

Comparative Law and Language
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*[T]he suggestion that inquiries into the meanings of words merely throw light on words is
false.*

- H.L.A. Hart

I. Introduction

At the simplest level of observation, language issues arise in connection to comparative law because people in different countries speak in different languages, producing legal texts in foreign languages that become the target of comparative legal studies. At the same time, English is gaining ascendancy, if not dominance, with international exchanges in the field increasingly conducted solely in that single language, whether in scholarly conferences, in journals targeting an international readership, or in university classes where professors and students do not share a native language. These matters of simple observation will be discussed in Part II, with some suggestion of how they relate to a deeper link between comparative law and language that is a principal subject of this chapter: namely, the study of language as a cognitive model for comparative law.

Part III discusses language's dependence on translation inasmuch as translation is the mechanism central to meaning construction, even within a given language. Part IV links

¹ For their helpful thoughts on some of the issues discussed in this chapter, sincerest thanks to John Allison, Sir Franklin and Lady Berman, Cécile Desandre, Dan Simpson and Phil Watts. Unless otherwise noted, translations are mine.

translation to comparative law as a model for the study of similarity and difference, of the universal and the particular, and discusses them in terms of the contrasting categories that undergird the civil- and common-law legal systems. It also discusses how post-war comparative law scholars analyzed these subjects, explaining their rejection of the legal positivism that increasingly had marked legal theory from the nineteenth century until the Second World War.

Part V examines the post-war émigré comparative law scholars' immersion into a new language and legal culture, and how that experience informed their scholarly theory on issues of sameness and difference across legal orders. It then progresses to the generation that followed, whose divergence from the post-war perspective has reflected an increasing incorporation of postmodernist influences. The debate in comparative law over the relative importance of similarity and difference among legal systems has its counterpart in linguistics in conflicting views about whether commonalities among languages are fundamental or merely marginal. Part VI shows that these issues situate comparative law between deeply entrenched, mutually contradictory aspirations of universalism and pluralism which have stalked the evolution of both language and legal studies.

Universalism may seem to be on the ascendancy today, due to the globalization that vastly increases contacts in law without impediments from geographical distance; the widespread use of English as a means of facilitating communication throughout the world; and the increasing importance of non-national structures in law. Part VII discusses these phenomena in order to demonstrate that former *domains* of pluralism and difference indeed are receding, but that difference itself remains undiminished. Rather, its nature and provenances are changing, due to rapidly multiplying reconfigurations that characterize our time.

Comparative law's challenge lies in deciphering significance amid reconstituting categories so as to unravel deceptive appearances, whether of unchanged legal significance surviving under a mask of change, or, conversely, of changed legal significance evolving under a surface that appears to remain static (Part VIII). In this task, comparative law's effectiveness as a translator of the foreign will depend on how well its acquired skills and methods can be adapted to new kinds of foreignness.

Part IX offers a concrete application of comparative law analysis as translator of current European legal developments, and shows why comparative law is needed urgently today in a world in which law increasingly absorbs influences and ideas that have crossed national borders and have blurred traditional legal classifications.

The Conclusion section discusses comparative law's need for fluctuating methods and resistance to formulaic approaches as the field continually must reestablish its equilibrium in changing contexts. Comparative law's continuity is in the permanence of its location between the same and the other, an attribute it shares with language. This necessitates ongoing reconnoitering as the poles of sameness and otherness shift in form and substance, elusive to detection and prediction, requiring comparative law to undergo internal methodological metamorphoses in keeping with the metamorphosing world.

II. Simple Observations

Comparative law's most visible connection to language is due to different legal systems' legal texts being in different languages. Issues of foreign law's accessibility arise where comparatists are not fluent in the relevant foreign languages. If translations exist, corollary issues arise, such as whether a legal text can be studied productively in any language but the original.

If fluency in the language of the target legal order is a prerequisite for comparative studies, comparatists necessarily will be limited in the range of legal cultures they can study by the foreign languages they know. Moreover, if foreign language knowledge is crucial, then even a polyglot comparative law scholar may not be able to communicate successfully to students who are unable to read foreign texts except in translation, thus reducing comparative law's educational potentials.

To the extent that translation is considered to be a viable option, how should translations be elaborated where a legal phenomenon has no exact equivalent in two languages? It is common in comparative law to translate certain words by approximation, so that, for example, the French word '*procès*' generally is translated into English as 'trial', even though innumerable attributes associated with the French '*procès*' are not attributes of 'trials'. Some authors add explanations to such effect in footnotes. The problem with this solution is that lengthy explanations will be necessary for a great many terms, making the translation of even a short legal text so cumbersome that it can not be achieved without an encyclopedic volume of explanation in footnotes.

One need only consider that if the French '*procès*' is not a 'trial', it is in part that the French '*juge*' also is not a 'judge', or at least that, if she is a 'judge', she only is so in some ways, but not in others. Further, if the French '*juge*' is not entirely a 'judge', it is in part because the relevant '*cour*' or '*tribunal*' is not exactly a 'court', and so on and so forth, with virtually limitlessly connected concepts that are not quite equivalent when any word is translated. Thus, the explanatory footnotes will be unwieldy unless drastic short-cuts and omissions are made, which in turn, however, would leave readers with an exaggerated and misleading impression of similarity to their own legal systems.

An alternative approach is to leave in the original language words that translate poorly. The appearance of a word or phrase in a foreign language and in italics will alert the reader to the irremediably foreign nature of the underlying concept. The obvious disadvantage of this technique, however, is that an untranslated word is not accessible to the reader in the absence of explanatory references. Thus, by leaving a word in a foreign language, a comparatist will succeed in conveying that the concept at issue is foreign and without exact equivalence, but will not in this manner transmit the concept.

Translation may appear to be a decreasing problem to the extent that English emerges as the single, dominant language of the field, with increasingly accomplished levels of fluency among those for whom it is not a native language. This would be an incorrect conclusion, however. The language of law is bound to the inner grammar of legal systems, cultures and mentalities, which in turn impede communication in words that are borrowed from another legal system, culture and mentality. As the rest of this chapter seeks to show, the complex comparative nature of language also characterizes law, making comparative law of paramount importance as a translator of law, but only so long as comparative law remembers that the comparative undertaking remains one of translation.

III. Plurilinguism , Imagination and Comparative Law

As chapter 16 (*Comparative Law and Socio-Legal Studies*) discusses, comparative law scholars today generally agree that the field encompasses the exploration of the nature of law in society, such that the examination of foreign law is an aspect of comparative legal scholarship, rather than its defining attribute. The more reconfigurations law undergoes in its dynamic interaction with a world in transition, the more comparative law must become a

process of decoding legal presences that are like languages whose connotations change just as they begin to acquire meaning, languages in which all of the speakers are among the uninitiated.²

As this section discusses, the decoding process, whether of foreign language or law, is a process of translation. Understanding translation's mechanisms thus illuminates the processes of comparative law. Translation is both de-coding and re-coding, identifying and constructing meaning. Translating between languages involves vast networks of associations of a word in one language that can not all be transposed into the other, such that there must be loss of connotative significance in the process. At best, translation achieves an overlap of some meanings between two domains, as in an intersection of sets, but not total overlap, as in a union of sets. The extent to which translation can succeed is a matter of debate.³ Similarly, the extent to which comparative law can succeed in communicating the other in law is a matter of debate.

Linguists and philosophers of language diverge on how communication takes place, and on whether any communication means, or can mean, an exchange of equivalent concepts. Theories also range as to whether and to what extent all languages may share deep structures.⁴ There is dispute as to how to define the concept of language.⁵ Finally, and crucially, the status and role of language are not the same in every society and legal order.⁶ In comparative law,

² This is the principal theme of Vivian Grosswald Curran, 'Re-Membering Law in the Internationalizing World' (forthcoming) 34 *Hofstra LR*.

³ Another debate concerns the legitimacy of undertaking translation between two domains of law. Neil Walker, 'Postnational constitutionalism and the problem of translation', in J.H.H. Weiler, Marlene Wind, (eds.), *European Constitutionalism Beyond the State* (2003), 27 ff.

⁴ The term originated with Noam Chomsky. In his most recent book on linguistics, Chomsky has revised his theory to reject the term, but he continues to consider language structure as 'invariant'. Noam Chomsky, *New Horizons in the Study of Language and Mind* (2000), 7 ff.

⁵ Donald Davidson, *Inquiries Into Truth and Interpretation* (1994), 186 ff.

⁶ Bernhard Grossfeld, *Core Questions of Comparative Law* (Vivian Grosswald Curran, trans. 2005); Bernhard Grossfeld, Josef Hoeltzenbein, 'Globalization and the Limits of Language', in Werner Krawietz (ed.), *Rechtstheorie* (2004), 87 ff. Bernard Hibbitts, 'Making Sense of Metaphors: Aurality and the Reconfiguration of American Legal Discourse', (1994) 16 *Cardozo LR* 229 ff.

analogously, theories range as to how to define law; whether too little equivalence links legal orders, such that they are not mutually communicable; or whether, on the contrary, law shares deep structures throughout the world. Also analogously to language, the status and role of law are not the same in every society.

For present purposes, it is sufficient to posit that there are irreducible untranslatables between languages. A vast and varied literature links the phenomenon of untranslatability to the conclusion that language uniqueness arises from, and in turn also fortifies, a unique world perspective, an irreproducible manner of seeing and understanding.⁷ This attribute of language has significance for comparative law beyond the similarity of the field to translation. It means that knowing a second language allows entry into another world, a way of seeing through another lens, into ‘incommensurable systems of concepts’.⁸ Consequently, for comparatists, knowing the languages of legal systems they study signifies access to all that the texts of law imply and connote, but do not state, to their infinity of links to the contexts that spawned them and that they also affect. It has been suggested that communication always lies beyond language.⁹ The kind of openings to perspective, to ways of thinking and feeling, that an additional language offers, also allows one to intuit the *nature* of the closures and barriers to intercontextual understanding that are comparative law’s greatest challenges, even before one locates, identifies, and learns to overcome the particular impediments in the particular study at hand.

