I

Raising My Game – To Fail Better

I envisage *Negative Comparative Law: A Strong Programme for Weak Thought* (*NCL*) as a manifesto in favour of a radically different approach to research in foreign law, such material practice operating under the technical and institutional label 'comparative law'. Given my circumstances – I refer both to my predilections and the opportunities that have presented themselves to me – I must offer a Eurocentric critique of comparative law as a Eurocentric intellectual pursuit. Fortunately, there remains significant epistemic value in this introspection, not least because it demurs Eurocentrism. I wish I could write insightfully about the Cambodian or Ethiopian law-worlds, Bolivian or Ugandan legal cultures, the law of Mongolia on the status of foreign legal nationals or of India on general secondary education in the state language. Alas, no creditable endeavour along these lines is possible.

Negative Comparative Law targets an Establishment, a settled theoretical model articulating comparative law that I name 'positivism'. This framework casts foreign law as a textual invariant and assumes the possibility of immaculate interpretive and representative access to it – not least through method, long the favoured technology of entry. Positivism has demonstrably exercised strong dominance over comparatists-at-law, whether in classrooms or law reviews, keynotes or monographs. Now, the epistemic occlusions and delusions informing the idea of a stable foreign law and the feasibility of impeccable readerly contact with it has contributed to the stigmatization of comparative law within the wider academic world and led to the inferior placement of comparison in the hierarchy of scholarly enterprises. Not only has the immaturity of the comparatist's epistemic instruments tainted comparability in the eyes of jurists, but the hold of positivist research has pre-empted the emergence of a more sophisticated theoretical arrangement within

the field of comparative law. In particular, positivism's unexamined attraction to objectivity and truth (two artifices assuming the quiddity of foreign law-texts); its infatuation to the wifty ideas of equivalence or commonality and the allegedly unbroken chains of likenesses across laws that would extend through the centuries and planetwide; and its disciplinary confinement to purportedly exclusively 'legal' themes – if with an occasional sprinkling of anthropological, philosophical, or sociological evocations – have eschewed a searching critique of the cognitive conditions pursuant to which the comparison of laws has been effectively unfolding and must be developing as, soberly to point the irrefutable, a report on foreign law is *made* – it is a composition, a bricolage. Not coincidentally, this striking absence of (self-)critique has favoured the lame ideologies that one associates with the depoliticization and naturalization of the status quo.

Because they have generated substantial epistemic, ethico-political, and institutional damage, positivists who crowd the field of comparative law must be exposed and their philistinism discarded. Positivism's decidedly exiguous and stealthily neophobic approach to the comparison of laws requires to be replaced by a far more incisive theoretical and practical model heralding in convincing terms what is epistemically desirable and plausible as one appreciates foreign law, that is, a paradigm effectively advancing one's understanding of what it means to understand foreign law and the comparison of laws. Specifically, this alternative strategy must efface any idea of a foreign law that would exist as a fixed entity docilely awaiting its comparatist and eliminate any appeal to an objective or true representative access to foreign law-texts. A substitute programme also requires to emphasize the comparatist's ethical responsibilities and political commitments, if only because the question of speaking for the other (which is what the comparatist emphatically does) is very vexed terrain indeed. Primordially, the different disposition I defend demands that comparison be apprehended as interpretation understood as transformation;[1] that foreign law therefore be regarded as intrinsically variable according to the intelligibilities and interests of the interpreting comparatist whose interpretation of foreignness fashions something new in the very act of interpretation; and that the comparatist accordingly be considered an inevitable part of any intervention into foreign law and of any reporting outcome arising

[1] cf F Moretti, 'The Roads to Rome' (2020/124) New Left R 125, 136: 'Interpretation *transforms* all it touches.'

from such an intervention – which means that any dichotomy along the lines of subject and object must be forsaken.

