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Law, Comparatism, Epistemic Governance: There Is Critique and Critique

A review of Günter Frankenberg, *Comparative Law As Critique* (Elgar, 2016), 281 pp, ISBN 978-1-78536-393-1.

By Simone Glanert & Pierre Legrand^{*}

How many scholarly fields have experienced the disappointing fate of comparative law and continued in the grip of a demonstrably indigent epistemology for decades on end? After the early postmodernity witnessed their protracted servitude to *Les Grands systèmes's* jejune classifications, fallacious correspondences, and meagre interpretive return — a predicament which, implausibly, endures in countries as diverse as Brazil, France, and Russia — law's comparatists began taking their epistemic orders from Hamburg and the Hamburger diaspora. For fifty years or so, they have been gorged on a diet of *Rechtsdogmatik*, scientism, objectivity, neutrality, truth, and assorted shibboleths. As if these epistemic delusions were not ensnaring enough, the lame French model was eventually revived although tweaked to focus on traditions instead of systems (or families).¹ While critics were occasionally moved to chastise the deficit of threadbare Hanseatic knowledge-claims — some expressing their concern in conspicuous venues, others harnessing prestigious institutional affiliations² — comparative law's orthodoxy,

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¹ René David's 1950 *Traité élémentaire de droit civil comparé* was rebranded as *Les Grands systèmes de droit contemporains* in 1964. The new text has persisted through successive editions in French and, less regularly, in other languages. The most recent English version was released in 1985 as *Major Legal Systems of the World Today*. Meanwhile, Konrad Zweigert and Hein Kötz's 1969 *Einführung in die Rechtsvergleichung*, a product of the Max-Planck Institute in Hamburg, became available to an anglophone readership as *Introduction to Comparative Law* in 1977 due to Tony Weir's acclaimed translation. In 2000, Patrick Glenn startlingly sought to breathe new life into David's primer by releasing his *Legal Traditions of the World*. In one of the more charitable reactions to Glenn's work, a commentator remarked that it was "as if one ha[d] been upgraded from an ordinary package tour to a luxury cruise ship with a more sophisticated guide to the standard sights." William Twining, *Glenn on Tradition: An Overview*, 1 JOURNAL OF COMPARATIVE LAW 107, 108 (2006).

² See, e.g., Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARVARD INTERNATIONAL LAW JOURNAL 411 (1985); George P. Fletcher, *The Universal and the Particular in Legal Discourse*, 1987 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 335 (1987).

somewhat extraordinarily, has hitherto been able to operate unencumbered by any epistemic challenge whose monographic exposition would have proved decidedly pre-eminent. It is the great merit of Günter Frankenberg's *Comparative Law As Critique*, in crucial respects an account at once capital and extensive, that it discontinues, finally, the longstanding deployment of comparative law's mainstream imposture.³ Frankenberg's refutation is thus well worth restating, and the first part of this review wishes loyally to apply itself to this important re-presentative task not least by affording the author much latitude to express himself in his own voice. Yet, Frankenberg's considerable critical integrity notwithstanding, this essay holds that his epistemic transgression remains too diffident. Specifically, five key concerns at least warranted more subversive epistemic commitments than Frankenberg allows. In the wake of *Comparative Law As Critique*, the second part of our commentary addresses these contentions with a view to making a case both for comparative law as *strong* critique and for the paradigmatic epistemic turn that has been persistently deferred within the field.

Frankenberg's disquisition begins with a detailed theoretical statement which, by the author's own admission, is meant to adopt the form neither of a "treatise" nor of a "textbook" on comparative law, not even of a "comprehensive introduction" to the subject-matter.⁴ Frankenberg also contributes a meticulous application of his manifesto through a chapter on religious attire, while adding two essays on human rights and access to justice — "[all] experiment[s] in how [critique] can be done,"⁵ critique involving "non-scientific theorizing; non-traditional theory; oppositional spirit; and, if possible, transformative vision,"⁶ that is, "mean[ing] more than the random and vague expression of doubt, dissent or discontent."⁷ While the book does not expressly fashion its argument around a ternary structure, the epistemic claim it propounds — its strategy to "creat[e] an anarchic moment in knowledge production by disrupting the established routines and, in particular, what is considered 'good comparative practice' or 'good disciplinary practice'"⁸ — discernibly features three recurring counterpoints.

³ GÜNTER FRANKENBERG, *COMPARATIVE LAW AS CRITIQUE* (2016).

⁴ *Id.* at x.

⁵ *Id.* at 22.

⁶ *Id.* at 31.

⁷ *Id.*

⁸ *Id.* at 33, 17.

First, Frankenberg castigates comparative law's "Anglo-Eurocentrism" and maintains the correlative need to "provincialize Western law."⁹ Although one may express surprise that comparatists should stand accused of falling prey to unwarrantable ethnocentrism, to a vestrhythm going beyond that with which one is arguably inevitably burdened, it bears recalling Jacques Derrida's warning to the effect that "[o]ne [is] apparently avoiding ethnocentrism at the very point when it will have already operated in depth, silently imposing its ongoing concepts of speech and writing."¹⁰

Secondly, the author censures law's comparatists for hiding "the relations between knowledge and power."¹¹ In particular, Frankenberg attacks what he styles comparative law's "posture of innocence" and its obsession with "cognitive control."¹² He thus decries comparatists for "comfortably accept[ing] the traditional object-subject conception of comparison,"¹³ for pursuing "what they believ[e] to be an 'objective' access to the reality of foreign law,"¹⁴ for being "bent on determining what the law *is* in another country, *the law* as contained in statutes and court decisions and accompanied by scholarly commentary,"¹⁵ therefore excluding "all extralegal incursions — notably politics, ethics, culture and the economy — on law-making and law-deciding."¹⁶ The author rejects this "[b]oundary-work" and the ensuing "reduc[tion] [of comparative law] to a mere technicality,"¹⁷ not unlike engineering,¹⁸ holding that "a discipline defined by its techniques is almost invariably complemented by tales of its *scientific* nature"¹⁹ — as is indeed the case with comparative law, long marked by the "ambition to promote [itself] to a science."²⁰ Moreover, Frankenberg contradicts the comparatists' "similarity disposition" and refutes "the moral deficit that comes with the routine management of similarities."²¹

⁹ *Id.* at x.