The polyglot knows that much alterity is not apparent. The polyglot legal comparatist knows that legal orders reside as much beneath and aside from words as they do in the words

⁷ Support for this may be found throughout the Romanticist movement and the field of semiotics. In legal literature, see, e.g., HLA Hart, *Definition and Theory in Jurisprudence* (1953).

⁸ Davidson (n. 5), 186.

⁹ George Steiner, *Language and Silence: Essays on Language, Literature and the Inhuman* (1967), x ff; Vivian Grosswald Curran, ‘Metaphor Is the Mother of All Law’, in Roberta Kevelson (ed.), *Law and the Conflict of Ideologies* (1995), 65 ff.

that purport to embody them. Ernst Rabel's insistence on multilingualism for legal comparatists, like George Steiner's for literary comparatists, stems from the premise that, since knowing another language is a powerful and crucial entry into another world vision and universe of thought, it more importantly indirectly transmits the fact that other world visions and universes of thought exist and are to be apprehended.¹⁰ Beyond the particulars of two differing underlying networks of meaning, knowing another language expands one's imaginative capacities to encompass an understanding of the nature of differences, the imperfections of translation, the pitfalls to constructing equivalences, and the likelihood that newness and difference will have unexpected locations and provenances in another system of thought.

Immersion in more than one language, and the struggle to translate between languages, highlight tapestries of interlinking threads that are woven into infinity, connections between past and present, and among spiraling associations inspired by words and phrases in a unique syntax, endless links of threads to connecting ties. It is a messiness that one can approach but not reduce without distortion. Just as comparison is an act of translation, so too translation is an act of comparison, and the word 'comparison', after all, admits of being less than exact correspondence. Comparison is of the order of simile, not metaphor.

The process of translating from one language to another is the basic pattern not just of comparative law, but of all analysis, of cognition.¹¹ Thus, the monoglot also engages in the same process within a given community of signs, or semiotic system, for translation is

¹⁰ On Rabel, see Gehard Kegel, 'Ernst Rabel (1874-1955) [:] Vorkämpfer des Weltkaufrechts', in H.C. Helmut Heinrichs, et al. (ed.s), *Deutsche Juristen jüdischer Herkunft* (1993), 571 ff., at 585; David S. Clark, 'The Influence of Ernst Rabel on American Law', in Marcus Lutter, Ernst C. Stiefel, Michael H. Hoeflich (ed.s), *Der Einfluß deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland* (1991), 107 ff., at 113. On Steiner, see George Steiner, *No Passion Spent: Essays 1978-1995* (1996), 142 ff. Accord, Ernst Cassirer, *Language and Myth* (Susanne K. Langer, trans.) 1946.

¹¹ George Lakoff, *Women, Fire and Dangerous Things: What Categories Reveal About the Mind* (1987); George Lakoff, Mark Johnson, *Metaphors We Live By* (1980).

‘formally and pragmatically implicit in every act of communication, in the emission and reception of each and every mode of meaning ... To understand is to decipher. To hear significance is to translate. Thus the essential structure and ... means and problems in the act of translation are fully present in acts of speech, of writing, of pictorial encoding inside any given language. Translation between different languages is a particular application and model fundamental to human language even where it is monoglot ... [One should] consider ... the teeming difficulties encountered inside the same language by those who seek to communicate across spaces of historical time, of social class, of different cultural and professional sensibility’.¹²

The passage between discourses of difference that comparative legal analysis demands will be less well performed by monoglots because monolingualism deprives one of a rigorous training and insight into both detecting and conveying alterity that conscious translation endows.

Roland Barthes said that ‘language is fascistic’.¹³ In advocating the search for a ‘hazy polylinguism’ (*‘un polylinguisme flou’*), rather than a single perfect, or even imperfect language, Umberto Eco notes that ‘a language always is a prison ... because it imposes a certain vision of the world’.¹⁴ A language imprisons thought and understanding. Many languages liberate them.

Automatic understanding accompanies immersion in another society: ‘Imagination conforms on its own to the customs of a country in which one is located’.¹⁵ Knowing the language of others brings such an intuitive, automatic understanding of the other. It enables polyglots to gain insight into foreign ways of being foreign, and to bend their cognitive grids, so as to be more open to absorbing data that monoglots will be unable to process. Language pluralism locates one elsewhere. For comparative law, language knowledge not only is part of

¹² George Steiner, *After Babel: Aspects of Language and Translation* (2d ed., 1992), xii. One who considered those ‘teeming difficulties’ was Isaiah Berlin throughout his life’s work, and in particular in his *Concepts and Categories: Philosophical Essays* (Henry Hardy ed.), 1999.

¹³ ‘*La langue est fasciste.*’ Roland Barthes, ‘La leçon,’ in *Leçon inaugurale au Collège de France* (1978).

¹⁴ Umberto Eco, interview by Bernard Pivot, *Double je*, TV-5, émission du 25 juillet 2005.

¹⁵ Charles Louis de Secondat, baron de la Brède et de Montesquieu, ‘Usbek à Rhédi’, in *Lettres persanes* (1721), LXXX (*‘L’imagination se plie d’elle-même aux mœurs du pays où l’on est’*).

foreign legal systems under examination; it is the most efficient shortcut to understanding how to understand.

IV. The Universal and the Particular in Post-War Comparative Law and Language

We have suggested through the translation metaphor that comparative analysis can not be valid unless it is keenly attuned to elements and domains of difference and, most fundamentally, unless it is attuned to expect changes from unexpected provenances and kinds of difference. If plurilinguism, multiplicity and the detection of alterity are comparative law's trump cards, then it may seem as though comparative law should choose difference over sameness. This section shows that, for comparative analysis, those attributes are not crucial because difference is an ultimate goal, but, rather, because it is only by identifying difference that one can identify both difference and its equally important counterpoint, similarity.

Somewhat paradoxically, western comparative law was steered towards the identification of similarity after the Second World War by those whose plurilinguism attuned them to the importance of difference. The field since then experienced a reaction, tending increasingly towards privileging difference. This section shows some striking parallels between the fields of comparative law and language concerning the issue of sameness versus difference. It first discusses the issue in terms of the contrasting conceptions that undergird the civil and common law legal systems.

In western legal discourse, historically and traditionally the common law perspective was primed on the particular and specific, on cases, the accumulation of facts within each, and the mosaic which cases create as a *pointilliste* composite. Continental European civil law traditionally embraced the universal and general, and marginalized the particular. In this one may see a link between civil law and the Enlightenment, with its premises of overarching

coherence and unity; and between the common law and Romanticism, with its focus on the particular, the individual, and, therefore, the different.¹⁶

Spinoza, whose work arguably is far more crucial to understanding the Enlightenment than generally has been credited,¹⁷ believed in universals. He wrote, however, that because of the human incapacity to apprehend more than a few of the links of causality in the concatenation or great, overarching chain of events, humans must act as though the world were one of contingencies rather than universals.¹⁸ As we will see below, comparative law scholars after the Second World War inverted Spinoza's admonition, acting as though the world were one of universals, regardless of their personal experiences of a world governed by turbulent contingencies. They believed that in universals lay whatever hope there might be for preserving civilization.

The identification of core human similarities as a hallmark of post-war comparative legal studies and theory derived from several sources. Some of the reasons were unrelated to the Second World War, and included Enlightenment-inspired views. Other reasons did relate to the war, shaped by a reaction against fascism's legalized persecution of those it had defined as different.¹⁹ Along with racism, nationalism, with its concentration on differentiating an in-group from an out-group, was seen as having been the scourge implicated in Hitler's rule, to be repudiated in favor of a tolerance based on human-wide commonality.²⁰

¹⁶Vivian Grosswald Curran, 'Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union', (2001) 7 *Columbia J European Law*, 63 ff.

¹⁷ Jonathan I. Israel, *Radical Enlightenment: Philosophy and the Making of Modernity 1650-1750* (2001); Stuart Hampshire, *Spinoza and Spinozism* (2005).

¹⁸ Benedict de Spinoza, 'Natural Laws and Human Laws', Section 4:2 (10), in *A Selection of Texts from the Ethics, the Theologico-Political Treatise and the Letters*.

¹⁹ This is a principal theme of Vivian Grosswald Curran, 'Cultural Immersion, Difference and Categories in U.S. Comparative Law', (1998), 46 *Amer. J Comparative Law* 43 ff., discussing the work of Ernst Rabel, Konrad Zweigert, Hein Kötz, Edgar Bodenheimer, Max Rheinstein, Rudolf Schlesinger, and some others.

²⁰*Ibid.* The word 'nation' derives from *natio*, originally used to signify the 'other'. Amos Elon, *The Pity of It All: A Portrait of the German-Jewish Epoch 1743-1933* (2002), 23.

