.

determine which is best',²¹¹ Julian Franklin emphasizes how his 'process of comparison' then stood as a 'far-reaching innovation'.²¹² For Bodin, said Franklin, 'the advantages and disadvantages of the different types of constitutional arrangements, and of the forms of state especially, are weighed as systematically as possible with a mass of historical examples the scope of which is almost as extensive'.²¹³ Franklin adds that '[t]he outcome, therefore, is a comprehensive system of comparative constitutional law, which is a major step in the beginning not only of this special branch, but of comparative jurisprudence generally'.²¹⁴ For Franklin, Bodin's was 'a sociological theory of legal differences which is a clear anticipation of Montesquieu's historical empiricism'.²¹⁵ Appositely, Bodin has been cast as '[a] ... representative of relativist comparatism'.²¹⁶

According to Bodin's 'logic of difference',²¹⁷ an example is only interesting and meaningful as long as it contradicts another illustration. For Bodin, negative modelization is the best way of capturing 'truth'. In other words, history is only meaningful in its difference from other possible histories (observe that the original title of Bodin's *Methodus* refers to the plural '*historiarum*'). If you will, the 'truth' of a people is only constituted by what separates it from the 'truth' of other peoples. Each people harbours its own intrinsic logic, which can only be understood through its dissemblance from other anthropological configurations. One key explanation lies in mesological determinism.²¹⁸ Historian Quentin Skinner's appreciation of Bodin's survey reads thus:

211 Franklin (n 125) 74.

212 *ibid* 76.

213 *ibid* 76–77.

214 *ibid* 77.

215 *ibid* 78.

216 Schilling (n 63) 24. For a general discussion, see *ibid* 24–26.

217 Desan (n 80) 148.

218 I track *ibid* 147–48: 'Bodin is one of the first French historians of the Renaissance to devote oneself to a series of systematic comparisons between the different peoples and cultures – as well in diachronic and synchronic fashion. ... Bodin uses *contrary* examples better to bring to light what he wants to demonstrate. He constantly puts on the same plane the declarations of the Ancients and those of modern historians so as to extract the differences and to catalogue behaviours. Bodin even discerns in history what he calls a "rule of the contraries". The contraries are in this fashion exposed over many pages and serve to define the specificity of the peoples the ones *vis-à-vis* the others. According to such a logic of difference, the example becomes interesting and [a] carrier of meaning only inasmuch as it contradicts another example, and so forth. The negative aspect of the models represents the best way to bring out the truth. Bodin understands very well that history has significance only in its difference in relation to other possible histories. History is the result of a putting into shape of events. The notion of truth itself changes constantly according to the interpretation produced by the comparisons. Thus, the truth of meridional peoples constitutes itself only through what separates it from the truth of northern peoples; each people, each civilization, possesses its own intrinsic logic that one can appreciate only through its

[It] culminates in a study of climate as a cause of the varying customs, religions and social structures to be found in the three distinct climatic zones of the civilised world. It is sometimes claimed that the earliest systematic study of the influence of such natural causes was the achievement of Montesquieu But this overlooks the extent to which Montesquieu was in fact drawing on an existing tradition of analysis – a tradition which was already well-established at the time when Bodin was writing, and which Bodin went on to develop to a point of sophistication scarcely exceeded even by Montesquieu himself.²¹⁹

Crucially, beyond his concern for exemplification Bodin unceasingly harboured a ‘classificatory mentality’,²²⁰ which itself was influenced by Ramism, a revised (French) logic breaking with Aristotelianism and seeking to impart knowledge in simpler and more systematic form.²²¹ Now, for Bodin, the differences that he ascertained did not detract from the unity of universal history. Specifically, while denying *Romanitas* a universal purview, Bodin continued to harbour hope for the formulation of a universal law of sorts, which he sought to induce from the major laws he had studied. Even as he deployed oppositions at the transcultural level and worked within a hierarchy of organizational divisions, Bodin therefore moved to construct his universal system. For the universal order that Bodin promoted to rest

dissemblance vis-à-vis other anthropological truths.’ Meanwhile, I recall Douglas Hofstadter’s notion of ‘negative space’: D Hofstadter, *Gödel, Escher, Bach: An Eternal Golden Braid* (Basic Books 1979) 67.

- 219 Skinner (n 196) vol 2, 292. While famously associated with Montesquieu’s *De l’esprit des lois* – see Montesquieu (n 145) bk 14, ch 11, 484–85; ch 13, 486–87; ch 14, 487–88, ch 15, 489 – traces of ‘climate theory’ are apparent as far back as Plato’s *Laws*: Plato, *Laws* (M Schofield ed, T Griffith tr from Greek, Cambridge University Press 2016 [c 348 BCE]) s 782a, 238. For a general assessment of Bodin’s theory, see MJ Tooley, ‘Bodin and the Mediaeval Theory of Climate’ (1963) 28 *Speculum* 64; Baudrillart (n 191) 413–48; [E] Fournol, *Bodin prédécesseur de Montesquieu* (Rousseau 1896) 117–44; Goyard-Fabre (n 202) 187–98. For Bodin’s own statement, see Bodin, *Methodus* (n 186) 313–45. Not everyone was convinced. Eg: Letter from E Pasquier to the Chevalier de Montreau in *Les Lettres d’Estienne Pasquier* in *Les Œuvres d’Estienne Pasquier*, vol 2 (Compagnie des libraires associez 1723 [1554]) bk 1, 9: ‘Remove I beseech you from your head this crazy persuasion, that the temperance of the skies makes people more or less learned.’ For a general discussion of climate theory in sixteenth-century thought, see F Lestringant, *Ecrire le monde à la Renaissance* (Paradigme 1993) 255–75.
- 220 G Cotroneo, ‘Il senso della storia nella “Methodus” di Jean Bodin’ (1964) 1 *Rivista di studi crociani* 296, 302.
- 221 KD McRae, ‘Ramist Tendencies in the Thought of Jean Bodin’ (1955) 16 *J History of Ideas* 306; KD McRae, ‘A Postscript on Bodin’s Connections with Ramism’ (1963) 24 *J History of Ideas* 569. In the ‘Postscript’, Kenneth McRae reports on the discovery in Oxford’s Bodleian Library of a book from Bodin’s own collection binding together various texts by Omer Talon, Ramus’s premier disciple, a fact that verifies Bodin’s connection with Ramism. On Ramus, see *supra* (n 69).