¹⁰ JACQUES DERRIDA, *DE LA GRAMMATOLOGIE* 178 (1967).

¹¹ FRANKENBERG, *supra* note 3, at 41.

¹² *Id.* at ix, 13.

¹³ *Id.* at 6.

¹⁴ *Id.*

¹⁵ *Id.* at 15 (emphasis original).

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 8, 40.

¹⁸ *See id.* at 40.

¹⁹ *Id.* at 38.

²⁰ *Id.* at 46.

In this regard, directing his attention to comparative law's typical "unitary projects,"²² he percipiently notes that "the universal does not exist independently from the particular perspective from which it is seen."²³ In sum, the author reproves comparative law's "logocentric, positivist . . . course,"²⁴ its understanding of "the legal vocabulary and grammar as an autonomous body of rules and decisions, arguments and doctrines,"²⁵ as a "narrow cognitive operation" marred by an "astonishing aloofness from methodological and epistemological battles."²⁶

Thirdly, Frankenberg, adamantly bent on moving beyond comparative law's "unbearable formalism, barrenness and mechanistic style,"²⁷ attends to "the ethical and political implications of locating, studying and comparing the foreign."²⁸ He thus propounds a strategy "for recognizing the other — foreign legal systems, cultures, institutions — in its own right,"²⁹ which he articulates around "the twin operations of *distancing* and *differencing*,"³⁰ each motion an occurrence of performativity,³¹ of constructivism also.³² For Frankenberg, "*distancing/differencing* calls on the comparatist to decenter her worldview and to consciously establish subjectivity and context in the comparative space, that is, to take into account the observer's perspective."³³ In other terms, "comparatists operate and observe within the boundaries of a *particular* context and interpret what they see within a *particular* matrix provided by a specific cultural context that constitutes law and is also constituted by law."³⁴ According to Frankenberg, "[b]oth operations encompass the

²¹ *Id.* at ix, 88.

²² *Id.* at 44.

²³ *Id.* at 98.

²⁴ *Id.* at 14.

²⁵ *Id.* at 5.

²⁶ *Id.* at 37, 78.

²⁷ *Id.* at 288.

²⁸ *Id.* at 41.

²⁹ *Id.* at 6.

³⁰ *Id.* at 42 (emphasis original).

³¹ *See id.* at ix, 111.

³² *See id.* at ix, x.

³³ *Id.* at 74 (emphasis original).

³⁴ *Id.* at 72 (emphasis original).

willingness and capability to cope with preconceptions and stereotypes, biases and rationalist assumptions that fall within the analytical framework and normative matrix of one's own (legal) education and experience."³⁵

As he proceeds to enunciate his theoretical engagement, Frankenberg entwines his claims with a historical panorama of the discourses having successively dominated the field's epistemic scene over the years. Specifically, the author identifies four principal (and overlapping) phases, which he names "universalism"³⁶ — the 1900 Paris conference, the quest for a *droit commun législatif*, and the configuration of law as a *science universelle*, both uniformizing pursuits driven by "a rhetoric of truth and objectivity";³⁷ "taxonomy" — the age of legal systems (or families);³⁸ "functionalism"³⁹ — "the categorical imperative of comparative reason,"⁴⁰ effectively "an analytical device introduced . . . [for] the narrow purpose of comparative legal problem-solving,"⁴¹ but a practice "not likely to either recognize or respect, let alone relish, significant differences" across laws;⁴² and "factualism"⁴³ — the self-indulgent, rambling, untheorized, and insignificant "common core" initiative hailing from Trento and having developed under two tutelary deities, Rodolfo Sacco and Rudolf Schlesinger, the former committed to "structuralist positivism,"⁴⁴ the latter to comparison "in terms of precise and narrow rules" that would "carry the same meaning to lawyers brought up in various legal systems."⁴⁵ Bringing together what he identifies as the four current epistemic strands within comparative law,⁴⁶ contributing his own distancing/differencing rejoinder, Frankenberg then produces a master grid where the

³⁵ *Id.* at 83.

³⁶ *See id.* at 42–47.

³⁷ *Id.* at 45.

³⁸ *See id.* at 47–52.

³⁹ *See id.* at 52–59.

⁴⁰ *Id.* at 52.

⁴¹ *Id.* at 54–55.

⁴² *Id.* at 57.

⁴³ *See id.* at 59–70, 94–95.

⁴⁴ *Id.* at 63.

⁴⁵ Rudolf B. Schlesinger, *Introduction*, in 1 *FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS* 9 (Rudolf B. Schlesinger ed., 1968); Rudolf B. Schlesinger, *The Common Core of Legal Systems: An Emerging Subject of Comparative Study*, in *TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA* 78 (Kurt H. Nadelmann, Arthur T. von Mehren & John N. Hazard eds., 1961).

⁴⁶ *See* FRANKENBERG, *supra* note 3, at 85–112.

diverse positions are correlated and contrasted through cursory inscriptions in the various quadrants.⁴⁷ (Interestingly, Frankenberg's diagram, perhaps heeding the theological quip that one begins to err as one begins to count, is silent on two insistent configurations of comparative legal knowledge, both revealing a peculiar understanding of the world as "flat" and both disclosing seemingly unalloyed faith in numbers: econometric or indicator-based research adopting the paradigm of "standard rational conduct" and "empirical" surveys aiming to accumulate epigrams about the laws of 14, 26, 79, 134, or . . . 180 countries.)