Post-war comparative law, like much western political thinking, urged not just non-nationalistic, universalist concepts, but, more particularly, it urged law itself as the remedy to political terror and ideology. The post-war generation of comparatists, including those who had not known exile personally, was undeterred by the spectacle of law's degradation in Hitlerism and Stalinism. On the contrary, their position was substantially Gustav Radbruch's, who elevated law to having a powerful redemptive capacity for self-perpetuation and for creating enduring civilization by excluding as non-law such measures as a state may issue that violate the most fundamental values of civilized society.²¹ The theoretical underpinnings for this stance have roots in natural law, thereby marking a reversal of course from the increasingly positivistic legal perspective of the pre-war era.²²

As Nathaniel Berman has recounted,²³ faith in law as the primary, ultimate and durable solution to age-old barbarism also had inhabited the legal scholars of the interwar years, following the First World War. After the Second World War, it was revived by some of the very scholars who had had an opportunity to observe the fallibility of their views. Hans Morgenthau described this phenomenon of repeat mistake with prescient irony as he observed the renewed article of faith taking form in the 1940s yet again, calling it an 'inveterate

²¹ Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', (1946) 1 *Süddeutsche Zeitung* 105 ff, translated in Stanley L. Paulson, 'Lon L. Fuller, Gustav Radbruch and the 'Positivist' Theses' (1994) 13 *Law and Philosophy* 313 ff.

²² It is in viewing law as inseparable from morality that Radbruch shares natural law roots, but the general agreement to categorize his position simply as one of natural law is problematic, in part reflecting the overlap between positivism in many versions with natural law. I especially like David Dyzenhaus' characterization of Radbruch's theory as being sufficiently distant from natural law to be, rather, 'positivism with a minus sign'. David Dyzenhaus, 'The Juristic Force of Injustice', in David Dyzenhaus, Mayo Moran (eds.) *Calling Power to Account: Law's Response to Past Injustice* (2005).

²³ Nathaniel Berman, 'But the Alternative Is Despair: European Nationalism and the Modernist Renewal of International Law' (1993) 106 *Harvard LR* 1792 ff.

tendency to stick to ... assumptions and to suffer constant defeat from experience rather than to change ... assumptions in the light of contradicting facts²⁴

The Nobel laureate René Cassin may be said to have been one of the clearest incarnations of this phenomenon, having been active and prominent in international law circles both in the interwar and the post- World War II periods. His writing reflects his unchanged faith in the power of law, and he became a principal drafter of the Universal Declaration of Human Rights.²⁵ His unflagging courage, dedication, humanity and brilliance more than explain his reputation and the honors heaped upon him. One may wonder, however, if his post-war eminence may not in some measure also have been due to the tenacity of his refusal to sink into disillusion with the law despite a life of much personal hardship that included confrontations with law's darkest potentials to enable and execute abject state terror. That such a man could maintain his lifelong faith in law's capacity to become a nearly universal panacea may have held great appeal for those whom his example enabled to credit law in similar fashion, allowing them to keep intact a cherished ideal that history otherwise may have compelled them to consider an illusion.

Post-war comparative law tended to assume that a perception of others as different invariably is the first step towards hatred and discrimination, which in turn may culminate in legalized persecution, as had been the case in Nazi Europe and as legal theorists such as Carl Schmitt, Julius Binder and Karl Larenz, among others, had supported. The link between otherness and hatred has not been indissociable throughout history, however. René Girard argues that, contrary to general belief today, it is sameness, rather than difference, which elicits

²⁴ Hans J. Morgenthau, 'Positivism, Functionalism, and International Law', (1940) 34 *American J International L* 260 ff.

²⁵ René Cassin, *La Pensée et l'action* (1972).

visceral hatred, as illustrated among others in antiquity's violent discrimination against twins.²⁶

Vladimir Jankélévitch coined the term '*le presque-semblable*', 'the almost-the-same', in arguing, based on Freudian theory, that the greatest hostilities in society arise neither from sameness nor difference, but from *minimal otherliness*.²⁷

Nor has the assessment of sameness and difference been a matter necessarily dependent on the historical era in question. An insight that captured a great deal about Rousseau and Diderot, who were contemporaries, suggests that, while Rousseau feared the other, Diderot feared the same: 'Rousseau's savage evolved the concept of 'man' to fix and stabilize the gnawing anxieties stemming from his fear of the *other*, [while] Diderot's *moi* ["I," by contrast] ...fear[ed] the *same*'.²⁸

Language studies have their own version of comparative law's intense focus on whether legal systems throughout the world are (1) fundamentally similar, such that apparent differences are superficial in nature, justifying universalist conclusions; or (2) fundamentally different, such that apparent similarities are misleading, and universalist conclusions unwarranted. Noam Chomsky views language principally as universal, such that the differences are relegated to a marginal role. In his most recent book on linguistics, he writes: '[W]e know that the diversity and complexity [of language] can be no more than superficial appearance[;] that all languages are variations on a single theme [; and that] language structure [is] invariant, except at the margins.'²⁹

²⁶ René Girard, *La Violence et le sacré* (1972).

²⁷ Vladimir Jankélévitch and Béatrice Berlowitz, *Quelque part dans 'inachevé* (1978) 69 ff. (1978).

²⁸ Arthur Goldhammer, 'Man in the Mirror: Language, the Enlightenment and the Postmodern', in Daniel Gordon (ed.), *Postmodernism and the Enlightenment: New Perspectives in Eighteenth-Century French Intellectual History* (2001), 31 ff., at 38.

²⁹ Chomsky (n.4), at 7.

Chomsky therefore situates the unshared, individual, internalized aspects of language, which he calls ‘I-language’, at the periphery. One might derive from the very concept of ‘I-language’ a diametrically different picture of the nature and constituent elements of language, however. Accordingly, both Willard van Orman Quine and George Steiner create an ultimate portrait of language as primordially *non-universal*, dominated by Chomskian ‘I-languages’ that are fundamental, not marginal, thus particularizing language, and rendering particularity essential.³⁰ Where Chomsky sees the defining attributes of language in universals, they emphasize that assumptions of universality and similarity are unwarranted, and that they obfuscate barriers to communication which result from language particularities.³¹

On the other hand, according to Wittgenstein, an entirely private language must be a conceptual incoherency,³² since, as Charles Taylor has put it, ‘[t]he genesis of [language] ... is not monological ... but dialogical’.³³ Notwithstanding all of the problems relating to verifiability in semantics, language is meaningless and even inconceivable in complete isolation because it can not exist without community and communication. This conclusion need not contradict the importance of particularity and difference to language. It indicates, rather, that for language, as for comparative law, the issue is one of balance.

V. *Recent History*

1. *Languages and Comparative Law Theory in the Post-War Generation*

The generation of comparatists immediately following the Second World War was steeped in many languages, products of classical educations strong in the tradition of

³⁰ Willard van Orman Quine, *Word and Object* (1960); Steiner (n. 12).

³¹ Steiner (n. 12); Willard van Orman Quine, (n. 30); Davidson (n. 14).

³² Ludwig Wittgenstein, *Philosophical Investigations* (1953); Saul A. Kripke, *Wittgenstein on Rules and Private Language* (1982), 68-9: “[T]he skeptical solution does not allow us to speak of a single individual, considered by himself and in isolation, as ever meaning anything.”

³³ Charles Taylor, ‘The Politics of Recognition’, in Amy Gutmann (ed.), *Multiculturalism* (1994), 25 ff., at 32. Taylor refers to ‘the genesis of the human mind’, not just of language, as being dialogical.

multilinguism, including Greek and Latin. Those who left Nazi Europe further perfected their knowledge of the languages of new host countries. Since many emigrated to common law nations, their immersion also was into the ‘other’ of the legal culture and mentality from the ones in which they had been trained.

Reading legal texts in their original languages was an obvious practice that did not figure as an explicit preoccupation of their scholarly writing about comparative law. Post-war comparative law thus was conducted by those who were well equipped to understand the nature of translation, the challenges to conveying meaning from one community to another, the disguises of the seemingly similar, and the depth and nature of differences.

Rudolf Schlesinger’s memoirs, a book not intended either for publication or for a legal audience, was written to tell his American children and grandchildren of the trajectory their grandparents and great-grandparents had undergone, and to describe a European ‘otherness’ to American progeny.³⁴ It recreates the world of those whom Victor Klemperer in his diaries so aptly called ‘*Goethedeutsch*’.³⁵ It also is a subtextual story of the legal translating which informed his methodological approach, and provides a glimpse into the generation of dual-identity comparatists that followed the Second World War.

Schlesinger conveys his youthful adventures with practicing German law under Hitler, a narrative of many social and legal metamorphoses, including the struggle to persuade legal authorities to treat previously established principles of traditional, unrepealed German law as though they were printed in an ink stronger than that of Hitler’s superimpositions in the ever-changing palimpsest that constituted law in Germany from 1933 to 1945.³⁶ It was a losing

³⁴ Rudolf B. Schlesinger, *Memories* (Ugo Mattei, Andrea Prodi, eds, 2000).

³⁵ Victor Klemperer, *Ich will Zeugnis ablegen bis zum Letzten: Tagebücher 1933-1945* (1995; 1996) (in two volumes).

³⁶ Schlesinger’s memoirs are a rare first-hand account of the practice of law in Nazi Germany by one who was not an apologist for the system. Other first-hand accounts by those deemed non-Aryans may be found in Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (E.A. Shils, trans.) 1941; and Yves

battle, as the government had foreseen the contest between the two legal regimes vying for supremacy, and had mandated that the palimpsest be construed exclusively through the ink from the Nazi presses if the texts that might seep through from the past otherwise would thwart political ideology.³⁷

Schlesinger was experiencing a dual existence as an outsider permitted until 1939 to be a lawyer on the inside of the system that was starting to erase his own legal existence.³⁸ He had become a foreigner-native, advocating a law whose meaning was disappearing as it became an unintelligible archaism, cluttered with newly enacted contradictory principles, and as unchanged legal texts from the past transmogrified when they became subject to an altered system of judicial interpretation and definition.³⁹

Schlesinger then recounts his steps in absorbing the common law and its bewildering language as a much confused ‘1-L’ student at Columbia Law School after emigration to New York. One watches the seeds of understanding a new law and world germinating in a mind whose initial methodological approach mirrored the twin tenets of his native German legal training and mathematical mindset.