on the governance of differences meant, as he saw the matter, that he must ascribe meaning to the multiplicity of singular histories by making them appear complementary. Thus, Bodin used climate theory not only to make sense of what he regarded as global harmony, but also to ensure a cohesive explanation of the planet's different legal regimes.²²² According to Simone Goyard-Fabre, Bodin's universalism 'could not do without relativism'.²²³ Interestingly, in his use of contrasts Bodin openly followed Machiavelli. The central role that the strategic drawing of oppositions played in Bodin's theoretical argument, and his obvious debt to Machiavelli in this respect, have in fact prompted the observation that Bodin remains the French author who owes most to the Florentine philosopher,²²⁴ despite his express refusal to follow the Italian thinker in other ways.²²⁵

Having claimed how he wished to withdraw from a view holding that the particular (the amalgam known as 'Roman law') could be universalized, Bodin wanted to avoid the trap that would consist in axiomatizing another particular such as French law. Along the way, however, he failed to appreciate a fundamental contradiction at the heart of his demonstration. While Bodin criticized the universalistic model of the Ancients by saying that what the medieval commentators were doing as they expounded on Roman law was to 'expose ... the law of a certain particular state' and remarking on 'the absurdity there is in wanting to establish the universal law upon the Roman laws'²²⁶ – for Bodin, 'to deal simply with the laws of one particular society [in order to discern law's universal properties] plainly would not do'²²⁷ – he ultimately remained unable to break with the universalist tradition. To be sure, he faced a

222 See Lloyd (n 195) 80–81.

223 Goyard-Fabre (n 202) 181. See also supra 47.

224 See G Cardascia, 'Machiavel et Jean Bodin' (1943) 3 Bibliothèque d'humanisme et Renaissance 129, 132. Guillaume Cardascia observes that the name 'Macciavellus' appears twenty times in the *Methodus*: ibid. See also EM Beame, 'The Use and Abuse of Machiavelli: The Sixteenth-Century French Adaptation' (1982) 43 J History of Ideas 33, 39: 'Of all his French readers, none was more conversant with Machiavelli's work than Jean Bodin.'

225 Bodin's reticence is particularly apparent in the *Six Livres* and tallies with a general shift in the reception of Machiavelli's work in France around 1572, when French readers of the Italian philosopher turned increasingly hostile. By 1576, Machiavelli's name had indeed become synonymous with 'hypocrisy, tyranny, and atheism': DR Kelley, 'Development and Context of Bodin's Method' in H Denzer (ed), *Jean Bodin: Verhandlungen der internationalen Bodin Tagung in München* (Beck 1973) 144 [hereinafter 'Development']. See eg E Philadelphie [pseudonym of N Barnaud], 'Dialogue I' in *Le Reveille-matin des Francois, et de leurs voisins* (James 1574) 21, 37, 40, 107, and 141–42; [I Gentillet], *Discours, sur les moyens de bien gouverner et maintenir en bonne paix un Royaume ou autre Principauté. ... Contre Nicholas Machiavel Florentin* (1576); E Junius Brutus [pseudonym, probably of H Languet], *De la puissance legitime du prince sur le peuple, et du peuple sur le Prince* (1581) 5–14. For general observations on the rise of anti-Machiavellism in France in the early 1570s, see Beame (n 224) 39–54; DR Kelley, 'Murdr'ous Machiavel in France: A Post Mortem' (1970) 85 Political Science Q 545.

226 Bodin, *Methodus* (n 186) 273 and 274.

227 Lloyd (n 195) 54.

structural problem for any so-called ‘universalism’ is bound to have emerged from somewhere.²²⁸ Even as Bodin wanted a universal law that was not based on Roman laws, even as he thought that an alternative universal configuration that would be more just and more scientific could be substituted for the old model, he remained unable to escape the fact that any process purporting to fashion a legal universal must be found to summarize, consciously or not, the questions and answers of one or more than one singular society arising at a particular period in time. This constraint held even as Bodin declared to have drawn, in addition to Roman laws (which, notwithstanding his proclaimed reservations,²²⁹ he continued to universalize), ‘upon the laws of the Persians, Greeks, Egyptians, Hebrews, as well as the principal countries of Europe at large’.²³⁰

Bodin thought diversity to be directed by an order, and he felt that the examination of differences could not be conducted without consideration of the specific order regulating them. Accordingly, he focussed not only upon expounding on a universal legal system, but also upon uncovering the hidden order of that system – which he located in a notion of ‘harmony’.²³¹ ‘All the juridico-political work of Bodin therefore rests on a metaphysical certainty: that of finding in natural harmonies an order full of meaning and value that it is incumbent upon the law of the republics not to betray.’²³² For Bodin, ‘[h]armonic justice is, according to its etymology, generator of “propriety” and, in the intertwining of differences, it is [a] source of peace’.²³³

In due course, the Bodinian universalizing legal enterprise would founder. By the time of the *Theatre*, in 1596, ‘Bodin had ... abandoned his project of universal law, a field he now recognized as full of imprecision, error and uncertainty ... and had turned his universalizing intentions instead to nature’.²³⁴ As he then wrote, ‘there is but one Principle of nature’,²³⁵ which meant that his intellectual quest, although it had moved from law to nature, remained informed by his long-standing conviction in the existence and value of oneness. However, no matter how significant universalism proved to be for Bodin – and it did matter greatly to him²³⁶ – he always felt strongly about the

228 Otherwise said, every universalism is someone’s universalism.

229 *Supra* 45. Hence, it is claimed, Bodin’s quarrel with Cujas, whose emphasis on Roman law was strictly limited to its historical circumstances. See Lloyd (n 195) 24 n 10. Lloyd is expressly referring to Goyard-Fabre (n 187) 92.

230 Lloyd (n 195) 56.

231 Eg: MD Kuntz, ‘Harmony and the Heptaplomeres of Jean Bodin’ (1974) 12 *J History of Philosophy* 31. In effect, the author’s argument on the significance of harmony for Bodin ranges beyond the *Colloquium heptaplomeres*, the work that the title of the article expressly invokes, which I discuss *infra* 55–56.