Frankenberg's theoretical critique finds its most detailed exemplification by way of a study relative to religious attire.⁴⁸ This inquiry features an iteration of the master grid with specific reference to the range of opinions on "Muslim veiling."⁴⁹ In particular, Frankenberg discusses the 2004 French statute that prohibits attire (the untranslatable French word is "*tenues*") "conspicuously" ("*ostensiblement*") displaying religious allegiance in public primary and secondary schools. While the author introduces the law in force in Germany, the United Kingdom, or the United States and also refers to various European Court of Human Rights decisions, French legislation remains his principal focus. In effect, Frankenberg contrasts "the French brand of . . . militant Republican secularism"⁵⁰ — an exercise in "social-cultural hygiene" allowing no room for any "displace[ment] [of] the power of the hegemonic culture, its beauty criteria and loyalty claims"⁵¹ — with the recognition of something like a "human right to veiling."⁵²

Although many approach the issue of religious attire by readily mobilizing an ethnocentric, controlling, assimilationist, imperialist, crusading, proselytizing, or universalizing frame of mind — all tactics reminiscent of comparative law's "similarizers" and their arrangements — others, like Frankenberg, defy a "reductionist understanding of . . . practices of dress."⁵³ Boldly channelling a distancing/differencing standpoint, Frankenberg therefore withstands "the denial of Muslim women and their complex identity construction."⁵⁴ As he stigmatizes

⁴⁷ See *id.* at 84.

⁴⁸ See *id.* at 117–64.

⁴⁹ *Id.* at 118.

⁵⁰ *Id.* at 130.

⁵¹ *Id.* at 150, 142.

⁵² *Id.* at 138.

⁵³ *Id.* at 143–44.

⁵⁴ *Id.* at 143.

“the colonial obsession with unveiling, uncovering and unmasking,”⁵⁵ the refusal to respect the fact that “the covered Muslim woman chooses to be sexually unavailable,”⁵⁶ Frankenberg, allying himself with politist Wendy Brown, whom he quotes,⁵⁷ disputes the unexamined Western view that postulates “the liberatory meaning of skin showing.”⁵⁸ He thus defends a robust comparative practice which would embrace “[the] [e]thics and [p]olitics of [s]kepticism,”⁵⁹ which would challenge the view that “legislative bans or administrative measures (by school principals) will help to find answers to the complex problems of integration in immigration societies.”⁶⁰ It is, as Frankenberg explains, about “accept[ing] the otherness of the ‘other’ without *othering* it,”⁶¹ that is, safeguarding foreignness and saving foreignness from marginalization or effacement or “cannibaliz[ation]” by “the . . . power of the sovereign self.”⁶²

The chapters on human rights and access to justice — the latter an institutional framework on which “the very effectiveness of human rights law hinges”⁶³ — offer instances of the author’s ambition, as befits a serious comparatist, “to unsettle the political routines of . . . policies and put into perspective the moral high ground of normativist projects.”⁶⁴ With respect to human rights, Frankenberg invites his readership to “re-imagin[e] [human rights law] as a point of departure for the resistance to normalization and ideology.”⁶⁵ Indeed, the romantic ubiquity of human-rights discourse means that one is liable to forget how it

⁵⁵ *Id.* at 148.

⁵⁶ *Id.* Frankenberg repeatedly quotes Fanon, a psychiatrist and philosopher having settled in Algeria from his native Martinique. See *id.* at 150–51. Fanon is best known for his analysis of colonialism and decolonization, which established him as a leading anti-colonial thinker. On the subject of veiling, Fanon wrote as follows: “This [Algerian] woman who sees without being seen frustrates the colonizer. There is no reciprocity. She does not surrender herself, does not give herself, does not offer herself. . . . The European man facing the Algerian woman wants to see. He reacts in an aggressive way before this limitation to his perception.” FRANTZ FANON, *L’AN V DE LA RÉVOLUTION ALGÉRIENNE* 26 (2011).

⁵⁷ WENDY BROWN, *REGULATING AVERSION* 189 (2006) (“What makes choices ‘freer’ when they are constrained by secular and market organizations of femininity and fashion rather than by state or religious law?”).

⁵⁸ FRANKENBERG, *supra* note 3, at 62.

⁵⁹ *Id.* at 159.

⁶⁰ *Id.* at 161.

⁶¹ *Id.* at 71 (emphasis original).

⁶² *Id.* at 225, 71.

⁶³ *Id.* at 217.

⁶⁴ *Id.* at 167.

⁶⁵ *Id.* at 204.

features “mechanisms that re-present, re-construct and transform reality in a specific way.”⁶⁶ Even as “[h]uman rights have the reputation of incarnating the core component of [a] humanist ethics,”⁶⁷ they engender alienation, namely the “relegat[ion] of rights-holders to the role of intimidated and rather ignorant bystanders who observe the automatic functioning of a well-oiled, complex legal machinery.”⁶⁸ Further limitations coincident with the normalization of human rights include justification (or vindication of organized state violence), selectivity (or the preferencing of certain rights), routinization (or institutional ritualization), and de-politicization.⁶⁹

Frankenberg’s theme is analogous as regards access to justice: “While modernist, romantic narratives stress the empowering and liberating effects law and access to courts may have, one has to add that law-rule comes at a cost.”⁷⁰ And the price is that “[c]onflicts [have to be] shifted from the everyday location where they arise — home, street, school, workplace — and transferred to official institutions and handed over to professional bodies specialized in dealing with legal conflicts.”⁷¹ In other words, “everyday conflicts are forced into the format of a case.”⁷² But this displacement entails that “the political-social dimension of a conflict, the personal drama also ten[d] to get lost or obscured in translation.”⁷³ Frankenberg emphasizes how this inevitably simplificatory process of normalization breeds disempowerment,⁷⁴ therefore questioning the very “justice” that one is meant to be accessing.

Drawing on contemporary ethnography, the author’s bracing conclusive remarks enter a plea for “thick” comparison, for narrativized comparative work which is “open to local knowledge and context sensitive,”⁷⁵ “interested in restoring and rehabilitating law’s detail,”⁷⁶ keen to “transmit the richness of law’s events . . . with their cultural background

⁶⁶ *Id.* at 176.

⁶⁷ *Id.* at 179.

⁶⁸ *Id.* at 180.

⁶⁹ *See id.* at 171–86.

⁷⁰ *Id.* at 218.

⁷¹ *Id.*

⁷² *Id.* at 219.

⁷³ *Id.*

⁷⁴ *See id.* at 220–22.

⁷⁵ *Id.* at 227.