Schlesinger later was to develop the ‘common core’ approach to law, reflecting his dedication to human-wide universals as central to his vision of a transcendent tolerance.⁴⁰

Ternon, ‘La Robe brune – les juristes allemands et le national-socialisme (1933-1936)’, (2000) *Revue d’histoire de la Shoah*, 68 ff. (summarizing the book of a German-Jewish lawyer who practiced until 1936 in Germany, less long than Schlesinger, and who adopted the pseudonym of ‘Timoroumenos’ (‘I avenge’). The only known surviving copy of the book is located in Paris, *Centre de documentation juive contemporaine*.

³⁷Bernd Rüthers, *Die unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus* (1968), 70 ff; Ingo Müller, *Hitler’s Justice: The Courts of the Third Reich* (Deborah Lucas Schneider, trans., 1991); Michael Stolleis, *The Law Under the Swastika: Studies on Legal History in Nazi Germany* (Thomas Dunlap trans.) (1998).

³⁸The legal theory pursuant to which Jews lost legal rights was founded on a new interpretation of Article 1 of the civil code, such that ‘legal capacity’ (*Rechtsfähigkeit*) was no longer to benefit those deemed outside of the German *Volk*. Rüthers (n. 46) 323 ff.

³⁹*Ibid.*; Fraenkel (n. 36); Ternon (n. 36).

⁴⁰Rudolf Schlesinger, ‘The Common Core of Legal Systems[:] An Emerging Subject of Comparative Study’, in Kurt H. Nadelmann, Arthur T. von Mehren, John N. Hazard (ed.s), *XXth Century Comparative and Conflicts Law [:] Legal Essays in Honor of Hessel E. Yntema* (1961), 65 ff.

Numerous post-war comparatists shared this outlook.⁴¹ That his analytical approach did not ignore differences of context as he engaged in finding commonalities that unite systems may be seen between the lines of his autobiography; in the enthusiasm with which he embraced and added to his common core theory Sacco's legal formants, those icons of contextual difference that are latent and elusive to detection;⁴² and by his own statement at the end of his career that the search for differences also was crucial to the 'common core' project.⁴³

As was the case for many of his colleagues of similar age and education, plurilinguism, both literally and figuratively, informed Schlesinger's scholarship and was central to it, without being an explicit part of the scholarly comparative project he elaborated.⁴⁴ This meant, however, that the superb comparative skills of the polyglot and dual-identity comparatists were an unspoken component of their methodology, and that their comparative law scholarship transmitted ideas the next generation of students would be less well equipped to execute, other than those whose life experience had replicated immersion in more than one language and society.

Imre Kertesz wonders if one can get an idea of water from those who drink it.⁴⁵ The post-war generation drank directly from the sources. The challenge for comparative law is to

⁴¹Ernst Rabel fits in this group, based on his writing during and after the war. See, e.g., Ernst Rabel, 'Private Laws of Western Civilization', (1950) 10 *La. LR* 431 ff.; Edgar Bodenheimer, *Jurisprudence* (1940); Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir, trans. 1977); Gustav Radbruch, *Rechtsphilosophie* (Erik Wolf, Hans-Peter Schneider eds.) (1973). For an extended discussion of post-war comparative law as a search for commonalities, see Curran (n. 19).

⁴² Rudolf B. Schlesinger, 'The Past and the Future of Comparative Law', 43 *Am. J. Comp. L.* 477 ff (1995); Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law', Parts I and II, (1991) 39 *Am. J. Comp. L.* 1 ff; 343 ff.

⁴³ Sacco, *ibid.*

⁴⁴ Ugo Mattei also has suggested that Schlesinger may have considered Sacco's legal formants initially to have 'been in the background at Cornell [i.e., the common core project], but in a sense was taken for granted and so was never actually discussed.' Ugo Mattei, 'The Comparative Jurisprudence of Schlesinger and Sacco', in Annelise Riles (ed.), *Rethinking the Masters of Comparative Law* (2001), 238, ff., at 249.

⁴⁵ "Peut-on se faire une idée de la source d'après ceux qui y boivent?" Imre Kertesz, *Un autre: Chronique d'une métamorphose* (trad. Natalia et Charles Zaremba, 1999), 62. Kertesz echoes Quine's more philosophical articulation: 'It is misleading to speak of the empirical content of an individual statement -- especially if it is a statement at all remote from the experiential periphery of the field'. W.V.O. Quine, *From a Logical Point of View* (Cambridge: Harvard University Press, 1980), 43.

convey the tastes and textures of the sources to those who have not drunk from them. The problem is acute in the classrooms of the United States, a country whose educational system has yet to wage a war against pervasive monolingualism. If there was failure of imagination on the part of the post-war generation, it was in not envisaging the order of limitation the single-identity monoglot faces.

The substantive objective of detecting commonality and unifying human-wide legal principles was challenged by the next generation of comparative law scholars.⁴⁶ It is the issue of the universal versus the particular, the same versus the different. As others have argued, however, the ‘core’ of law is both common and distinct.⁴⁷ Comparative law’s modes of analysis should enable it to shed light on how to take in the image of the world with as little preconception as can be mustered: ‘[T]he world is not to be narrowed till it will go into the understanding ... but the understanding is to be expanded and opened until it can take in the image of the world’⁴⁸ In this task, it is helpful to remember Wittgenstein’s caution that ‘[t]he limits of my language are the limits of my world.’⁴⁹

2. *The Next Generation*

The recent history of comparative law has seen changes that have mirrored intellectual trends since the Second World War. Western intellectual discourse gradually espoused group claims as postmodernism and multiculturalism gained ascendancy, and a new generation

⁴⁶ The Trento project, in reaction to such criticism, has explicitly rejected an *a priori* objective of finding commonalities. Mattei (2002) *Global Jurist Frontiers*.

⁴⁷ Rodolfo Sacco, ‘Diversity and Uniformity in the Law’, (2001) 49 *Am. J. Comp. L.* 171 ff.

⁴⁸ Francis Bacon, ‘Preparative Towards a Natural and Experimental History’, in *Collected Works of Francis Bacon*: vol. IV: *Translation from the Philosophical Works* (John Spedding et al., eds., 1976, reprint of the 1875 edition), 255 ff. I am grateful to Professor Freeman Dyson for introducing me to this passage and directing me to its source.

⁴⁹ Wittgenstein, *Tractatus Logico-Philosophicus*, Proposition 5.6 (1933).

turned its attention to the national, contextual and linguistic differences that are irreducible, and that conflict with the idea of a search for commonality.⁵⁰

The idea of a common core to law can be seen in many comparative law undertakings still today, from the Trento Common Core of European Private Law project that adopts Schlesinger's approach as a model, to the proposals for a European Civil Code and a common contract law. Opposition to such projects sometimes has stemmed from considerations such as maintaining national traditions deemed essential to cultural identity,⁵¹ and has included the argument that differences trump similarities, such that a project of legal unification is doomed to remain illusory.

The postmodern tendency has been to debunk universals, in keeping with Lyotard's view that western postmodernism is coterminous with loss of belief in any of the metanarratives that claim universalism, such as religion, socialism or the Enlightenment.⁵² The proponents of difference in comparative law are part of the pendulum swing away from the post-war generation. It has been suggested recently that '[t]o accord difference priority is the only way for comparative legal studies to take cognizance of what is the case'.⁵³ As Derrida

⁵⁰ Sacco gives an account of 'the ideology of diversity' in Sacco, 46 *Am.J.Comp.L.*, 179 ff.; see generally also Günter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law', (1985) 26 *Harvard Int'l LJ* 411 ff; Richard A. Hyland, 'Babel: A She'ur', (1990) 11 *Cardozo L.R* 1585 ff; Pierre Legrand, 'Comparative Legal Studies and Commitment to Theory', (1995) 58 *Modern L.R* 262 ff. (1995); Sacco, 39 *Am. J. Comp. L.* 1 ff; 343 ff.; Curran(1998) 46 *Am. J. Comp. L.* 43 ff.; Teemu Ruskola, 'Legal Orientalism', (2002) 101 *Michigan LR* 179 ff.;

⁵¹ Yves Lequette, 'Quelques remarques à propos du projet de code civil européen de M. von Bar', (2004) 28 *Le Dalloz* 2202 ff.

⁵² Jean-Francois Lyotard, *The Differend: Phrases in Dispute* (trans. Georges van den Abbeele, 1988). Already in 1947, the American Anthropological Association criticized the Universal Declaration of Human Rights on the basis that '[s]tandards and values are relative to the culture from which they derive....' The implication was that the Universal Declaration was not universal, but the reflection of one culture only. American Anthropological Association, Statement of Human Rights by the Executive Board, (1947), 49 *Am. Anthropologist* 543 ff.