232 Goyard-Fabre (n 202) 13.

233 *ibid* 272.

234 Lloyd (n 195) 213.

235 Bodin, *Theatre* (n 206) proem.

236 cf Lloyd (n 195) 259: ‘Certainly, concerns with the universal were characteristic of much humanist scholarship. But no one could match Bodin’s relentless mission’ –

merits of local knowledge. With respect to history, for instance, Bodin stated that ‘it is not enough to understand universal History if one does not understand also particular history.’²³⁷ For Bodin, in other words, the general could only be meaningfully explained once it had been accessed through the particular.

Having stated that human actions are never under the influence of God,²³⁸ Bodin maintained how there is a logic that is indigenous to history, which he tried to elicit by resorting to mathematical equations. History was quantifiable and subordinated to stable and constant relations.²³⁹ Bodin accordingly strived to fashion ‘a regular and continuous classification’ so that one, considering the elements of the whole, could ascertain ‘their reciprocal links and their harmonious relations’.²⁴⁰ Such process of typification of concrete illustrations and reduction of facts or particular instances into categories allowed Bodin to avoid what he clearly perceived as an inappropriate subjectivism – a point on which he differed from Machiavelli. On this account, his thought has been said to have been transitional in the sense that his penchant for universalism or harmony is a remnant, strongly influenced by Platonism,²⁴¹ of the medieval thinking that had come before him and depended upon Christianity, Romanity, and Latinity.²⁴²

which extended to the ‘divulg[ation] ... [of] “universal time” ... and ... the discovery of a “universal religion”.’

237 Bodin, *Methodus* (n 186) 286.

238 *ibid* 287: ‘The will, indeed, is the master of human actions.’ Bodin makes this point elsewhere, too. cf eg *ibid* 282: ‘[H]uman history follows principally from the will of men.’ While I do not wish to belabour this matter, it is clear that Bodin was very much a theological libertine. For instance, he authored a book on demonology. For an overview of Bodin’s ideas on religion (including his expulsion of God), see eg CR Baxter, ‘Jean Bodin’s Daemon and His Conversion to Judaism’ in H Denzer (ed), *Jean Bodin: Verhandlungen der internationalen Bodin Tagung in München* (Beck 1973) 1–21; R Briggs, ‘Dubious Messengers: Bodin’s Daemon, the Spirit World, and the Sadducees’ in P Marshall and A Walsham (eds), *Angels in the Early Modern World* (Cambridge University Press 2006) 168–90; H Busson, *Les Sources et le développement du rationalisme dans la littérature française de la Renaissance (1533–1601)* (Letouzey & Ané 1922) 539–65; P Mesnard, ‘La pensée religieuse de Bodin’ (1929) 16 *Revue du seizième siècle* 1; PL Rose, *Bodin and the Great God of Nature: The Moral and Religious Universe of a Judaiser* (Droz 1980); H Védérine, *Philosophie et magie à la Renaissance* (Livre de Poche 1996) 85–97. Donald Kelley underlines that Bodin held a diabolical reputation, and fellow historian Claude Fauchet (1530–1602) indeed regarded him as a sorcerer: see Kelley, ‘Development’ (n 225) 124.

239 For the importance of numbers in Bodin’s thought, see eg M Villey, ‘La justice harmonique selon Bodin’ in H Denzer (ed), *Jean Bodin: Verhandlungen der internationalen Bodin Tagung in München* (Beck 1973) 69–86. For Bodin’s own text, see Bodin, *Methodus* (n 186) 387–93.

240 Bodin, *Exposé* (n 187) 9.

241 See Goyard-Fabre (n 202) 273.

242 *ibid* 183, where the author refers to a ‘thought of transition’. One could pursue this theme, for the transition is apparent from Budé onwards. Thus, Budé believed in the superiority of ancient languages, and he took the view that French could not be used for serious scholarship. Indeed, Ferdinand Brunot notes that on twenty occasions in

His atheism notwithstanding, Bodin could never accept that whatever order there was would be the exclusive outcome of human reasoning. For him, history existed in autarky, outside of narrative: its truth lay there, the historian's task being to access it. As a narrator, Bodin therefore regarded himself as standing apart from history. The contrast is stark with someone like Montaigne, who was willing to include the thinker's mental processes into his theoretical framework. By placing the human mind at the centre of his historiographical approach, Montaigne effectively held that truth was a matter of perception, that it depended on 'angle' and 'bias', for instance.²⁴³ In Montaigne's words, '[i]t does not matter only that one sees the thing, but how one sees it.'²⁴⁴ Montaigne thus referred to 'the matter of History, naked and shapeless',²⁴⁵ claiming that 'everyone can make of it his profit as long as he has understanding [thereof].'²⁴⁶ Meanwhile, for Bodin 'truth', which he apprehended in objective and intemporal terms, remained what method had to reach.²⁴⁷

Bodin's epistemic obsession with system, his over-conceptualism also, was mitigated in important ways by what one might nowadays call his 'inter-disciplinarity', his *indiscipline*. In the discourse to the people of Toulouse that he delivered in 1559 as a kind of farewell to academic life, he had stated that if deprived of the support of the other disciplines law would only be 'ridiculous and empty' (*ridiculum & inane*).²⁴⁸ Kelley helpfully summarizes Bodin's position:

According to the composite portrait presented in the *Methodus*, the perfect jurist was a living encyclopedia possessing at once a knowledge of history and philosophy, an understanding of natural law and equity, a familiarity with the commentators, a competence in both Latin and Greek philology, and above all a proper 'method' to organize this refractory mass of material. ... [I]t was obvious that legal sources alone were insufficient.²⁴⁹

In this sense, Bodin had moved beyond Budé and, as I have indicated,²⁵⁰ could even be envisaged as a neo-Bartolist (in fact, legal historian Daniel Coquillette

his *Institution du Prince*, Budé praised ancient languages, which he regarded as the only ones worthy of politics and history. See Brunot (n 103) 75–76.

243 Desan (n 55) 115.

244 Montaigne (n 170) bk 1, ch 40, 277.

245 *ibid.*, bk 2, ch 10, 438.