⁷⁶ *Id.* at 228.

as well as their political, economic and social ramifications.”⁷⁷ And the “thickness” that Frankenberg advocates enjoins an acute awareness that “the comparatist is *always already* anchored in a specific, particular legal tradition, culture and experience.”⁷⁸

Eruditely invigorating, Frankenberg’s critical aspirations are nonetheless incompletely radical, his oppositional edge insufficiently sharp, to operate as comparative law’s governing epistemic practice. Frankenberg’s critical reticence is apparent in at least five respects.

There is no meaningful foreign law other than as culture. Without wanting to reduce complex works of scholarship to their abstracts or titles, publishers’ law lists and journals’ tables of contents obstinately offer a plethora of evidence that comparative law’s orthodoxy remains in thrall to a Kelsenian mindset whereby “[t]he law counts only as positive law.”⁷⁹ Now, ploughing their grim grooves positivists are primarily preoccupied with analytics, that is, with legal technique and with the rationalization of legal technique. They foster “legal dogmatics,” to transpose the well-rehearsed German phrase, in as much as they purport to arrange the law in orderly, coherent, and systematic fashion. Throughout, their investigations remain squarely set on rules — on what has been posited by authorized officials as “what the law is” — and on the formulation of rehearsals of these rules, whether judicial or academic, that are readily offered as veritistic. In Frederick Schauer’s terms, “the description of law” stands “at the heart of the positivist outlook.”⁸⁰ Indeed, this understanding of the legal appears so uncontroversial within mainstream comparative law that one finds oneself encountering a cavalier dismissal to the effect that any re-consideration of the matter would prove “largely sterile and boring.”⁸¹ Such unhelpful presumption notwithstanding, a marginal view has emerged to claim that foreign law ought to be studied in context. In other words, a probing of the 2004 French statute on religious attire at school (to track one of Frankenberg’s leading illustrations) should favour a contextual analysis so as to embrace, say, historical, social, political, and ideological — that is, cultural — considerations pertaining to the legislative text. *But this argument must be deemed unacceptable.* As it confines culture to the periphery of the legal, it leaves uncontested the dominant view of law-as-law, of law as consisting of the legal only — of

⁷⁷ *Id.*

⁷⁸ *Id.* at 230 (emphasis original).

⁷⁹ HANS KELSEN, REINE RECHTSLEHRE 64 (§28) (1934).

⁸⁰ FREDERICK SCHAUER, THE FORCE OF LAW 12 (2015).

⁸¹ Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems*, 45 AMERICAN JOURNAL OF COMPARATIVE LAW 5, 13 n.37 (1997).

the legal understood as unsullied or uncontaminated by other discourses. To relegate culture to the circumference of the law means, in effect, that comparative law's orthodoxy can easily continue to discard it as superfluous. In order to counter this positivism which, even on a most generous reading of what it is able to achieve, can only ever allow one to *identify* the foreign law in force rather than *explain* it in depth, comparatists, who require to ascribe meaning to another law, to address the question "why?," resolutely need to argue that "law is thoroughly a cultural construct,"⁸² that "law is culture-specific."⁸³ Only if they undertake such a re-signification of the legal can comparatists begin to produce meaningful reports concerning foreign law.

It is not, then, that an examination of the French statute on religious attire at school should feature social or ideological considerations which would be situated beyond the law, but that it should include these *as law*. Indeed, when reckoning the ideology that informs the French statute, for example, one is not leaving the law. Rather, one is dismantling the text of the law to peruse what it has been concealing. In effect, *one is reading between the lines* — which means that one is still reading the law-text itself. If you will, it is as if the French statute was being subjected to a spectroscope which would photograph the ideological phantoms constitutively haunting it. If, as Frankenberg convincingly suggests, the French statute is Islamophobic (that is, if it inscribes a fear of Islam), such Islamophobia forms an inherent part of the statute's textual fabric and semantic reach so that the legislative text can legitimately be said to exist *as* an Islamophobic statement. In the process, law — indeed, legislated law, the very hallmark of positivism — is seen to feature an ideological mark or trace which lives on *as* the statute and which a close reading relying on a sound knowledge of French culture can meaningfully disclose. This affirmation is well worth emphasizing. Islamophobia is not to be regarded as contextual vis-à-vis the law or as external to it or as some sort of parergon belonging to the realm of non-law, to an "outlaw" space. Rather, Islamophobia informs the making or fabrication of the law-text, it concerns the very texture of the law-text, it lurks within the law-text into which it has morphed *as* the law-text that now exists — which is to say that it remains as a textual survivancy. To trace the French statute on religious attire at school to the Islamophobic threads that constitute it (etymologically, "text" and "textile" converge) is therefore not to leave the law for the land of the extra-legal. Rather, it is to search the law — to excavate it⁸⁴ — to disassemble the legal that was erected in the form of a statute, a complex and multi-dimensional construct, with a view to eliciting — to bringing to light — the law-text's discursive "building blocks" and to making sense of this singular textual composition.

⁸² BRIAN Z. TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY* 128 (1997).

⁸³ George P. Fletcher, *What Law Is Like*, 50 *SOUTHERN METHODIST UNIVERSITY LAW REVIEW* 1599, 1610 (1997).

⁸⁴ Derrida mentions "*le travail en creux de l'interrogation*." JACQUES DERRIDA, *L'ÉCRITURE ET LA DIFFÉRENCE* 49 (1967).

The vertiginous techno-economic interdependencies and space-time compressions characterizing the era of “globalization” and the attendant erosion of specific national-sovereignty prerogatives, far from confining culture to irrelevance, have heightened its pertinence, for example as a heuristic implement allowing one to bear (participatory) witness to the global production of a kaleidoscope of embodied and significant disjunctive, differentiated, and singularized local knowledges. Indeed, a comparatist investigating foreign law existing as culture must acknowledge that cultural inquiry summons a process of quarrying which is, in all rigour, infinite. Consider how the French statute on religious attire at school also instantiates a centuries-old history of anti-clericalism; a post-Revolutionary idea of citizenship; a vehement opposition to multiculturalism (known as “*communautarisme*” in France) or to minorities’ rights; a predilection for state intervention and for the enactment of apodictic statutes purporting to install a fixed and uniform legal meaning over the entire national territory; and an extolment of the school as a leading vector of institutionalization into republicanism. In the absence of a finite enumeration of the statute’s cultural markers, no anamnesis can attest to the French law-text’s interminable cultural embeddedness. It follows that there are never exhaustive comparisons, only exhausted comparatists (ascription of meaning to law-as-culture thus falling prey to the body and being interrupted by it).