⁵³ Pierre Legrand, 'The same and the different', in Legrand and Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (2003) , 240 ff., at 279 (emphasis omitted).

signaled, however, neither identity nor difference is foundational, nor either derivative of the other, because they are interdependent, each conceptually incoherent without the other.⁵⁴

Martti Koskenniemi has summarized the debate in similar terms of an interdependence in which the universal depends on the local for its expression, and is unintelligible without it, such that one can consider the particular to be a channel for the universal, a means of its expression.⁵⁵ Habermas envisions fusion of the universal and particular in law: ‘The universalism of legal principles is reflected in a procedural consensus, which must be embedded in the context of a historically specific political culture through a kind of constitutional patriotism.’⁵⁶ He criticizes postmodernism for its ‘suspicion of an indiscriminately assimilating and homogenizing universalism [and for] ... obliterate[ing] the relational structure of otherness and difference that universalism, properly understood, precisely takes into account’.⁵⁷

The historian John Higham said that the refugees from Hitler’s Europe were America’s first multiculturalists.⁵⁸ The comparative law scholars following the Second World War in the United States and Great Britain were no exception, but their scholarship did not make this evident. Their collision with multiculturalism and postmodernism derived from both a failure to elaborate explicitly what remained an unspoken attention to difference, context and incommensurables, and from the fact that they revived universalist claims incompatible with most renditions of postmodernism and multiculturalism. To the extent that contemporary

⁵⁴Jacques Derrida, *Writing and Difference* (Alan Bass, trans., 1978), 278 ff; Jacques Derrida, *Margins of Philosophy* (Alan Bass, trans, 1982), 3 ff.

⁵⁵ Koskenniemi (2005) 16 EJIL 115 . Koskenniemi is in the tradition of Hegel, for whom different particularized forms in law carry within them an objective generalization, thereby transcending themselves. Georg Wilhelm Friedrich Hegel, *Hegel’s Philosophy of Right* (trans. T.M. Knox, 1967).

⁵⁶ Jürgen Habermas, ‘Struggles for Recognition in the Democratic Constitutional State’, in Gutmann (n. 33), 107 ff., at 135.

⁵⁷ Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin, Pablo De Greiff, eds., 1999), xxxv.

⁵⁸ John Higham, *Hanging Together: Unity and Diversity in American Culture* (Carl J. Guarneri, ed., 2001).

comparative law's postmodernist tendencies cause it to apprehend the world as consisting of 'structures of otherness' that consign us to coexistence without the possibility of mutual understanding or meaningful communication across legal communities, implicitly the field would consider legal communities to be divided not just by incommensurables, but also by a Tower of Babel.

VI. Babel

Comparative law has experienced the debate over universalism and pluralism as consisting of mutually contradictory aspirations. As we have seen, the post-war generation put its plurilinguism at the center of its search for a universal language of law, an Esperanto to reconcile all of humanity. In this, it echoed the goal of a single law for all of civilization that Saleilles expressed during the first modern international congress of comparative law in 1900.⁵⁹

Historically, language and law both have known relentless human aspirations towards a universalist perfection that would eliminate disorder. These continue today. In law, some of this may be viewed as the 'legocentrism' Günter Frankenberg coined to denote the perils of a field that inflates its own importance.⁶⁰ Those immersed in law have a tendency to suggest political and social solutions based on law. The principles of translation evoked above imply that comparatists will convey law poorly if they view it in isolation from the social, political, historical and cultural influences that inform it, and that create the environment of the humans

⁵⁹Édouard Lambert, 'Rapport,' in *Congrès international de droit comparé réuni à Paris du 31 juillet au 4 août 1900. Procès-verbaux des séances et documents* (1907), 39 ff. (summarizing Lambert's urging a common law for humanity).

⁶⁰Frankenberg, (1985) 26 *Harvard ILJ* 411 ff.

who people its institutions.⁶¹ Plurilinguism in the figurative sense requires interdisciplinarity.

Legocentrism may explain why legal scholars and legal actors exaggerate law's capacity, tending to view it as an ideal and universal panacea, but universalist aspirations for law are widespread also in the larger population. More generalized than legocentrism within the field is an urge, as intense among the lay population as among legal specialists, to believe that law represents a solution to the problems of human conflict and a potential remedy to past barbarism, if only the right law and legal order can be identified, codified and enacted.

Universalist claims both fortify this perspective, and ensue from it. To view law as subject to the vicissitudes of transitory human perceptions and contemporaneous values, as are all other social institutions, is to recognize that there are no final solutions to barbarism that law can provide in a reliable and durable way. As Nathaniel Berman has put it, however, in a title that explains the strength and tenacity of the refusal to acknowledge the full measure of law's limitations and vulnerabilities, '*But the Alternative Is Despair...*'⁶².

Language has inspired similar hope and faith in its perfectibility. George Steiner's *After Babel*⁶³ and Umberto Eco's *The Search for the Perfect Language*⁶⁴ tell the tale of the age-old anguish born of earth's many mutually incommunicable languages, and of each individual human language's incapacity to achieve a transparent reflection of the world through the medium of words. The despair that no spoken language can match signifier to signified in a one-to-one correspondence has been linked to the Biblical message that such a perfect

⁶¹ This should not be interpreted to contradict the view of Luhmann and Teubner that the field of law is to be understood as an autopoietic system. I mean, rather, that those who project law as a solution in areas to which law is not relevant ignore other fields at their peril precisely because of law's limitations. E.g., Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System,' (1992) 13 *Cardozo LR* 1419. Günther Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism', (1992) 13 *Cardozo LR* 1443.

⁶² Berman (1993), 106 *Harvard LR* 1792 ff.

⁶³ Steiner (n. 12).

⁶⁴ Umberto Eco, *The Search for the Perfect Language: The Making of Europe* (James Fentress, trans., 1995).

language existed before God created the confusion at Babel to punish man. By the twentieth century, one sees in Gottlob Frege's work, and the beginning of modern philosophy of language, that the ideal of an entirely unambiguous language also is considered to be the key to discovering the nature and functioning of thought.⁶⁵ Eco tells us that an obsession with finding a single, redemptive, perfect, universal language is to be found in every culture in the world.⁶⁶

Steiner, like the postmodern legal comparatists, turns the Babel story on its head, seeking to resolve the mystery of the incommunicable. He explores how it is that many mutually incomprehensible languages persisted within geographical areas too small for distance to explain their multiplicity, and concludes in the tradition of Romanticism that language profusion is metaphoric of a human-wide desire to develop individual worlds of difference in which the enduring and productive richness of imagination can best flourish and be preserved for future fertility.

Steiner suggests that the value of particular languages is in being *untranslatable*, in not being subject to communication to the 'other'. Since to translate is possible only to the extent of shared elements in more than one language, in the measure that translation is successful, languages are not unique. If unicity is the goal, then the chaos of Babel can become more desirable than its alternative of communication. If one finds Steiner's thesis improbable, one may wish to reflect on the fact that Heine was reproached in Germany for having written poetry *which translated too well* into other languages. According to Amos Elon, it was in Heine's having crafted a German that could be communicated easily outside of German that his critics charged him with treachery to the language.⁶⁷

⁶⁵ Gottlob Frege, 'The Thought: A Logical inquiry', in P. Strawson, (ed.), *Philosophical Logic* (1967).

⁶⁶ Eco (n. 64), at 1 (citing Arno Borst (1957), *Der Turmbau von Babel. Geschichte der Meinungen über Ursprungen und Vielfalt der Sprachen und Völker*).

⁶⁷ Elon (n. 20), 128 ff.

In Steiner's work, language multiplicity incarnates the value of the particular and the local. A more recent study, *Vanishing Voices*,⁶⁸ the collaboration of a linguist and anthropologist, analyzes the vastly accelerated rate at which languages are dying across the planet today, and likens the phenomenon to an irremediable loss in biological species. It raises the specter of a sterile world converging towards one language, an 'after Babel' monolingualism of loss. *Vanishing Voices* argues the irreplaceable nature of loss when the number of languages diminishes in the world; *After Babel* allows one to divine the measure of loss in the degradation and death of any one language.

It should be remembered, however, that no matter how immeasurable losses in difference prove to be, difference itself does not diminish. Rather, the terrains of difference shift, such that the importance of some of the differences that have mattered most in the past will recede. For comparative law, as the world globalizes, it is foreseeable that the field's traditional skills for grasping the nature of national, including language, contexts will be of decreasing usefulness in their particulars. The acquired skills will retain value to the extent that having developed those skills allows the field to adapt so as to perceive and interpret new orders of difference.

VII. Language Deflation and the Growth of the Non-National

Ours is an era of simultaneous language deflation and law inflation (see Part IX), both of which are eliciting considerable anxiety.⁶⁹ The increased dominance of English is a much debated topic in comparative law; in law; and in many other fields. Efforts to reverse or even halt the trend to use English seem to be as ineffective as efforts to defend any one language from foreign importations within it. Even autocratic rulers lack power to control language

⁶⁸ Daniel Nettle, Suzanne Romaine, *Vanishing Voices : the Extinction of the World's Languages* (2000).

⁶⁹ For a recent discussion of the language issue, see Ewoud Hondius, 'The Impact of American law and American Legal Theory: Threat or Incentive?', in *De Tous horizons: Mélanges Blanc-Jouvan* (2005), 271 ff.

evolution. Bernhard Grossfeld tells us how Marcellus is reputed to have instructed the Emperor Tiberius that, no matter how great the ruler's power, it extended over people only, but not over words.⁷⁰

On the other hand, English is changing as it enters other languages. Inexorable as language evolution may be, where host languages absorb foreign words, the foreign imports are altered in a highly complex process of assimilation reminiscent of the transformation process Watson describes for legal transplants.⁷¹ Conversely, an accumulation of imported words affects and alters the host language. In law, the limitations of the English legal language to express concepts that extend beyond the boundaries of its underlying common law context have led to a modification of English in the form of new words spawned by concepts of civilian origin.⁷² Thus, where many languages cede to a dominant single one, the ascendant language must expand to accommodate to difference, transforming itself in the process.