As I seek to deconstruct a general economy of comparative law – to dismantle the Positivist Machine and refute its pre-lapsarian ontological indistinction isolating law from every other discursive formation – and as I aim to abandon the presumptuous Cartesian fable of an idealized and autonomous mind (a myopic vision informing an occidental metaphysics obsessed with individual rationality and agential subjectivity), I argue for an individual of limited mind-sovereignty framed through preceding determinative cultural forces – structures of emergence and becoming – into which he is inextricably entwined, not least by way of language (but also on account of socialization and institutionalization).[2] My ethical/political dissolution and reconstitution of the comparative project denying the primacy of (liberal) human subjectivity demands not merely new manners of thinking and reading, but a different attitude, another way of perceiving and being, too. Basically, I ask the comparatist to accept that his place (or his displacement) is invariably 'between' rather than 'within', which means that foreign law's reality lies beyond where the comparatist can reach even as he remains too close to be able to detach himself from it. In other words, access to foreignness's full meaning – the foreign's meaning *as it is*, if you will – must be persistently deferred to another day (and must insistently differ according to its specific interpreter), no matter how sophisticated the cognitive assemblage the comparatist is able to deploy towards the ascription of sense to foreignness. There being no meaning grounding foreign law here and now, *the* meaning of foreignness always-already pertains to fiction. What there is, then, is a comparatist standing on the verge of foreignness facing both the irreducible unknowability of foreign law's meaning and its attendant proliferation.

As a matter of creditability, I claim that the comparison of laws necessitates to manifest itself as the material practice indivisibly legal and cultural – legal/cultural – that it is: the jurist comparing laws is encultured (a fact that the comparatist must acknowledge by visibly inscribing himself and his report into the interpretive existence of the foreign law-text), and the foreign law being interpreted is encultured, too.

[2] I am reminded of Fernand Braudel's exclamation in his sprawling study of the Mediterranean Sea: 'Thus am I always tempted, before a human being, to see him imprisoned within a destiny that he barely fashions': F Braudel, *La Méditerranée*, vol 3 (2nd edn, Colin 2017 [1966]) 314. As regards the vexed decussation of language and gender, I address the matter presently.

In this epistemological vein, I hold that one's value-commitments are available for assessment only as regards their internal coherence, there being no transcultural or universally valid criteria by which one can move beyond contestation to Rational or Reasonable consensus. Any evaluation of foreign means and ambitions can only be critique from the standpoint of one's own. Still, the course of inquiry and mode of experience that is comparison hold forth as important vehicles of change of the self(-in-the-law) through the other(-in-the-law) as opposed, say, to mere solipsism. To be sure, in the comparison no one becomes the other, but no one remains who one was before engaging the other. Just as the comparatist's interpretation of foreign law affects its existence as foreign law and impacts its iteration in the comparative report and elsewhere, the comparatist finds himself being changed by virtue of his comparative work. Picture a movement of co-constitution of meaning arising out of the interchange between the comparatist and the foreign law-text.

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Because the fifteen essays I have assembled as this book – an extended skiagraphy – seek to contradict the orthodox ideology presiding over comparative law, it follows that they struggle against a master scenario that prohibits, silences, condemns, outcasts, or exiles counter-discourses (readily deemed inutilious, belligerent, or strident), a segregation that is institutionally prescribed and ceaselessly inscribed within the comparison of laws. As it chastises this 'powerful gesture of protection and containment', this 'Cartesian gesture',[3] my argument delineates an engagement with activism that resists the dominant explanation of foreign law-worlds, foreign legal cultures, and foreign law-texts informed by an authoritarian model positing the right way to think about comparative law, the proper method to practise comparison-at-law, and the existence of the correct meaning of foreign law. Since such autarchic epistemology (not in the least apolitical) interrupts the democratic negotiation with otherness-in-the-law, it must be interrupted in its turn to promote the relativization of the comparative enterprise. As I interpret the field and respond to its discursive and repressive utterances, as I aim to remove comparative law from the grip of the posited and the positers, from the clasp of that *mindset*, affectivity figures significantly in my address, which is above all a refusal quietly to acquiesce to the field's deceptive theoretical and practical schemes. The epistemic complacency on display within comparative law disappoints me. And it makes me anxious, not to say irate.

[3] J Derrida, *L'Ecriture et la différence* (Editions du Seuil 1967) 85.

But the fact is that no hegemony is hermetic. Every discursive space, no matter how seemingly entrenched, features gaps – that is, from the point of view of those who contest the orthodox enterprise, latitude. I wish to harness such epistemic crevices as I can discern in the citadel so as to oppose ideas that I regard as inimical to scholarly inquiry, but also that I consider dangerous – dangerous to comparatists on account of the disabling epistemic dependence they have instilled and installed (not least in the newly educated, eager for accreditation and therefore susceptible to levelling and conformist tendencies), dangerous to the field, but also dangerous to the foreign law-worlds or legal cultures or law-texts themselves that are being investigated under impoverished epistemic auspices. Effectively, I am doing what it seems other comparatists-at-law do not want to be doing, which is to revisit the epistemologically indefensible claims that so many appear willing to take in their stride without due probing.[4] My wager is that these received ideas can be examined and challenged to the comparatist's benefit, to the field's advantage, and to foreignness's profit also. In the process, I hope to put pressure on my own comparatism, too; indeed, I want to push myself further, to be more demanding of myself, to responsibilize myself in order to act more critically tomorrow and the day after.