There is no meaningful foreign law other than as unforeign law. When a German comparatist enters a Paris law library to make sense of the French statute on religious attire at school so as to articulate a (forced) negotiation between French and German laws, the French law-text stands *before* her, twice: it is in front of her, on the statute book, as she sits at her desk, and it has come into legal being in advance of her arrival. Still, the statute cannot mean on its own. As the legislative text uses terms like “*tenués*” (“attire”/“garb”/“apparel”), “*manifestent*” (“attest to”/“express”), or “*ostensiblement*” (“conspicuously”), the semantic extension of these words is not fixated in self-evidence. Any foreign law-text therefore demands an interpreter in order to accede to signification.

The meaning that our German comparatist assigns to the French statute should be based on a sound appreciation of French culture, French legal culture, and French law. Moreover, it should rest on thorough and thoroughly interdisciplinary research. Crucially, however, the German comparatist we suppose dwells in the German culture or language to which she belongs, operates under the influence of the German legal education that institutionalized her into the law, and works pursuant to the influence of her dissertation supervisor, say, a leading comparatist from Berlin who socialized her into comparative law (himself, say, the pupil of a famed Heidelberg comparatist). (Note that for our German comparatist’s heteronomous engagement with the French statute to be possible at all, it is necessary that her thought should be immersed within such pre-understanding. Otherwise, how could she even begin to recognize the French statute as legislation rather than as a poem?) In addition, the reading of the French statute that the German comparatist produces foregrounds her substantive and stylistic emphases, choice of references, selection of quotations, formulation of headings, adoption of certain words or

expressions, and assumption of a precise tone. The statute thus receives the interpretive appearance that the comparatist fashions for it through an extensive *sorting* process. It is therefore hardly an exaggeration to maintain that as reader of the foreign statute, on the basis of “her” reading of the law-text, *the comparatist becomes its author*.

Even as the French statute exists independently of the German comparatist, it cannot exist meaningfully without her or without alternate interpreters. Strictly speaking, the law-text cannot exist meaningfully except as *interpreted words*. In other terms, “the meaning of a text is not to be found in it like a stone and hel[d] up for display,”⁸⁵ but depends on the decisive enunciative intervention of an interpreter in the interpreter’s language without which the statute is destined to remain meaningless. For the meaningfulness of the statute to emerge, interpretation — in effect, speculation — must act constitutively; it must enable or emancipate the text into meaning. As regards the French statute on religious attire at school, our German comparatist will thus move to interpret or speculate until she feels confident that she has framed a textual interpretation of the law-text amenable to adhesion (any reception of her proposed reading being subordinated not to some algorithm, but to an extraordinarily intricate interlapping of complex regimes of disclosure and appreciation).⁸⁶

Since, within a comparative dynamics, the French statute on religious attire at school only exists meaningfully as German — or as Italian or Canadian — commentary, it follows that the French statute’s meaningful existence is, say, as the German comparatist’s German interpretation in the German language. This epistemic fact implies that when our German comparatist writes on the French statute, she is addressing foreign law in a limited sense of the word “foreign” only. Indeed, the so-called “foreign” finds itself always already de-Frenchified/Germanized, any *Verfremdungseffekt* instantaneously compromised. In other words, as the French statute is performed by the German comparatist, it is always already no longer the French statute. No hearkening — not even a further reading which would “begin again now with rather less force, because [one] want[s] to let [the French law-text] speak”⁸⁷ — can avoid an inevitable appropriation of the archive as narrative, interpretation as transformation, inscription as iteration. Paradoxically, while our German comparatist cannot remain external to the French statute that she enunciates (her writing tells “her” French statute), the French statute that obviously exists without her and irrespective of her thus stays out of her reach: our German comparatist not being in a position to make herself external to any re-statement of the French statute means that she is effectively keeping the French statute external to her.

⁸⁵ JAMES B. WHITE, *HERACLES’ BOW* 80 (1985).

⁸⁶ See SAMUEL BECKETT, *THE UNNAMABLE* 85 (Steven Connor ed., 2010) (“What can one do but speculate, speculate, until one hits on the happy speculation?”).

⁸⁷ SARAH WOOD, *WITHOUT MASTERY: READING AND OTHER FORCES* 1 (2014).

On close examination, our German comparatist's account of French law is therefore not a report *relating* to foreign law. Rather, it configures a *disrelation* as it conveys French-law-through-German-eyes-and-words instead of anything that would be French law as it existed *sic et simpliciter* in advance of the comparatist coming to it. Again, the only French law that our hypothetical comparatist can have in mind is a French law that is present to her as always already Germanized French law, as *unforeign* law. It is in this sense also that foreign law cannot exist meaningfully except as the comparatist's constitutive interpretation or speculation. No matter how rigorous one's economy of application, the journey *to* cannot be achieved, the journey *from* cannot be escaped. While the comparatist may be *after* the foreign in the utmost earnestness, the comparative incursion stands in effect as an exercise in introspection. Implacably, "it is always [one]self that [one] choose[s]." ⁸⁸

There is no foreign law-text other than as playground. (Encultured and unforeign) law-texts are necessarily fashioned out of language whose intrinsic ductility generates an uncircumventable semantic lee-way or *play* — as in "room for action," "scope for activity" (*Oxford English Dictionary*) — which pertains to the very texture of textuality. In other words, textuality's basal condition is as semantic heterogeneity, which means that the text's presencing exists as incessant semantic movement. Because "the text itself *plays*," ⁸⁹ since it must follow that "meaning *depends* on play," ⁹⁰ no original, fixed, or ultimate meaning can be extracted from a text. Rather, the making of textuality is such that every text structurally holds the possibility of disseminating an infinity of meanings. This is an irrepressible fact pertaining to textual architectonics which every interpreter must confront. Even as the interpreter projects himself towards the text with a view to making sense of it, to assigning salience to aspects of it, the text, in some sort of counteracting drive, has always already undertaken to dominate the interpreter's doing. In particular, the text unceasingly plays through the interpreter no matter how determined she is to arrest its motion.