Just as Steiner wondered at the evolutionary significance of language multiplicity where geographical distance did not provide an adequate explanation, today one can wonder at the evolutionary significance of language diminution, including the extraordinary rate of English importations into European languages where the imported vocabulary seems to replace words already in existence, rather than to add new meanings.⁷³ There is little doubt of an ultimate language impoverishment as one language emerges to dominate others, but the wealth of subtleties lost in the ascendancy of English is part of those kinds of distinctiveness that are dissolving around the world. Their disappearance is a scent on the trail comparatists can follow in detecting new subtextual changes as old divisions and categories reconfigure.

⁷⁰ Grossfeld, (n. 6), 91.

⁷¹ Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2d ed. ,1993).

⁷² Nicholas Kasirer, 'The Common Core of European Private Law in Boxes and Bundles', (2002) 10 *ERPL* 417 ff.

⁷³ Umberto Eco, 'Le populisme menace l'Europe', *L'Express* (14 June 2004), 37 ff; Umberto Eco, 'Méconnaître les langues produit de l'intolérance', *l'Express*, (22-28 avril 1999), 12 ff.

One such reconfiguration is the contemporary trend away from the national. The transformation of the national into the non-national is most striking when even efforts originally dedicated to reinforcing national strengths are subsumed into detracting from them. Today, measures designed to preserve linguistic pluralism no longer principally reinforce nation states, including those measures intended to do so. Thus, in the EU, support for linguistic diversity originally was centered on the preservation and flourishing of member state national languages, but now has transmuted into support for the rescue and even renaissance of subnational languages, some already moribund, in the name of ‘Europe’s cultural wealth and traditions’,⁷⁴ and pursuant to the European Charter for Regional and Minority Languages.⁷⁵

France provides an example of a state which throughout centuries and in various ways undertook to develop, preserve and promote French as the exclusive language of the nation through legal regulation. Until recently, this meant discouraging the use of languages other than French, including its own territory’s ancient regional languages. As recently as 1992, the French Constitution was amended to state that French is the nation’s language.⁷⁶

As English came to be considered a greater threat to French than its own regional languages,⁷⁷ and pursuant to EU policies, France reversed course in favor of the very sort of

⁷⁴ Preamble, European Charter for Regional and Minority Languages, ETS no. 148 (1992). On the original EU purpose to support national languages, see ‘The EU’s Commitment to ‘Linguistic Diversity,’ in Richard L. Creek, *Law and Language in the European Union* (2005), 49ff. It has been pointed out that EU texts in support of national languages have been sufficiently vague as to lend themselves to being interpreted as supporting not necessarily just the language of each nation state, but also the many languages within states. Bruno de Witte, ‘Language Law of the European Union: Protecting or Eroding Linguistic Diversity?’, in Rachael Craufurd Smith (ed.), *Culture and European Union Law* (2004), 205ff., at 206.

⁷⁵ ETS no. 148 (1992)[*ibid.*].

⁷⁶ Marc Frangi, ‘État, langue et droit en France’, (2003) 119 *Revue du droit public*, 1607 ff., at 1612.

⁷⁷ The *loi Toubon* had English as its target, not regional languages. Loi no. 94-98 du 1er février 1994, analyzed in Frangi, *ibid.*, 1616 ff.

linguistic pluralism it traditionally repressed as subversive to the national.⁷⁸ The French government's current promotion of subnational languages whose survival minority populations consider threatened is in a relation of paradox, if not complete contradiction, with its objective of protecting the national language.

This tangled web is the latest in a history of efforts to define, preserve and purify French over centuries, from errors in philology that once caused clerics to attempt to freeze the language in illogical spelling,⁷⁹ to endowing the *Académie française* with legal authority to define and regulate French. The country's history of projects to govern language among others testifies to the indomitable force of language in resisting direction and governance.⁸⁰ Language traditionally has emerged as stronger than any law purporting to control it, like a butterfly escaping from its chrysalis in colors impossible to predict and flying in unknown directions. Current evidence suggests the towering difficulties of regulating language either by positive measures, such as financial support, or by interdictive measures, such as legal regulation of linguistic criteria.⁸¹

In their ungovernable and independent paths, languages resemble nothing more than law, whose history also is one of resistance to stasis in meaning. As the humans who operate

⁷⁸In April, 2001, then Minister of Education, Jack Lang, publicly acknowledged that the French government historically had maintained an active policy of repressing regional languages. 'Les annonces que le ministre Jack Lang a faites devant la presse, le 25 avril 2001, représentent une évolution très sensible et dans le bon sens', in Union démocratique bretonne, available at <http://www.udb-bzh.net/Brezhoneg/com-lang-0401.htm> (last visited 6 August 2005).

⁷⁹ Spelling was fixed so as to reflect what were thought to be the relevant Latin or Greek derivations, but mistakes were made as to the etymology of many words, such as where the French term had an apparent similarity with Latin, but in fact derived from Greek.

⁸⁰ See Eco, 'le populisme menace l'Europe' (n. 73), 37 ("No power on earth can impose a national or vehicular language. Languages are in a way biological forces."). Recently, French courts occasionally have felt themselves called upon to declare that language must be controlled by usage, not law. Frangi (2003), 119 *Revue du droit public*, 1612 ff.

⁸¹ Nettle, Romaine (n. 68). At least one recent survey indicates moderate success recently in reviving languages newly used in schools, although the results are inconclusive. 'Why the Welsh language is making a comeback', (13 August 2005) *The Economist* 31. De Witte reports mixed success in reviving dying minority and regional languages. De Witte (n. 74) 211 ff. Some of France's more recent legal measures have been compared to a new Maginot line. Frangi, (2003) 119 *Rev. du droit public* 1611 ff.

legal institutions change in beliefs and values over time, the subtextual meaning of law drifts with them. When such ‘ideological drift’⁸² occurs despite unchanged, unamended language in legal texts, it may be due to conscious subversion, but equally often to innocent, unknowing shifts reflecting an ever-changing ‘constitution ... written in the citizens minds’ that, according to Ernst Cassirer, inevitably, perpetually and always changeably, determines law’s meaning.⁸³ The variables that affect the evolution of both language and law are innumerable, and originate in many non-linguistic and non-legal sources. Comparative legal analysis therefore can not help but be interdisciplinary if it is to be effective in understanding and conveying law.⁸⁴ The extent to which law’s transitions elude detection is the extent to which they also preclude reaction and direction by legislators, regulators and educators.

VIII. Familiarity and Foreignness

Translating the foreign into the familiar ends by clarifying the familiar that one discovers also to be foreign.⁸⁵ For comparative law, this means clarifying one’s own legal framework through perspectives the foreign adds to one’s lens of vision. As Arthur Rimbaud, one of France’s nineteenth-century ‘accursed/wretched poets’, *poètes maudits*, said with metaphoric prescience and alienation a century later, ‘*je est un autre*’, ‘I is another’,⁸⁶ a theme

⁸² J.M. Balkin, ‘Ideological Drift and the Struggle Over Meaning’, (1993) 25 *Connecticut LR* 869 ff.

⁸³ Ernst Cassirer, *The Myth of the State*, 27 (1946). Very much in line with Cassirer, who was a political philosopher, were his contemporaries Hermann Kantorowicz and Eugen Ehrlich of the Free Law School, who emphasized the inevitable role of community values on the meaning of law due to, inter alia, textual gaps in the law, and language indeterminacy.

⁸⁴ To put this in Luhmann’s terms (n.61), such interdisciplinarity refers to elements that the autopoietic system of law has absorbed, or others on which it depends. On the latter, see Gunther Teubner, ‘How the Law Thinks: Toward a Constructivist Epistemology of Law’, (1989) 23 *L and Society Rev.* 727, at 742 (‘The dynamics of social differentiation force legal discourse to produce reality constructions of its own, but the very same dynamics make law dependent upon a multiplicity of competing *epistèmes*’.)

⁸⁵ This was the fascination that Montesquieu’s *Persian Letters* exerted on French readers in the eighteenth century, in the epistolary novel featuring visitors from Persia who described French mores. Cf. Goethe: ‘He who does not know foreign languages knows nothing of his own’, quoted in George Steiner, *What Is Comparative Literature?* (1995), 5.

⁸⁶ Arthur Rimbaud, *Lettres de la vie littéraire d’Arthur Rimbaud (1870-1875)* (Jean-Marie Carré, ed., 1931) (Lettre à Paul Demeny, 15 mai 1871).

Franz Kafka renewed in the twentieth century ('I have hardly anything in common with myself')⁸⁷ and that Imre Kertesz generalized beyond the personal to the whole of the human race ('we have nothing in common with ourselves'),⁸⁸ as well as by scholars including Julia Kristeva in *Strangers to Ourselves*.⁸⁹ As a field that has specialized in examining the outside, the other, comparative law is situated to see the foreign in the familiar, so as to elucidate the familiar.

The divided self that confronts its own 'other' was the basis for Rousseau's social contract between the self-individual and the self-citizen.⁹⁰ It also became the foundation for Stuart Hampshire's conception of justice in heterogeneous western constitutional democracies. Hampshire posited that no set of substantive values would be shared by all populations within the ever more diverse national communities of western democracies, such that justice systems can not legitimately impose any single set of substantive norms. Rather, the fair hearing should serve as the cornerstone of justice inasmuch as each individual has conducted internal hearings when in inner conflict, thereby creating ubiquitous recognition of the value and fairness of a system based on listening to each side.⁹¹

For Hampshire, the experience of the foreign 'other' within a fragmented, conflicted self is a defining human attribute, and a cause for celebration. Both Kristeva and Edward Saïd have suggested beauty in the further identity disruption experienced by those who undergo physical exile from their country of birth. Kristeva equates it with a 'weightlessness in the infinity of cultures [that] gives [the exiled] the extravagant ease to innovate'.⁹²

⁸⁷ Franz Kafka, *The Diaries* (Max Brod, ed., 1976), 169.