246 *ibid.*

247 See Desan (n 55) 115.

248 [J Bodin], *Oratio de instituenda in Repub. juventute ad Senatam Populumque Tolosatem* in *Œuvres philosophiques de Jean Bodin* (P Mesnard ed and tr, Presses Universitaires de France 1951 [1559]) 17. For an authoritative French translation from the Latin, see [J Bodin], 'Discours au Sénat et au peuple de Toulouse sur l'éducation à donner aux jeunes gens dans la République' in *Œuvres philosophiques de Jean Bodin* (P Mesnard ed and tr, Presses Universitaires de France 1951) 47.

249 Kelley, 'Development' (n 225) 138.

250 *Supra* 44.

regards him as ‘an acknowledged Bartolist’).²⁵¹ Moreover, despite his profound reticence, Bodin ultimately granted historians a certain critical vocation,²⁵² and he appreciated the centrality of politics.²⁵³ Also, he could adopt a very personal tone, as he did in the *Theatre*, talking about his conversations with the princes of this planet, his travels, his height, his daily life (his meals and his health), his career, and his books.²⁵⁴ In this sense, he evoked Montaigne.

What remains highly significant from my perspective is that Bodin resolutely concerned himself with the fashioning of a model articulated around legal differences, that he proved ‘so accessible to the sentiment of differences’.²⁵⁵ His commitment to ‘the profusion of facts’ was steadfast,²⁵⁶ even as his works, perhaps the *Juris universi distributio* above all, made clear that he valued order and harmony very highly – for example, he wrote that ‘there is nothing in the world that be more pleasing to see, or that recreates with greater volupty the spirit of man, or that be more commodious than order’.²⁵⁷ Bodin was convinced that the universal order that existed could only be understood if the differences supporting it were fully grasped, and that it could only be sustained if it succeeded in reconciling these differences within itself. As I have observed,²⁵⁸ Bodin’s demonstration that there is a universal system to be envisaged through particulars operated antagonistically, an oppositional strategy that very much stood as a characteristic feature of his scholarship.

Referring to the *Six Livres*, Franklin writes that ‘[t]he essential differences in polities, and especially in forms of state, are so universally and copiously illustrated that literally every system known in any way is considered in the light of Bodin’s scheme, and classified according to his principles’.²⁵⁹ He adds:

Under the ‘aristocratic state’, for instance, there is a concise presentation of all available data as to the size, composition, and status of the ruling organs for Pharsalia, Sparta, Epidaurus, Thebes, Rhodes, Genoa, Geneva, Zurich, Basel, Berne, Lucerne, Fribourg, Venice, Rhagusa, Lucca, the German Empire, and finally the political system of Nuremburg considered as representative of Augsburg, Worms, and other independent German cities.²⁶⁰

251 DR Coquillette, *The Civilian Writers of Doctors’ Commons*, London (Duncker & Humblot 1988) 43.

252 See Bodin, *Methodus* (n 186) 299.

253 See *ibid* 289.

254 See Berriot (n 207) 21–22.

255 L Febvre, ‘L’universalisme de Jean Bodin’ (1934) 7 *Revue de synthèse historique* 165, 167.

256 Goyard-Fabre (n 202) 67.

257 Bodin, *Theatre* (n 206) proem.

258 *Supra* 46 and 49.

259 Franklin (n 125) 76, where the author refers to Bodin, *Six Livres* (n 186) bk 2, ch 6, 264–77. For Bodin’s own outline, see Bodin, *Methodus* (n 186) 284–85 and 290.

260 Franklin (n 125) 76. For an extensive panorama of the foreign illustrations that Bodin mobilized for the *Six Livres*, see A Stegmann, ‘Bodin et l’histoire

In the range he deployed, Bodin operated very deliberately, as he made clear in his book on demonology: ‘I put many authorities from many peoples and nations so that truth be better elucidated.’²⁶¹ He would therefore have disagreed with Postel, who had written, in his 1541 *De magistratibus Atheniensium Liber*, that the diversity of political regimes between Athens and France could not allow for an ‘exact comparison’ (*exacta comparatio*).²⁶² Bodin made the salutary point that one part of the whole (say, one legal experience) could not, on its own, be the whole (say, the universal experience), that the totality could only be understood through an acknowledgement of difference, and that the diversity of experience must be recognized and respected. Specifically, Bodin entered two key claims: ‘[O]ur universe ... is composed of parts very unequal, indeed of elements quite contrary’; but ‘the suppression of this apparent disagreement would destroy the profound harmony and would cause the death of the universe’.²⁶³ Differences, for Bodin, were not in the least expendable, no matter how committed one showed oneself to be to the idea of unison. Instead, they proved crucial to his entire intellectual construction.

As Bodin framed the matter in the *Six Livres*, ‘discord begets harmony’.²⁶⁴ For him, though, the aim was never to efface dissonance, but to make differences consonant in the end.²⁶⁵ Crucially, Bodin had ‘that sense of differences that rectifies unceasingly the sight of resemblances’.²⁶⁶ He was thus eminently

contemporaine (1520–1570)’ in *Jean Bodin: Actes du Colloque Interdisciplinaire d’Angers*, vol 2 (Presses de l’Université d’Angers 1985) 495–508.

261 J Bodin, *De la demonomanie des sorciers* (Du Puys 1587 [1580]) 94.

262 [G Postel], ‘Praefatio’ in *De magistratibus Atheniensium Liber* (Vascosanum [Vascosan] 1541) fol Biiia.

263 Bodin, *Methodus* (n 186) 412. Bodin openly drew an analogy between his understanding of harmony-out-of-opposites, on one hand, and music, on the other, by claiming that as regards a choir, harmony arose from a well-proportioned mix of bass and sharp voices and not from a combination of voices singing at the same pitch. See *ibid.* For a discussion of harmony and music in Bodin, see Goyard-Fabre (n 202) 263–69. Bodin’s argument recalls Leibniz’s *De rerum originatione radicali*: ‘The most distinguished composers often mix dissonances with smooth harmonies in order to arouse the listener – to *disturb* him, as it were – so that he will be momentarily anxious about what is to happen, and will feel all the more pleasure when order is restored’: GW Leibniz, *De rerum originatione radicali* in *Die philosophischen Schriften von Gottfried Wilhelm Leibniz*, vol 7 (CI Gerhardt ed, Olms 1965 [1697]) 306–7. I follow Jonathan Bennett’s translation from the Latin: GW Leibniz, *The Ultimate Origin of Things* <www.earlymoderntexts.com/assets/pdfs/leibniz1697b.pdf> (2007) 5–6 [on file].