Although the interpreter purports to achieve the unconcealment of the text, the playing text withdraws from every effort at semantic stabilization across any self/other line. Addressing this resistance to disclosure, Heidegger refers to "the primal conflict between clearing and concealing." ⁹¹ Instead of a consensus between *interpretandum* and

⁸⁸ Letter from Samuel Beckett to Marthe Arnaud (10 June 1940), in 1 THE LETTERS OF SAMUEL BECKETT 684 (Martha D. Fehsenfeld & Lois M. Overbeck eds., 2009).

⁸⁹ ROLAND BARTHES, LE BRUISSEMENT DE LA LANGUE 78 (1984).

⁹⁰ DERRIDA, *supra* note 84, at 382 (emphasis original).

⁹¹ MARTIN HEIDEGGER, HOLZWEGE 42 (2015 [1950]).

interpretans, there is insurmountable strife. And it is because of such discord that Heidegger rejects “the structure of an agreement between knowing and the object in the sense of the adjustment of one being (subject) to another (object).”⁹² As the text’s presencing takes the form of an obtrusion,⁹³ textual play operates agonistically (it affirms incompleteness and openness). The inherence of play to textuality thus denies every archaeological tentative to seize the totality of the text’s meaning, every interpretive attempt to capture the entire text. No matter how sophisticatedly the interpreter responds to the play of the text, this failure of isomorphism means that textuality will preserve an interpretive remainder, a “singularity forever encrypted,”⁹⁴ a secret which interpretation simply cannot peer.

Notwithstanding the unreflective presupposition on the part of law’s comparatists that a law-text can only comprise a set of noncontradictory properties — either the French statute on religious attire at school is Islamophobic or it is not — the structure of textuality commands that no text can answer to one and only one admissible interpretation, awkward as this insight may prove from the standpoint of law’s normativity. The circumstance that two interpretations are contradictory does not exclude that they can both prove convincing at the same time from the vantage-place of various interpreters or of different interpretive constituencies for whom the play of the text generates specific (and incompatible) interpretive outcomes. Although incongruent interpretations — one that imputes Islamophobia to French legislation, the other that makes the case for the religious disinterestedness of the statute — cannot both be true, the notion of truth proves irrelevant to the pertinence of interpretive assertions since the play of the text entails that it cannot mean as an interpretation-independent entity. While the French statute itself cannot adjudicate between the multiplicity of interpretive or speculative accounts that are applicable to it, the play of the text ensures that every interpretation, necessarily mediated and implicitly denying other possible re-presentations, intervenes as an ever-defeasible narrative proposal which, in the absence of any unbiased readerly criterion, is destined to be validated or disconfirmed on the basis of its (perceived) persuasive merit or demerit rather than because of any intrinsic idea of rightness or exactness. Note that it is not that there is more than one legislative text, and that it is not either that the statute was drafted ambiguously. Rather, it is that the text is, densely, *textual*.

There is no translation of foreign law other than as impossibility. Foreign law-texts typically demand translation. Consider our German comparatist in a Paris law library actively writing/producing her account of the French statute on religious attire at school

⁹² MARTIN HEIDEGGER, SEIN UND ZEIT 218–19 (2006 [1927]).

⁹³ See WHITE, *supra* note 85, at 80 (referring to “the independent force of the text”).

⁹⁴ JACQUES DERRIDA, BÉLIERS 41 (2003).

and transposing the expression “*les écoles, les collèges et les lycées publics*” as “*öffentliche Grundschulen, Mittelschulen und Gymnasien*.” While seemingly transparent and agreeable, this German translation in effect raises insuperable problems. Ultimately, it reveals how each language unfolds *monologically*.⁹⁵

Within translation studies, an essay of Walter Benjamin’s has become a *locus classicus* on the undialectizable dynamics prevailing across languages. Evoking Saussure’s later distinction between “signifier” and “signified,” Benjamin separates “the intended object” (“*das Gemeinte*”) from “the mode of intention” (“*die Art des Meinens*”).⁹⁶ The intended object is the material entity to which a word refers. It is the *meant*. Consider the “San Diego High School.” Now, that material entity, there, is the self-same object — the self-same *meant* — to which the French syntagm “*lycée public*” and the German words “*öffentliches Gymnasium*” both refer as these terms both purport to designate the “San Diego High School” either in French or German. Meanwhile, the “mode of intention” — the manner in which the intended object shows itself to the world by way of language — differs according to whether the manifestation takes place through the words “*lycée public*” or “*öffentliches Gymnasium*.” Every language operates within the bounds of a singular cultural horizon. This enculturation fashions a language’s “mode of intention,” so that the self-same material entity or *meant*, the “San Diego High School,” will not signify identically within the French language or French horizon, where it manifests itself as “*lycée public*,” and within the German language or German horizon, where it manifests itself as “*öffentliches Gymnasium*.”⁹⁷ An analogy may assist. Imagine Dorothy observing that “The book is on the shelf” as Greta approves by saying either “*Ja, das Buch steht im Regal*” or “*Ja, das Buch liegt im Regal*,” depending on whether the book is standing or lying. Just as the “San Diego High School” is materially what it is, the book is materially where it is. However, the way in which the book occupies space differs across the English and German languages. Meaning therefore does not exhaust itself in the *meant* (the “what”, the “where”). As meaning comes towards us from out of the words, it is also bound to the way of meaning (the “how”) — which implies that the move across languages will, perforce, produce “deficiencies” or “exuberances.”⁹⁸ If there is the co-presence of more than one language, law’s comparatists can safely auspicate that there will be difference in meaning across languages for there *must* be (as Leibniz discerned in his *Nouveaux essais sur l’entendement humain* more than three centuries ago).

⁹⁵ See MARTIN HEIDEGGER, *UNTERWEGS ZUR SPRACHE* 265 (1959). See also JACQUES DERRIDA, *LE MONOLINGUISME DE L’AUTRE* (1996).

⁹⁶ WALTER BENJAMIN, *Die Aufgabe des Übersetzers*, in *ILLUMINATIONEN* 54–55 (1977 [1923]).