⁸⁸ "[N]ous n'avons rien de commun avec nous-mêmes", Imre Kertesz, *Un autre: Chronique d'une métamorphose* (Natalya Zarembo, Charles Zarembo, trans, 1999) 73.

⁸⁹ Julia Kristeva, *Strangers to Ourselves* (Leon Roudiez, trans. 1991)

⁹⁰ Jean-Jacques Rousseau, *Du contrat social* (1762) (Flammarion, 2001).

⁹¹ Stuart Hampshire, *Justice Is Conflict* (2000).

⁹² Kristeva (n. 89), 13.

Unlike the nineteenth-century *poètes maudits* who lived in an inner exile, exiles from lands of birth know language displacement and disruption as part of their experience of the foreign. Some, like Theodor Adorno, emigrate from their homeland because it is the unpleasant price they must pay for physical survival. Exile was so bitter for Adorno that he returned to Germany after the Second World War, explaining his return as the longing to be reunited with the language of his birth.⁹³ In this, he was in a tradition of German-Jewish writers starting with Heine, who declared that his fatherland was not Germany, but German, the language.⁹⁴ Adorno most famously said that the holocaust had transformed poetry, that ultimate tribute to the power and beauty of language, into barbarism.⁹⁵ Barbarism was the Greek word for foreign. For him, the familiar had become the foreign, irremediably altered in his manner of experiencing it. Adorno's remark was reminiscent of Walter Benjamin's view that barbarism is embedded in the very concept of culture,⁹⁶ and a forerunner of still others who foresaw the legacy of twentieth-century totalitarianism's abuse of language as the beginning of the end of language itself.⁹⁷

According to Adorno, it is in the foreign and barbaric only that one can see the familiar: 'He who wishes to know the truth about life must scrutinize its estranged form'.⁹⁸ Only the estranged, the barbaric, the 'other,' can be noticed because the familiar, taken for granted, becomes invisible. The estranged is a conduit to noticing the familiar because it is that which we are able to see. Zygmunt Bauman extends Adorno's and Benjamin's ideas by

⁹³Christian Joerges, 'La langue de l'étranger', Observations on the Need to Observe and Understand Discourses on Foreign Territories', available at <http://www.europeanbooks.org/>, citing Jacques Derrida, *Fichus : discours de Francfort* (2002).

⁹⁴ Heinrich Heine, *Sämtliche Schnitten*, (1975-85) 55, quoted in Elon (n.20), 118.

⁹⁵ Theodor Adorno, *Negative Dialectics* (E.B. Ashton trans., 1973) (1966), 360 ff.

⁹⁶ 'Die Barbarei steckt im Begriff der Kultur selbst', Walter Benjamin, 'Das Passagen-Werk', in Walter Benjamin, *5 Gesammelte Schriften* (Rolf Tiedemann & Hermann Schweppenhäuser eds., 1977) 584.

⁹⁷ Jean-Pierre Faye, *Langages totalitaires : la raison, critique de narrative, l'économie* (1967); Steiner (n. 9). For a more optimistic view, implying that language remains redeemable, see John Wilson, *Language and the Pursuit of Truth* (1967), viii ff.

⁹⁸ Theodor Adorno, *Minima Moralia: Reflections from Damaged Life* (E.F.N. Jephcott trans., 1974), 15.

suggesting that estranged forms do not just show us sameness through showing us difference. Rather, what appear to be differences may be the germinated form of unsuspected seeds long implanted and embedded within the familiar.⁹⁹ Just as the study of metastasized cells can reveal previously unperceived functions of the normal, we can see in ‘estranged forms’ how the familiar carries the potential for its own dramatic metamorphoses, and thereby better identify the development of those potentials.

Once we understand that even the familiar is foreign, we also see that it is not just the ‘other’ which requires translation: so does sameness, since sameness masks alterity (*‘I is another’*). Visible otherness merely renders visible the need for translation, and permits one to observe its processes. Those processes of translation also are the ubiquitous mechanisms of meaning construction and comprehension. Thus, translation always is at work, even within the apparently same system of signs, only less easily observably so when interlocutors are not aware of what communication and exchange imply.¹⁰⁰

If comparative law is the translator of the law of others and otherness, but if translation is not the making equivalent of foreign languages, only a lantern that makes visible how ‘every mode of meaning’¹⁰¹ signifies, then, by extrapolation, what can comparative law have to offer? If everything is foreign because, ultimately, the self is another, then in deciphering the officially, visibly foreign, and also the foreign that is masked by the familiar, does comparative legal analysis do something that is not being done through legal analysis *tout court*? Is comparative law a fraud in posing as something different from the regular run of legal analysis?

⁹⁹ Bauman writes of the inner logic of the modern nation state that consists of structures which load the dice towards genocidal conduct. The structures he identifies are not in and of themselves culpable, making their innocuous appearance all the more dangerous, since they relate causally to destructive state practices without being necessarily ill-intentioned. Zygmunt Bauman, *Modernity and the Holocaust* (1989).

¹⁰⁰ Steiner (n.12), xii.

¹⁰¹ *Ibid.*

In its essence, comparative legal analysis *is* just legal analysis, since comparison is not unique to the field of comparative legal analysis, since, rather, all analysis, legal and other, is comparative at heart.¹⁰² Comparative law is merely an ‘estranged form’ of the familiar. Comparative law remains key to understanding law, our own and others’, because of its habits and history, its accoutrements, because it is conversant in otherness, in approaching and dealing with the alterities of languages, histories, and legal mentalities. It is our best bet today, because it is the field with the biggest head start towards deciphering the peculiar newnesses of the contemporary legal world, in which law has become mobile and, it has been suggested, a product of exchange.¹⁰³ Comparative law can begin the process of detecting the unseen that lurks beneath the seen if it can put to fruitful current uses its own history of venturing into contexts that enlarge the practitioner’s cognitive grids, enabling the assimilation of information that can be processed no other way than by extending the limitations of imagination.

Law’s messiness can not be reduced. If comparative law can be an effective translator, it may be by conveying messiness more accurately, thereby allowing for a deeper understanding of the ways in which law is changing, the subtle new associations and linkages occurring as old distinctions give way to new ones. In our globalizing world, the distinctions associated with geography, including statehood and language differences, are fading as English becomes ubiquitous and even nation states that have not restructured officially are dealing with non-national normative claims, entailing legal changes of a non-national nature. The struggle to understand legal phenomena that do not fit within the traditionally exclusive categories and nomenclatures of law: namely, the national or the international, extends to trying to identify a

¹⁰² Lakoff (n. 11).

¹⁰³ Julie Allard , Antoine Garapon, *Les juges dans la mondialisation: La nouvelle révolution du droit*, (2005), 5.

new vocabulary capable of encompassing the novelties, tentatively termed by some as ‘transgovernmental’; by others as ‘post-national’, as unfamiliar phenomena continue to unfold in a dynamic of mutual interaction with the words that name them.¹⁰⁴

Comparative law is the sleuth of significance, of legal meaning, and its old antennae, so carefully and painstakingly attuned to the sorts of hidden change that challenged past generations, now need to be adapted to unearthing new configurations. Its objective should be to become so pervasive that it disappears. Its greatest contribution would be to convince all those who analyze law today that comparative law must be part and parcel of their undertakings, and consequently to merge into invisibility by making itself part of a familiar that it permeates, shedding its own distinctiveness in a globalizing world which needs the methods and skills the field has developed to be infused into all forms of legal analysis.

IX. Translating European Law: Examples

Europe today is one of many arenas of legal change in need of comparative analytical methodology. The difficulties of perceiving how law is transforming in Europe are magnified still further on the world scale, where legal encounters involve states and sources less connected by history and geography than are the current European member states. Even in Europe, like silences between words, a host of legal changes are passing unobserved under the mantle of observable change. Conversely, unchanged legal concepts persist under misleading guises of change.

European institutions such as the European Court of Justice and European Court of Human Rights (ECHR) are spaces of encounter and exchange that have become more than the sums of their parts, having developed considerable legal convergence in a distinctive emerging culture. National legal publications purporting to report their decisions often fail to include

¹⁰⁴ ‘Transgovernmental’ is Anne-Marie Slaughter’s term, ‘post-national’ Jürgen Habermas’. See Curran (n. 2).

much needed comparative analysis, however, filtering the foreign aspects of European court decisions through domestic legal frames of reference that result in distortion.

The failures of translating legal meaning in renditions of European court decisions tend to be exacerbated when the national legal publication and the country whose law was analyzed by the European court are not from the same legal system, as could be observed when a major French legal publication excerpted and analyzed an ECHR decision in a case on assisted suicide that had originated in the United Kingdom.¹⁰⁵ The choice of which excerpts to reproduce from the lengthy European decision was the first step of inadvertent transformation of the European court decision in its presentation to the French reader, who typically would be following European law to the extent it is likely to impact a domestic legal practice, and would read European decisions only in the versions national legal publications publish.

In its manner of abridging the ECHR decision, the French publication did not just shorten the original; it expurgated the ECHR's common law analysis, thus omitting those portions of the ECHR decision that would have been inhabitual in a French court decision.¹⁰⁶ These included ECHR reasoning by analogy among cases in their factual contexts. The French rendition preserved ECHR references to cases through factually decontextualized, normative principles more familiar to civilian legal thinking.