264 Bodin, *Six Livres* (n 186) bk 6, ch 6, 758.

265 In this regard, Bodin brings to mind Goethe’s ‘*Weltliteratur*’, whose aspiration to universalism encouraged the preservation of local knowledges. For a thorough discussion of Goethe’s initiative in the context of an argument in favour of legal pluralism with specific reference to European legal integration, see S Glanert, ‘Goethe’s Challenge’ (2013) 8(2) *J Comp L* 288.

266 Moreau-Reibel (n 204) 270.

able to perceive ‘the slippery resistances that life opposes to rigid theories’.²⁶⁷ In today’s language, Bodin can be said to have offered a theory of globalization *avant la lettre*.²⁶⁸ It is curious, then, given the impact of ‘Bodin’s system of comparison and synthesis ... by which the modern development is influenced – and not only in juristic science but in related social disciplines as well’,²⁶⁹ that Walter Hug and Frederick Pollock, who both situate the emergence of comparative jurisprudence in the sixteenth century, fail to mention Bodin.²⁷⁰

I find it interesting to observe that Bodin argued the case for pluralism not only with respect to legal/cultural experiences, but also as regards religion. I refer to the *Colloquium heptaplomeres*, a Latin text that most analysts agree Bodin would have written in the early 1590s,²⁷¹ but that was not published before 1683,²⁷² that is, nearly ninety years after his death, and then again only as part of a dissertation in theology whose German author sought to refute Bodin’s contentions. In fact, a publication in extenso had to wait until 1857.²⁷³ In this work, Bodin gathers seven scholars representing the various religious or rationalistic options of his day. After confronting their fundamental dogmas, the seven characters have to acknowledge their thorough disagreement and accept that the best they can do is to encourage mutual tolerance. Thus, Coroni, the Roman Catholic, wishes ‘that there be, within the world, but one religion and but one belief provided that it be the true one’,²⁷⁴ while Senamy (the sceptic, and Bodin’s own pluralistic voice) replies: ‘[I]s it not much better to receive in

267 Febvre (n 255) 167.

268 cf C-G Dubois, ‘La “nation” et ses rapports avec la “République” et la “Royauté”’ in Y-C Zarka (ed), *Jean Bodin: nature, histoire, droit et politique* (Presses Universitaires de France 1996) 100, where the author observes in Bodin the manifestation of ‘a mondialism, according to the spirit of his time’.

269 Franklin (n 125) 79.

270 See W Hug, ‘The History of Comparative Law’, (1932) 45 Harvard LR 1027; F Pollock, *Essays in the Law* (Macmillan 1922 [1903]) 1–30.

271 Eg: Lloyd (n 195) 240. For a detailed refutation of the view that Bodin would not have authored this text, see N Malcolm, ‘Jean Bodin and the Authorship of the *Colloquium heptaplomeres*’ (2006) 69 J Warburg & Courtauld Institutes 95.

272 See J Diecmann, *De naturalismo, cum aliorum, tum maxime Jo Bodini, ex opere ejus Msto ανεκδοτω de abditis rerum sublimium arcanis, schediasma inaugurale, etc* (Reuman 1683).

273 See [J Bodin], *Colloquium heptaplomeres de rerum sublimium arcanis abditis* (L Noack ed, Klincksieck/Nutt 1857) <www.gutenberg.org/files/17859/17859-h/17859-h.htm>. The text appeared simultaneously in Paris and London, hence my reference to two publishers. Note that an anonymous French translation had been achieved a few years after Bodin’s death, in 1596. But it did not enter the French *Bibliothèque nationale*, then named the *Bibliothèque du roi*, until 1685. François Berriot has now re-issued an edited version of this translation, to which I refer: J Bodin, *Colloque entre sept scavans qui sont de differens sentimens des secrets cachez des choses relevees* (F Berriot ed and tr, Droz 1984) [hereinafter *Colloque*]. For a belated (and well-received) English translation, see J Bodin, *Colloquium of the Seven About Secrets of the Sublime* (MLD Kuntz ed and tr, Princeton University Press 1975).

274 Bodin, *Colloque* (n 273) 187.

the great states, as we see in those of the Turks and the Persians, all sorts of religions, than to exclude any?²⁷⁵ Again, Senamy opines:

For myself, I reckon that all the religions of the world ... that everyone embraces after one's fashion, without hypocrisy or disguise but with a sincere soul, are all agreeable to God, and that those amongst them who, in good faith, are mistaken in their cult and way of worshipping, are in truth excusable, although the best one be most agreeable to him. This is why I enter willingly and without revulsion in all the temples, in all the Churches, in all the chapels, in whatever country I be, to say my prayers.²⁷⁶

Again, Bodin is strongly defending the idea and the virtue of difference. One of Bodin's seven colloquists, Toralba, a humanist abiding solely by the law of nature, thus holds that 'even these conversations where Coroni [the Roman Catholic] engages us would not have any utility or pleasure, if they were not rendered famous through a contrariety of opinions and of reasonings'.²⁷⁷ Typically, Bodin makes his case for diversity under the auspices of the value of harmony, a theme that performs a 'central' role in the book.²⁷⁸

*

Although Bodin displayed an 'attitude [that] was at once inter-disciplinary and inter-cultural',²⁷⁹ it would be simplistic to maintain without further ado that he pioneered comparison-as-difference. This strategy was already present in Machiavelli, who basically defined *virtù* (power), the corner-stone of his politico-philosophical argument, in opposition to its antonym, *fortuna* (fate), and who moved by way of antinomic examples, those of Francesco Sforza and Cesare Borgia, so as to determine the political behaviour to be recommended for the Prince. Through the clash of these extreme illustrations, Machiavelli elicited the *virtù* that was required in order to make the Prince a *virtuoso*.²⁸⁰ As regards Bodin, the point to be emphasized, then, is rather that he applied his differentialism to comparative studies generally and to comparative *legal* studies in particular.