⁹⁷ See PAUL DE MAN, *THE RESISTANCE TO THEORY* 73–105 (1986).

⁹⁸ José Ortega y Gasset, *La reviviscencia de los cuadros*, in *8 OBRAS COMPLETAS* 493 (2d ed. 1994 [1946]).

Derrida's insight that there can never be translation but only transformation,⁹⁹ that "[w]hat [must] guid[e] [one] is always untranslatability,"¹⁰⁰ has paramount normative implications for law.¹⁰¹ Given the empirical fact of linguistic impassability, how can Canada or the European Union ever deem legislative texts official in two or twenty-four languages? And how can a comparatist ever work beyond one language, as she must, when translation constitutes "a practice producing difference out of incommensurability (rather than equivalence out of difference),"¹⁰² when to use the German "*öffentliches Gymnasium*" to discuss, in German, the French "*lycée public*" is indeed to import, to domesticate, to indigenize, and therefore to *angle* French law? How to translate the untranslatable, to possibilize the impossible? As they involve a pattern of expropriation-and-appropriation, these questions recall our argument about foreign law's unforeignness because of foreignness's inevitable enmeshment with the interpretive self's epistemic accoutrements, whose unfurling also prevents any enactment of the other's law that would partake of settledness rather than ambulation.¹⁰³

There is no method other than as distortion of foreign law. "It is important to recognise that comparison is not a method or even an academic technique; rather, it is a discursive strategy."¹⁰⁴ Indeed, "[t]here is no empirical methodology for learning how to disclose a world,"¹⁰⁵ no systematic or "scientific" path allowing to make the other othery in the way the artist seeks to make the flower flowery. Also, method — always *someone's* method — unescapably reveals a committed ethical or political perspective as regards the investigation of the matter under scrutiny.¹⁰⁶ And the claim to a method is necessarily an argument for the valorization of a certain way of knowing. The idea that method would afford a depersonalization of the comparative enterprise and accordingly allow for the production of an impartial or objective account — that it would serenize (or scientificize?) the study of foreign law and thus act as an "anxiety reducing device"¹⁰⁷ — is therefore but

⁹⁹ JACQUES DERRIDA, POSITIONS 31 (1972).

¹⁰⁰ Jacques Derrida, *Du mot à la vie*, MAGAZINE LITTÉRAIRE (April 2004), at 26.

¹⁰¹ Simone Glanert & Pierre Legrand, *Foreign Law in Translation: If Truth Be Told...*, in LAW AND LANGUAGE 513–32 (Michael Freeman & Fiona Smith eds., 2013).

¹⁰² Meaghan Morris, *Foreword*, in NAOKI SAKAI, TRANSLATION AND SUBJECTIVITY xiii (1997).

¹⁰³ Observe that for a postcolonial sensibility, untranslatability salutarily "exposes the limits of what the dominant language can handle." Judith Butler, *Restaging the Universal: Hegemony and the Limits of Formalism*, in CONTINGENCY, HEGEMONY, UNIVERSALITY 37 (Judith Butler, Ernesto Laclau & Slavoj Žižek eds., 2000).

¹⁰⁴ Benedict Anderson, *Frameworks of Comparison*, LONDON REVIEW OF BOOKS (21 January 2016), at 18.

¹⁰⁵ NIKOLAS KOMPRIDIS, CRITIQUE AND DISCLOSURE 108 (2006).

¹⁰⁶ See Günter Frankenberg, *The Innocence of Method — Unveiled: Comparison As an Ethical and Political Act*, 9/2 JOURNAL OF COMPARATIVE LAW 222 (2014).

“false comfort.”¹⁰⁸ Within comparative law, the (long-standing) commitment to method effectively legitimates the distortive arraignment of information as “data” being collected and enframed, consciously or not, with a view to fitting a preconceived ideology. Not only, then, can method not guarantee anything like epistemic neutrality (an illusive goal in any event), but it provokes “an actual deformation of knowledge.”¹⁰⁹

Making sense of foreign law depends on experience and experimentation (the French “*expérience*” conveys both ideas), which imply nomadic errancy and “flair.”¹¹⁰ Heidegger reminds us that an experience is not banal: “To undergo an experience with something, whether it be a thing, a human being, or a god, means that we let it befall us, strike us, come down on us, jostle us, and transform us.”¹¹¹ For Heidegger, a way (*Weg*) thus advantageously replaces a method, “[method] abid[ing] by the extreme perversion and degeneration of what is a way.”¹¹² Evoking the Heideggerian *Denkweg*, Derrida, too, draws a connection between experience and “the trajectory, the way, the crossing.”¹¹³ And, like Heidegger, Derrida distinguishes a way (*chemin/route*) from a method.¹¹⁴ Crucially, a way neither begins nor leads anywhere in particular. It has no origin or point of arrival since thought, which must be incessant questioning, shuns firm solutions. The insistence on the way thus expresses “the fact that thinking is thoroughly and essentially questioning, a questioning not to be stilled or ‘solved’ by any answer.”¹¹⁵

Insightfully, Heidegger reveals how he operated free of any methodological strait-jacket: “I would actually be in the greatest embarrassment if I ought to describe my method or even to release a methodology. And I am happy that I am thus far not feeling the fetters of a technique, but rather the coercion of a predicament.”¹¹⁶ (The comparatist-at-law’s own

¹⁰⁷ GEORGE DEVEREUX, FROM ANXIETY TO METHOD 97 (1967).

¹⁰⁸ PAUL RABINOW & ANTHONY STAVRIANAKIS, DEMANDS OF THE DAY 110 (2013).

¹⁰⁹ HANS-GEORG GADAMER, WAHRHEIT UND METHODE 306 (5th ed. 1986).

¹¹⁰ DERRIDA, *supra* note 10, at 233.

¹¹¹ HEIDEGGER, *supra* note 92, at 159.

¹¹² *Id.* at 197.

¹¹³ JACQUES DERRIDA, PAPIER MACHINE 368 (1990).