From their various angles, the following essays therefore call on comparative law to confront its positivist heritage (largely a German legacy, although not exclusively so), which it must now recognize as a deficient intellectual configuration inasmuch as this approach eschews profound understanding of foreignness and fails to generate deep understanding of what the comparatist does when he addresses foreignness. Crucially, the texts I collate reveal new problems and new ways of conceiving problems and suggest addressing these challenges with sharpened tools. As they advocate for different themes, modalities, sensitivities, and perspectives – at least in the sense that such topics and outlooks have been conspicuously absent from the controlling texts in the field of comparative law – these essays squarely situate themselves within contemporary critical theory. (I mean *genuine* critique, not Kantian critique.[5]) Defying the nationalist conviction long invested in the idea that local-law-is-ultimately-the-only-law-that-matters, thus making the case (and the normative argument) for more-than-one-law permeating

[4] cf L Wittgenstein, *Vermischte Bemerkungen* in *Über Gewißheit* (GEM Anscombe ed, Suhrkamp 1984 [1948]) 543: 'Where others keep going, there I stop.'

[5] For remarks on this important distinction, see BE Harcourt, *Critique and Praxis* (Columbia University Press 2020) 541n1.

legal argumentation in its various aspects, this work's militancy in favour of legal analyses comprising diverse laws also addresses the ever-increasing and seemingly ubiquitous marketization of life-in-the-law, which within comparative law has entailed the development of agendas in favour of standardization or normalization, tactics going under designations like unification, uniformization, or harmonization – all processes consisting of making-laws-look-equivalent or making-laws-look-common, all instances of concoction of sham-equivalence or sham-commonality. In a significant way, my contention thus purports to resist the pervasive neo-liberal rationality suffusing the 'economization' of comparative law under layers of positivist shellac.

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The leitmotiv informing this monograph is epistemic, five times.

First, the writings I appose oppose any Hegelian-style theory or vision contemplating anything like a state of eventual oneness as the most developed stage of human consciousness in which a higher homeostatic wholeness would be achieved through individual finite selves somehow being tied together within a condition of spiritual recognition of each other – unless, of course, this mutuality should take place within the form of free-market fundamentalism. Hegel's idealism swallows contingencies and smothers singularities. In the end, it is indifferent to the concrete world. To refute the idea that totality can/must surpass plurality does not mean, however, that I defend identity groups understood as separate, distinct, self-contained units featuring an 'inner something' common to all members, insulated and inaccessible to outsiders. But my rejection of essentialism does not detract from the fact that the homogeneity of, say, French legal culture (I am not writing of its unchanging nature), while neither pristine nor pure, is not spurious either, even less so vis-à-vis, say, English legal culture. Yes: French legal culture exists, and it exists meaningfully. And yes, French legal culture differs from English legal culture, and it differs meaningfully. (For positivists, one of the main difficulties pertaining to culture is that it cannot be grasped directly. The fact that any theory or conceptualization of culture must rest on its individual manifestations prompts positivism, in effect, to confine culture to a mere rhetorical figure – an ostracization that amounts to the unsustainable denial of non-genetic axiological or attitudinal patterns informing the law and its capillarian instantiations.)