275 *ibid.*

276 *ibid.* 302.

277 *ibid.* 183.

278 Kuntz (n 231) 31.

279 Kelley, 'Development' (n 225) 125.

280 Machiavelli's *Il Principe* appears to have been written between 1513 and 1515. See WJ Connell, 'Dating "The Prince": Beginnings and Endings' (2013) 75 *R. of Politics* 497. However, the text was only officially published posthumously in 1532. The key part is ch 7. See eg JM Najemy, 'Machiavelli and Cesare Borgia: A Reconsideration of Chapter 7 of "The Prince"' (2013) 75 *R. of Politics* 539. See generally JGA Pocock, *The Machiavellian Moment* (2nd edn, Princeton University Press 2003); P Bobbitt, *The Garments of Court and Palace: Machiavelli and the World That He Made* (Grove 2013).

Bodin's considerable influence, which is readily apparent in the output of his many disciples, meant that his differential comparatism radiated beyond him in his lifetime and long outlived him. Over more than 600 pages, the distinguished sixteenth-century historian and noted translator Gabriel Chappuys, for instance, produced a study of the government of France followed by an examination ranging from the kingdoms of Poland, Prussia, Spain, England, Scotland, Portugal, Naples, Turkey, Tunis, Persia, and Fez, to the republics of the Hebrews, the Athenians, Sparta, ancient Rome, modern Rome, Venice, Rhagusa, Genoa, Lucca, ancient and modern Germany, Norimberg, and the Swiss.²⁸¹ For his part, Nicolas Lenglet du Fresnoy, writing in the eighteenth century what has been described as the leading work of the day,²⁸² went so far as to borrow the title that Bodin had devised for his *Methodus*.²⁸³ Expressly acknowledging Bodin's guidance in his foreword,²⁸⁴ Lenglet du Fresnoy developed the view that 'the world is not composed of similar elements, but of different ones, [that are] nonetheless agreed by analogy'.²⁸⁵ But it is undoubtedly Loys (or Louis) Le Roy, Bodin's contemporary, who remains the best known exponent of Bodin's thought. Intriguingly for comparatists-at-law, Le Roy takes Bodin's theorization of comparison-as-difference further than Bodin himself was prepared to do.

Like Bodin, Le Roy was a law graduate from Toulouse and, like Budé, a professor at the *Collège de France* (in fact, Le Roy began his literary career with a biography of Budé in 1540).²⁸⁶ It has been said that in his books, Le Roy was essentially advocating 'a state of mind'.²⁸⁷ His most celebrated text, *De la vicissitude ou variete des choses en l'univers*,²⁸⁸ regarded as 'the first treatise on the philosophy of history in the French language',²⁸⁹ illustrates optimally the disposition that he was assertively defending. In effect, Le Roy's project 'moves away ... from the humanist canon of universalism in order to accentuate cultural differences'.²⁹⁰ The bulk of his work is indeed devoted to a comparison and synthesis of such

281 See Chappuys (n 88) *passim*. For express references to Bodin, see eg *ibid*, bk 1, fol 2a, 55b and 70a.

282 See Franklin (n 125) 153–54.

283 [N Lenglet du Fresnoy], *Methode pour etudier l'histoire*, 2 vols (Coustelier 1713). Observe that Pierre Droit de Gaillard had also lifted his title from Bodin's. See [P] Droit de Gaillard, *Methode qu'on doit tenir en la lecture de l'histoire, vray miroir & exemplaire de nostre vie* (Cavellat 1579). There were other instances, too. Eg: R de Lucinge, *La Maniere de lire l'histoire* (MJ Heath ed, Droz 1993 [1614]).

284 See Lenglet du Fresnoy (n 283) vol 1, fol v b.

285 *ibid* 207.

286 See Ludovicum Regium, *G Budaei viri Claris vita* (Roigny 1540).

287 WL Gundersheimer, 'Louis LeRoy's Humanistic Optimism' (1962) 23 *J History of Ideas* 324, 337.

288 See L Le Roy, *De la vicissitude ou variete des choses en l'univers, et concurrence des armes et des lettres par les premieres et plus illustres nations du monde* (L'Huilier 1576 [1575]). An English translation appeared in 1594.

289 Desan (n 80) 175.

290 *ibid* 178.

differences. As Claude-Gilbert Dubois underlines, Le Roy's title was all about difference: while his notion of '*variete*' (or variety) was concerned with 'the relation of differences amongst themselves', the word '*vicissitude*' (which, in sixteenth-century French, meant '*changement*', or change²⁹¹) addressed 'the relation of differences in relation to themselves'.²⁹² Le Roy supplied 'perhaps the best example that we have at the Renaissance of a systematic use of the comparative method and of a logic of difference'.²⁹³ Unsurprisingly, just like Bodin, Le Roy has been said to have deployed a 'relativist process'.²⁹⁴

For Le Roy, it was difference that allowed the discovery of the internal logic governing human behaviour. The understanding of a *mentalité* was only possible following a series of comparisons, and the discourse on a people could only be conceived in the inscription of its difference vis-à-vis another type of social or political organization. As he multiplied illustrations,²⁹⁵ Le Roy sought to interpret difference so as to generate a historical law. Where there previously existed only a chaos of facts, comparison, as it disclosed differences, thus permitted the institution of an order. This approach to singular configurations showed how they only acquired significance with respect to other configurations and then only to the extent that they stood in opposition to them. In sum, it was no longer possible to analyze an entity short of confronting it with another.²⁹⁶ For Le Roy, the sense of history firmly resided in this interaction between, say, more than one people, more than one event, more than one thing, and more than one fact. As theorized and practised by Le Roy, history required more than one element with a view to the articulation of revealing contradictions. As Bodin had done before him, Le Roy insisted on drawing attention to differences through a comparison of the experience of his world with the statements of the Greeks and the Romans on a given point. By way of this process of confrontation and quantitative assessment of his examples, Le Roy ascribed meaning to what initially appeared as mere '*vicissitudes*'. The paradoxes and antagonisms that he studied led him to assert how '[t]he sciences can only be properly taught through a comparison of contraries',

291 E Huguet, *Dictionnaire de la langue française du seizième siècle*, sub *vicissitude*, vol 7 (Didier 1967) 464.

292 Dubois (n 112) 84.

293 Desan (n 80) 178. Le Roy also pursued the differential theme in other works. Eg: L Le Roy, *Des differens et troubles advenans entre les hommes par la diversité des opinions en la Religion* (Morel 1563) fol 3b: '[M]en are different in [their] complexions, ages, morals, vocations, lands, languages, seigneuries: certainly there is no dissimilitude that is more strange, than that of religion.'