¹¹⁴ See Jacques Derrida, *Et cetera... (and so on, und so weiter, and so forth, et ainsi de suite, und so überall, etc.)*, in JACQUES DERRIDA 24 (Marie-Louise Mallet & Ginette Michaud eds., 2004 [2000]).

¹¹⁵ Joan Stambaugh, *Heidegger, Taoism, and the Question of Metaphysics*, in HEIDEGGER AND ASIAN THOUGHT 80 (Graham Parkes ed., 1987).

¹¹⁶ Letter from Martin Heidegger to Julius Stenzel (31 December 1929), 16 HEIDEGGER STUDIES 11, 19 (2000).

“predicament” is to ascribe meaning to the other’s law.) But how did the philosopher manage? Consider Heidegger’s own explanation: “I actually work factually out of my ‘I am’ — out of my spiritual, indeed factual origin — my environment — my life connections, from what is, from there, accessible to me as living experience, from that within which I live.”¹¹⁷

As Mallarmé had cause to ascertain, “[a]ny comparison is, in advance, defective,”¹¹⁸ that is, comparative research, no matter how intrinsically excellent, is always already a failure. This is so for the five reasons at least that we have identified: in order for foreign law to manifest itself meaningfully, it must be seen to exist as culture, which means that it can never be completely appreciated through interpretation; a comparatist cannot formulate foreign law as culture on its own terms, but must enunciate it according to “her” enculturation; foreign law cannot generate a fixed or fixable meaning which would exist independently from a comparatist’s interpretation; a comparatist cannot transmit foreign law in another language other than transformatively; and foreign law cannot have its integrity warranted through a comparatist’s interpretive obedience to a method.

In as much as it eschews a consideration of the primordially and magnitude of these epistemic hurdles, Frankenberg’s critique is not as resolute as ours. It is less *radical* than ours (we use the term etymologically), and it is also less anacoluthic. Reading Frankenberg, one may in effect be led to conclude that comparative law would ultimately *work* if only it could escape the stultifying epistemic shackles of the orthodoxy by including some consideration of law’s context, by showing enhanced awareness of the comparatist-at-law’s ethnocentric bias, or by embracing methodological pluralism. But not even Frankenberg’s incisive indictment of mainstream cognitive assumptions addresses the underlying fact that comparative law is epistemically doomed since the comparatist must always already *fail* to access or recount foreign law as it exists in advance of his interpretive essay.

Like us, Frankenberg has read Beckett (“Ever tried. Ever failed. No matter. Try again. Fail again. Fail better.”)¹¹⁹ Unlike us, he refuses to follow the playwright to his uncompromisingly dissensual conclusion, to the Derridean view that “[t]here is no world,

¹¹⁷ Letter from Martin Heidegger to Karl Löwith (19 August 1921), in 2 ZUR PHILOSOPHISCHEN AKTUALITÄT HEIDEGGERS 29 (Dietrich Papenfuss & Otto Pöggeler eds., 1990).

¹¹⁸ [Stéphane] Mallarmé, *Tennyson vu d’ici*, in DIVAGATIONS, in 2 ŒUVRES COMPLÈTES 138 (Bertrand Marchal ed., 2003 [1892]).

¹¹⁹ SAMUEL BECKETT, WORSTWARD HO, in COMPANY/ILL SEEN ILL SAID/WORSTWARD HO/STIRRINGS Still 81 (Dirk Van Hulle ed., 2009 [1983]). For Frankenberg’s reference to Beckett, see FRANKENBERG, *supra* note 3, at 20.

[that] there are only islands,”¹²⁰ that “the worlds in which we live are different to the point of the monstrosity of the unrecognizable, of the un-similar, of the unbelievable, of the non-similar, of the non-resembling or resembleable, of the non-assimilable, of the untransferable.”¹²¹ Let us be clear, though, that to assert how one must reckon with comparative law’s failure to account for the other law or for the other-in-the-law — how one must earnestly pursue the “rhetoric of dissimulation”¹²² — is not in the least to disqualify comparatism as a necessary intellectual pursuit. Quite apart from the fact that the very existence of foreign law interpellates one, makes a claim on one, solicits one’s recognition and respect, its normative relevance as persuasive authority compellingly prevails over exclusionary national or territorial arguments. And even as any scrutiny of foreign law must accept the presence of an epistemic gap that the comparatist cannot bridge and must acknowledge that the comparatist and the foreign law will therefore never *meet*, comparative law — *la comparaison quand même* — promotes the unravelling of the foreign, the only brand of interpretation that can prove meaningfully edifying “despite the fact that/because of how” the comparatist must abide distant reading.

Since sheer duplication of foreign law by the comparatist is of no interest in any event, interpretive enrichment requires a comparative text that tells foreign law otherwise than foreign law’s own telling of itself. Only by means of the comparatist’s trials, sallies, shots, goes, and shies at bringing “elsewhere within here,”¹²³ then, can there be a conversation, a deliberation, or a negotiation across laws of the kind that may allow for an amelioration of what attentive and lucid understanding of the other (and of the self) is feasible, not to mention the emergence of “the best way of concerning oneself with the other and of concerning the other with oneself, the most respectful and the most grateful, the most giving also.”¹²⁴ As it affords a more significant interpretive *yield* — indeed, as it informs the realization that “the *commitment* to [comparative law] means that one can never become a *comparatist*”¹²⁵ — inadequacy is opportunity.

¹²⁰ 2 JACQUES DERRIDA, *LA BÊTE ET LE SOUVERAIN* 31 (Michel Lisse, Marie-Louise Mallet & Ginette Michaud eds., 2010 [2002]).

¹²¹ *Id.* at 367.

¹²² NATALIE MELAS, *ALL THE DIFFERENCE IN THE WORLD* 65 (2007).

¹²³ *See, e.g.*, TRINH T. MINH-HA, *ELSEWHERE, WITHIN HERE* (2011).

¹²⁴ JACQUES DERRIDA, *POINTS DE SUSPENSION* 296 (Elisabeth Weber ed., 1992 [1989]).

¹²⁵ D.N. RODOWICK, *PHILOSOPHY’S ARTFUL CONVERSATION* 306 (2015) (emphasis added). We adopt Rodowick’s observation regarding “his” discipline and apply it to “ours.”