Secondly, these essays want to stand as a forceful objection to Hans Kelsen as he writes that '[t]he law counts only as positive law, that is, as legislated law';[6] as he maintains that purity poses 'the limits within which cognition must remain, and these limits are, especially for legal science, *very narrow*';[7] and as he proclaims, 'I consider the law as a self-standing . . . system.'[8] Bearing in mind that Kelsen's construction easily qualifies as the only theory benefitting from any kind of entitlement to serious long-standing intellectual consideration across the entire European legal scene, not to mention Europe's colonial emanations,[9] my opposition extends to Kelsenians of all hues and Kelsenisms of all shades, including the most diffuse or insidious manifestations of science fetishism in the form of a drive for an ever-purer theory of posited law (or an ever-purer posited law) – even as I tell myself that the 'purity' model is ultimately too ludicrous to mislead.[10] Again, each of my texts wants to promote the epistemic invalidation of positivism's complacency – to foster a less reductive, more sophisticated, less mysophobic, more complex understanding of the legal. Indeed, I claim that the legal empirically exists not only as what is posited by the legislature (which, tautologically, bases itself on the right to posit the law that is conferred to it by. . . the posited law), but as a cultural intervention, as a modality of culture, as culture speaking legally. The law – say, this statute or that appellate judicial decision – exists as culture, which means that, for example, it conceals, more or less subterraneously, economic, historical, philosophical, political, or sociological dimensions. Observe that it is emphatically not the case that law *reflects* culture, an idea that would suffer at the very least from the suggestion that law operates as a different discourse from culture instead of working as an exemplification of it. Law exists *as* a cultural formation, so that when a French statute prohibits certain religious attire in public schools or a US Supreme Court decision sanctions an individual right to use weapons at home, the law-text is indissociable from the cultural commitments

[6] H Kelsen, *Reine Rechtslehre* (Deuticke 1934) 64.
[7] H Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Mohr Siebeck 1920) v [my emphasis].
[8] ibid.
[9] I do not exclude the common law tradition altogether. Eg: P Troop, 'Why Legal Formalism Is Not a Stupid Thing' (2018) 31 Ratio Juris 428; T Smith, *Judicial Review in an Objective Legal System* (Cambridge University Press 2015).
[10] For an authoritative discussion of purity in Kelsen's theory, see SL Paulson, 'The Purity Thesis' (2018) 31 Ratio Juris 276. Stanley Paulson insists that for Kelsen, '[t]he limits of the jurist's competence are set by purity': ibid 280.

of which it is but the legal expression. There is much more to a law-text than its graphematic inscription, and it behoves the comparatist to apply an enriched appreciation of textuality with a view to tracing the text to the cultural claims (say, Islamophobia or conservatism) that lurk between the lines, encrypted in the text's fabric. Such enciphering indicates that culture is not to be relegated to the law's context either – a conclusion that deprives positivism of the facile retort that being circumambient vis-à-vis law, culture would be located somewhere beyond the law-box.[11] In fact, the law-text is in the world, and the world is in the law-text also.

Now, everything that there is being situated, the jurist – say, the comparatist-at-law – exists as culture, too. Not unlike a law-text, then, a comparatist-at-law stands as a cultural formation, an encultured entity. This statement does not mean to suggest that the individual would be but the passive support of supereminent forces somehow mechanically deploying themselves in line with an autotelic logic: no one is a normative zombie, and there is no question of a collective brain either. The idea is rather that comparatists have inherited, through education and interaction, schemes of understanding, judgement, and performance that structure their lives-in-the-law, that delineate the thinkable and predispose the thought, these configurations being neither strictly individualistic nor completely deterministic. If you will, the body is in the world, but the world is in the body also.

Meanwhile, positivism, having sought to ignore the empirical fact of cultural imbrication, has been promoting absurd conceptual distinctions separating culture from both law-texts and the law's interpreters and thereby promoting the cultureless character of foreign law and of the comparatist. I reject positivism's mutilating scissions, the organized abdication of the enterprise that would seek to explain why the law exists as it does and why the comparatist apprehends it as he does. I earnestly refute positivism's false rigours, and I chastise its conceited cultural unmattering.

Thirdly, the studies I regroup all disclose, each in its own way, how the comparatist's work on foreign legal cultures or law-texts implies 'a

[11] The argument from culture-as-context proves particularly vulnerable to a positivist exclusionary rejoinder when its unfurling is marred by sustained confusion as in U Kischel, *Rechtsvergleichung* (Beck 2015) passim. For a critique, see P Legrand, 'Kischel's Comparative Law: *Fortschritt ohne Fortschritt*' (2020) 15(2) J Comp L 292, 293n11, 296n23, and 327–36 (review article of U Kischel, *Comparative Law* [A Hammel tr, Oxford University Press 2019]).

relation of relationlessness',[12] an *irrelation* – how the comparative endeavour supposes at once that the comparatist ought to access the other law or other-in-the-law *and* that such access cannot be had not only because the self cannot be the other, but also since 'the uttered otherness is already no longer a "true" otherness'.[13] Indeed, no description features absolute deixis, and to evoke is to revoke. Yet, a comparatist wagers that even though comparison is structurally unable ever to grasp otherness – the other law or other-in-the-law is not at hand, not present; rather it is not-at-hand, not-present – the comparative motion can unfold as a productive practice. Resolutely, comparison-at-law claims to be able to attest to a strong interpretive yield despite the epistemic aporia in which it finds itself mired.