294 Nicklas (n 65) 34. For the reference to Bodin's relativism, see supra 47 and 49.

295 See Desan (n 80) 179.

296 Le Roy reprised this claim in other work. Eg: L Le Roy, *Consideration sur l'histoire françoise, et l'universelle de ce Temps, dont les merveilles sont succinctement recitées* (Morel 1570) fol 8a: '[M]atters of the world ..., cannot be well understood the ones without the others.'

since ‘in all cases, we can say [that] the contraries put next to one another show more’.²⁹⁷ In other terms, the staging of opposites made it possible better to underscore historical singularity as regards the matters that Le Roy wished to investigate. Throughout *De la vicissitude ou variete des choses en l’univers*, Le Roy constantly ran the themes of difference and comparison closely together as selected excerpts from the book’s list of headings (in bold characters) and subheadings make clear:

Book 1: ‘Of the change of things’ (fol 1a–15b)/

‘Of the change that have the four Elements amongst them, & each by itself (fol 3a–5a)/

‘How all things in the universe are tempered & preserved through contraries & dissimilars’ (fol 5a–6a)/

‘Of the variety and change of shadows, days, & seasons of the year, & diversity of the habitations of the earth’ (fol 6a–8b)/

‘Of the variety of things according to the difference of locations’ (fol 8b–9b)/

‘Of human variety and change’ (fol 9b–14a)/

‘Change of peoples’ (fol 14a–b)/

‘Change of cities’ (fol 14b–15a)/

‘Change of republics, kingdoms, & Empires’ (fol 15a–b)/

‘Change and variety of languages’ (fol 15b)/

‘Change of disciplines’ (fol 15b).

Book 2: ‘Of the change and variety of languages’ (fol 16a–23b).

Book 3: ‘Of the change and invention of the arts, and how men out of their primary simplicity and roughness have reached the magnificent and excellent present convenience’ (fol 24a–29b).

Book 4: ‘Of the change of arms and of letters competing in the conjunction of power & learning by the most famous peoples of the world, & which have been the first & the most ancient of all, that have excelled in both’ (fol 30a–51b)/

‘Comparison of Indians, Ethiopians, Egyptians, Scythes, Assyrians, in their antiquities’ (fol 45b–46a)/

‘Comparison of the great Egyptian, Assyrian, Medean, Persian, Parthian monarchies, in their bases, beginnings, expanses, revenues, riches, powers: & of illustrious Monarchs who founded them & others under whom they ended’ (fol 46a–48b).

Book 7: ‘Comparison of the Romans, to the Egyptians, Assyrians, Persians, Greeks, Parthians, in power, militia, knowledge, language, eloquence, poetry, and works of the other arts’ (fol 76b–87a).

Book 11: ‘Comparison of this century with the more illustrious preceding [ones], to know in what [way] it is superior inferior or

297 Le Roy (n 288) bk 1, fol 5b.

equal to them, and primarily touching upon the modern militia with the ancient, Greek and Roman' (fol 102b–115a).²⁹⁸

As Le Roy's comparatism 'brings out the differences', it stands as a 'new approach' that 'constitutes an important change in the way to see events'.²⁹⁹ Indeed, there is a significant distinction between Le Roy and Bodin. While the latter's world may have been characterized by a '*concordia discors*', Le Roy's universe was regulated by a '*discordia concors*'.³⁰⁰ For Le Roy, the equilibrium of the planet was based on the fragile harmony of opposites involving a constant tension close to rupture point. If you will, he was much more sceptical than Bodin. Castigating Plato's yearning that the earth should be governed by one king, he thus wrote that '[t]hese remarks ... are easier to wish than practice: given the diversity of languages, the dissimilitude of mores & customs, the variety of sects, the variety of opinions that govern amongst men, & make them lose the dilection [that is] desired between them'.³⁰¹

Now, no narration of sixteenth-century French comparatism can afford to omit Montaigne. While he acknowledged Bodin as 'a good author of our time', who was 'accompanied with much more judgement than the rabble of scribblers of his century', who 'deserves that one judges and considers him',³⁰² and even though his own *Essais* were demonstrably influenced by Bodin's work,³⁰³ Montaigne cannot in any meaningful sense be regarded as Bodin's disciple. Although relying on Bodin, Montaigne is taking one important step beyond him as, not unlike Le Roy, he moves further into differential comparatism.

For Montaigne, '[t]he world is but variety and dissemblance'.³⁰⁴ Concluding the 1580 edition of his *Essais* at the end of the second book (he would add a third a few years later), Montaigne holds that there 'never were in the world, two similar opinions' and that '[t]heir most universal quality, is diversity'.³⁰⁵ Not only does Montaigne therefore find it easier to admit of difference than to assign equivalences or commonalities ('[I] receive more easily difference than resemblance about us'),³⁰⁶ but he reckons that there is 'no better school ... to craft life, than incessantly to propose [to the soul] the diversity of so many other lives, fancies, and usances: and make it taste such a perpetual variety of forms of

298 *ibid.*

299 Desan (n 80) 180.

300 Céard (n 87) 375.

301 Le Roy (n 288) fol 77a.

302 Montaigne (n 170) bk 2, ch 32, 758. For another approving reference to Bodin, see *ibid.*, bk 2, ch 10, 439.

303 For compilations of Montaigne's numerous borrowings from Bodin, see P Villey, *Les Livres d'histoire moderne utilisés par Montaigne* (Slatkine 1972 [1907]) 58–59, 68–69, and 238; P Villey, *Les Sources et l'évolution des Essais de Montaigne*, vol 1 (2nd edn, Hachette 1933) 87–89 and 204.