Fourthly, the different texts I colligate as *NCL* want to indicate that no configuration being reasonably styled 'foreign' can meaningfully exist without a comparatist-at-law ascribing meaning to it in 'his' language – language thereby imposing its law unto him and compelling him to do violence to foreignness accordingly. Even acknowledging the remarkable achievement that seeing far into foreign law must involve, it remains that to find words in one's language to express what one thinks one has seen into foreign law is impossible (it is trite to recall that there are no semantic equivalences or commonalities across languages). It follows that the comparatist-at-law must frame the foreign in a language that is, perforce, alien to foreignness.[14] Paradoxically, the comparatist has no choice: so as to ascertain the other law, he must configure it in terms of 'his' language – and even though he can inflect the linguistic equipment available to him in order to attune it so that it can account for otherness as felicitously or justly as possible, the most audacious neologisms (only procurable within certain semantic limits, in any event) still depend on 'his' language.[15] No matter how excellent the comparatist's work, his comparison is therefore fated to be unable to move beyond the realm of the approximate or hypothetical: it cannot but operate asymptotically vis-à-vis the foreignness that there is there. As it necessarily finds itself

[12] R Jaeggi, *Entfremdung* (Suhrkamp 2016) 20 [emphasis omitted].
[13] L Bonoli, *Lire les cultures* (Kimé 2008) 61.
[14] 'Heterology and violence' is thus a heading in R Barthes, *Roland Barthes par Roland Barthes* in *Œuvres complètes*, vol 4 (2nd edn, E Marty ed, Editions du Seuil 2002 [1975]) 678.
[15] cf J Derrida, *De la grammatologie* (Editions de Minuit 1967) 227: '[T]he writer writes *in* a language and *in* a logic the very own system, the laws, and the life of which, by definition, his discourse cannot absolutely dominate.'

overwhelmed by an excess of foreign aspects, surfaces, and remainders, the comparatist's account is thus destined to differ from the foreign legal culture or law-text that he has made into the focus of his investigation and report. In this important sense, comparative law thus affirms the breach between the laws – the self's and the other's – even as it promises to draw a bridge across them.

Fifthly, the essays I defend want to implement to the fullest possible extent the regime of authenticity that befits comparative law. These texts therefore aim to shield the comparatist-at-law's interventions from the specious authority of objectivity and truth. Instead, they activate a programme of *invention* – etymologically, the term straddles the ideas of finding and fashioning (the comparatist comes to the foreign law-texts that he finds there, which he then moves to articulate, to fashion, by way of his report). In effect, 'the concept of invention distributes its two essential values between the two poles of the constative (to discover or disclose . . .) and the performative (to produce, institute, transform)', there being an 'infinitely rapid oscillation' between the two situations.[16] Invention? The comparatist *inventing* foreign law? Precisely. Yes.

Meanwhile, I strongly condemn the view that the only or most worthy enunciation within comparative law would be an objective or true statement regarding the foreign. Although I maintain that I am offering sophisticated inquiries and not mere sophistry, my contribution to the comparative conversation refuses to make any argument in favour of its objectivity, and it rejects the idea that it would be propounding any truth-claim. While it exists as a characteristic discursive formation outside the comparatist, foreignness – foreign law – can only be thought and experienced by the comparatist through the comparatist's thought and experience. As comparatist-at-law, my dealing and understanding, my alloying and writing – all of it in 'my' words – are thus informed by aesthetic, rhetorical, practical, or cognitive considerations that are inherently contingent and firmly limit my comparative work to

[16] Eg: see J Derrida, *Psyché*, vol 1 (2nd ed, Galilée 1998 [1987]) 23 and 25. Jacques Derrida is right to claim that 'one would not say today that Christopher Columbus has invented America . . . . [U]sage or the system of certain modern, relatively modern conventions would prohibit us from speaking of an invention whose object would be an existence as such': ibid 41. Yet, in the Roman liturgical rite, there was long celebrated on 3 May the Invention of the Holy Cross (*Inventio Sancta Crucis*), that is, St Helena's *discovery* of the Cross in 326. Having been abolished by Pope John XXIII in 1960, the feast of the *Inventio* remains important for the Church of the East on 13 September. As one applies oneself to repair comparative law, 'one must today reinvent invention': ibid 37.