304 Montaigne (n 170) bk 2, ch 2, 358.

305 *ibid.*, bk 2, ch 37, 826.

306 *ibid.*, bk 1 ch 36, 234.

our nature'.³⁰⁷ And what choice does one have, asks Montaigne, for 'events ... are always dissimilar. There is no quality so universal, in this image of things, than diversity and variety'.³⁰⁸ Such is the case, according to Montaigne, because the slightest difference suffices to confer singularity upon any entity.³⁰⁹ In sum, Montaigne is 'too sensitive to the singular quality of each being and of each thing to accept that one consider them only through their resemblance with another being, another thing'.³¹⁰

*

What have I shown (beyond an anecdotal assortment of often immature expressions of French patriotism to which contemporary immature expressions of French patriotism can no doubt be traced)?

Perhaps I can allow historian Jean Céard to state the characteristic features that my essay ascribes to French sixteenth-century thought:

[T]he order of the world escapes the confused monotony of the identical only through the existence of differences. There does not exist two beings, two things absolutely similar. In this sense, each being, each thing, is rare. This rarity may appear to us of little importance when it concerns only a distinctive trait that does not seem to change nature; and nonetheless, because the order of the world exists only thanks to differences, the most tenuous distinctive trait has its place in this order.³¹¹

To be sure, difference – the differential trait – must inevitably be discussed against the backdrop of an indifferentiation. For instance, when Belon proceeded to depict a wide range of different birds, he effectively posited that each singular kind of bird pertained, at least minimally, to an intersection with every other singular kind of bird, which is why it made sense to refer to all these entities as birds (rather than as rodents or trees or whatever). Yet, beyond such necessary point of entry into any comparative excursus,³¹² the sixteenth century – which offers 'the greatest discontinuity in the organization of occidental knowledge'³¹³ – very much remains the era of differential analysis, not least in France. With a view to articulating a discursive ordering of the range of differential characteristics that they ascribed to a wide array of beings, sixteenth-century writers brought to bear their scrutinizing gaze on the detail of things,

307 *ibid.*, bk 3, ch 9, 1018–19.

308 *ibid.*, bk 3, ch 13, 1111.

309 Eg: *ibid.*: 'Resemblance does not so much make, one, as difference makes, another.'

310 Céard (n 87) 404.

311 *ibid.*, xi.

312 An imputed equivalence or commonality – a cue-equivalence or cue-commonality – stands as a threshold requirement for the undertaking of any comparison.

313 Desan (n 80) 14.

then to arrange for the transcription of what they had seen by way of what was effectively a large chart attributing to each thing its relevant name. This table connected both with the gaze that had observed the differentiated planet and with the discourse that had been interpreting it. According to Desan, '[t]o compare and to differentiate represent the essential steps to apprehend ... the Renaissance'.³¹⁴

*

Even as Zweigert and Kötz argue that a '*præsumptio similitudinis*' accounts for the description of laws as they exist,³¹⁵ even as James Gordley maintains that '[t]here [is] nothing distinctively German, French or American about [German, French, or American judicial] decisions',³¹⁶ even as Rudolf Schlesinger aims to formulate a transnational law that would 'carry the same meaning to lawyers brought up in various legal systems',³¹⁷ even as Basil Markesinis contends that comparative reports must be 'manipulat[ed]' so that laws appear to be the same,³¹⁸ and even as the orthodoxy within comparative law indulges a self-serving reductionist composition of the field's major intellectual developments,³¹⁹ it remains that comparative law features an unacknowledged history heralding voices that Zweigert and Kötz's incantatory words, immutable across three editions over thirty years, have sought to ignore or disavow – although they have not been alone in so doing.³²⁰ While I refer to the orthodoxy's traducement of the 1900 Paris congress as leading comparatists-at-law exclude Tarde and Esmein from their account of the proceedings, as they eject them from the history of comparative law, as they out-law them, I also have in mind the elision of sixteenth-century intellectuals, not least jurists, whose powerful eloquence imagined comparison otherwise and, yes, other-wise, that is, more optimally attuned to a recognition of otherness and respect for the other. One of the most important lessons of that history possibly being how historical narratives require incessant rethinking and rewriting, a rigorous examination of comparative epistemology's past thus shows what comparison in general, and

314 *ibid* 19–20.

315 *Supra* 13.

316 J Gordley, 'Comparative Legal Research: Its Function in the Development of Harmonized Law' (1995) 43 *Am J Comp L* 555, 563.

317 R Schlesinger, 'The Common Core of Legal Systems: An Emerging Subject of Comparative Study' in KH Nadelmann, AT von Mehren, and JN Hazard (eds), *XXth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E Yntema* (Sijthoff 1961) 78.

318 BS Markesinis, 'Why a Code Is Not the Best Way to Advance the Cause of European Legal Unity' (1997) 5 *Euro R Private L* 519, 520.

319 *Supra* 14–15.

320 Consider U Kischel, *Rechtsvergleichung* (Beck 2015). Out of 1,000 pages of text or so, Uwe Kischel mentions the 1900 Paris Congress twice, the first (unsourced) reference being to Lambert and Saleilles, the second to Saleilles only: see *ibid* 28 and 29. No other conference participant is acknowledged.

the comparison of laws in particular, have effectively been – and therefore what they can still be. If you will, such an investigation conjures the spectral presence of an other past, an *effective* past. The outstanding question, of course, is whether contemporary comparatists can accept what their predecessors were able to appreciate centuries ago, which is that, in the words of Foucault, an argument from equivalence or commonality is but ‘the occasion of error, the danger to which one exposes oneself when one does not examine the badly lit site of confusions’.³²¹ Although universalism has remained a ‘core elemen[t] of traditional comparative law’,³²² comparatists-at-law must resolutely engage in negative comparative law, that is, they must reject the orthodox disciplinary story and task themselves with learning how to read comparative law’s past differently, and more honestly, thereby forgoing the dissemblance or censorship that the orthodoxy’s strategy of epistemic governance within the field has long been heralding. In other words, they must actively favour the emergence of the other-oriented history that befits the comparative motion – *and that has existed and that therefore insistently continues to exist.*

321 Foucault (n 113) 65.

322 Siems (n 24) 31.