The scholarly analysis which followed the French rendition of the ECHR decision further magnified the failure to translate legal meaning from the European context to the domestic one, as it portrayed aspects of the court's decision as being substantively defective when in fact they reflected a common law manner of reasoning. Notably, the French scholar in civilian manner was indignant that the ECHR had referred with approval to UK policy that not

¹⁰⁵*Pretty v United Kingdom* (2002) App. No. 2346/02, 35 Eur. Ct. H.R. 1. 'La Cour EDH ne reconnaît pas l'existence d'un droit à la mort', (2003), 15-16 *La Semaine juridique*, 676 ff.

¹⁰⁶ For a more detailed discussion, see Curran (n. 2).

every defendant whose conduct violated the relevant statute against assisted suicide need be prosecuted. There was no discussion of the UK policy as rooted in a systemically different legal approach, nor of the possibility of latitude for the ECHR to approve of it.¹⁰⁷ The result of such purported domestic republication and explanation is a rendering familiar of European law to a national legal community through use of the legal code of the home mentality, freeing European law from confusing foreignness by recoding it according to the categories of the reader's member state legal order.

Conversely, symbols of new legal convergence throughout Europe by means of an apparently common vocabulary also can be deceptive and illusory, and perpetuate legal differences that remain unrecognized. Assumptions in both civil and common law systems that European law today has adopted the common law concept of case law are widespread but largely erroneous. The acceptance by civil law states of European court decisions as a source of law appears to be a change towards legal convergence because it sounds reminiscent of common law methodology and practice, and because the common law term 'case law' is used extensively by civilians.

For the civilian, the concept of 'case law' is the validation of court decisions as a source of law, but such decisions then are reduced to what, in common law parlance, is only one component part of a court decision: the 'rule' of the case, a normative principle from which future case solutions will be deducible.¹⁰⁸ For the common law lawyer, however, 'case law' is an intricate network of significance in which legal principle is fused indissociably with particular, contextualizing facts from a host of cases. In the common law, an individual court

¹⁰⁷ *La Semaine juridique* (n. 105) 682. For a fuller explanation of the civilian approach as withholding punishment but not prosecution, see Antoine Garapon, 'French Legal Culture and the Shock of 'Globalization'', (1995) 4 *Soc & Leg Studies* 500 ff.

¹⁰⁸ Curran, (n. 2).

decision becomes the basis for future detailed inductive reasoning, to be conducted by comparisons among multifarious aspects of other cases that fit within an arguable, and to-be-argued, range of similarity. For the civilian, even the court decision that has acquired the stature of law is understood as a normative rule resembling a code provision. The civilian conception of ‘case law’ thus has not assimilated cases-*qua*-law in the common law manner, which would require not just recognizing court decisions as a source of law, but also would require a fundamentally altered understanding of the nature of law when cases are its source.

A common law feature has penetrated the EU, however, in the piecemeal pattern of change increasingly characterizing legal development in all EU member states. The evolution proceeds from detailed directive, or other individual European institutional command, to the reactive changes in member state domestic law in order to become compliant with new European law. It is a direction antithetical to the civilian pattern of legal change emanating from an initial, *a priori*, overarching coherence associated with the very idea of law and legal legitimacy.¹⁰⁹

This pattern of change in Europe, coupled with the principle of subsidiarity, has led to a particularized drafting style, inhabitual and discomfitingly unfamiliar to the civilian legal public in its expectations of such language.¹¹⁰ It is reminiscent of the detailed common law statute that similarly arose from a piecemeal system: namely, from the common law tradition of courts creating unenacted law by means of cases, and of the legislature’s interference as being the exception rather than the rule, occurring only where the legislature wrests control over particular matters it deems necessary to take into its own hands from the *a priori* accepted

¹⁰⁹ Antoine Garapon, Ioannis Papadopoulos, (2003) *Juger en Amérique et en France*; Christophe Jamin, ‘Un modèle original: la construction de la pensée juridique française’, (2004) *Bulletin d’information Cour de cassation*.

¹¹⁰ Christian von Bar, ‘Le groupe d’études sur un code civil européen’, (2001) 53 *RIDC* 127, 138 ff.; *Bulmer Ltd. v. Bollinger S.A.* (1974) All. ER 1226.

ubiquity of judicial governance.¹¹¹ Part of the civilian frustration with perceived ‘legislative inflation’ in European member states today can be explained by its association with this suspect pattern of legal change that is experienced as the reverse of law’s proper course from the whole to the particular.

Law profusion also recalls the fascist period, in which there was an explosion of statutes that undermined the prior rule of law through outer garments of legality veiling profound change and, as was later judged, abdication rather than preservation or promotion of law and rule of law.¹¹² The association between statutory abundance and the subversion of law also has roots that go back further in modern civilian legal thinking, as Portalis’ explanation of the drafting of the French Civil Code reveal.¹¹³

Along with an ideal of keeping laws few in number, the sparse style of the civilian legal norm is considered inseparable from law and the rule of law because it is considered to have proven its ability to withstand changed circumstances. As exemplified by the Prussian code that failed before Napoleon’s succeeded,¹¹⁴ abundant language and abundant law are deemed fated to outlive the problems they address, entrapping society by legal texts that eventually bind senselessly, because they become helpless to resolve future problems time-bound legislators inevitably fail to foresee.¹¹⁵

The civilian view that legal quantity and linguistic specificity in enacted law cause injustice, law subversion and social mayhem may owe more to historical contingency than to

¹¹¹ Felix Frankfurter, ‘Some Reflections on the Readings of Statutes, (1947) 47 *Columbia LR* 527, 532 ff; John Chipman Gray, *The Nature and Sources of the Law* (1909) 164 ff; Roscoe Pound, ‘Common Law and Legislation’, 21 *Harvard LR* 383, 389 ff.

¹¹² Stolleis (n. 36); Rùthers (n. 36).

¹¹³ Portalis, *Discours préliminaire au premier projet de code civil* (1999, Firmin Didot frères 1841).

¹¹⁴ *Allgemeines Landrecht*, Prussian General Territorial Law of 1794, discussed in James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change* (1990), 55 ff.

¹¹⁵ ‘Dossier spécial [:] législation; Inflation législative galopante’, (10 November 2004) *La Semaine juridique*.

causality, however.¹¹⁶ The lessons Continental European nations learned that caused national codifications to espouse a general, loose style of language, widening future interpretive potential, do not take into account the alternative possibilities for balancing legal stability with societal changes that the common law developed in a much different pattern, one that has included narrowly drafted legal norms arising as circumstances in society were deemed to justify their enactment. Unreflective associations arising from particular historical trajectories confuse the issues today as Europe seeks to reconcile two substantially different legal traditions and mentalities within a single supranational judicial system.

X. Conclusion

Comparative law as translator can be envisaged as cybernetics for the irreducible messiness of legal concepts that are wedded to the language which encases them and to the connotations which adhere to them. The physicist Freeman Dyson describes cybernetics as ‘*a theory of messiness*’,¹¹⁷ and its Greek etymology as evoking one ‘who steers a frail ship through stormy seas between treacherous rocks’.¹¹⁸ According to Dyson, the founder of cybernetics, Norbert Wiener, was a former child prodigy who became immersed in the cultures and languages of both pure and applied mathematics, engineering, and neurophysiology, and translated among all of them. Wiener determined that ‘the messiness of the real world was precisely the point at which his mathematics should be aimed’.¹¹⁹

As this chapter has discussed, comparative law and its practitioners have long been interpretants attempting to steer through the messiness of the foreign by reordering it into the

¹¹⁶ This is a principal theme of Vivian Grosswald Curran, ‘Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology’s Impact on Substantive Law’, (2002) 35 *Cornell Int’l LJ* 101 ff.

¹¹⁷ Freeman Dyson, ‘The Tragic Tale of a Genius’ (July 14, 2005) *New York Review of Books* 10

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

language of the familiar without betraying the original. Today's world of dizzying legal changes, and the accelerated rate at which changes are occurring, heighten comparative law's difficulties, even as the field increasingly finds itself implicated in world events.

Comparatists have ceased being remote from reality like the philosophers an empress once envied: 'You philosophers are fortunate. You write on paper, and paper is patient. I unlucky empress write on the sensitive skin of people'.¹²⁰

As Ugo Mattei has been exhorting his colleagues to remember, scholarship is an important influence on European legal and political decision-making in this foundational period, and will affect millions of people for a long time to come.¹²¹ In other parts of the world, new encounters of laws and legal norms occur, crossing borders of geography, statehood and, most confusingly, crossing traditional categories for law and legal meaning.¹²² Analyses and interpretations of interlocking, often mutually irreconcilable claims will affect decision-making as the reshaping world seeks to solidify emerging concepts of legitimacy and legality.

Comparative law tends to be least acknowledged and most often absent where legal analysis does not involve visibly divergent legal orders. It is needed urgently in contexts of unrecognized metamorphosis, however, and today metamorphoses are burgeoning in murky areas outside of the traditional rubrics of either national or international law.¹²³ The less

¹²⁰ 'Ihr Philosophen habt es gut. Ihr schreibt auf Papier und Papier ist geduldig. Ich unglückliche Kaiserin schreibe auf der empfindlichen Haut von Menschen.', Nachrichtendienst für Historiker, <http://www.nfhdata.de/premium/index.shtml>. (*Spruch des Tages*, 5 June 2005) David Kennedy disagrees: 'Comparative law today is about knowing, not doing.' David Kennedy, 'The Methods and the Politics', in Legrand, Munday (n. 53), 345ff, at 346.

¹²¹ Ugo Mattei, 'Hard Code Now!' (2002) 2 *Global Jurist Frontiers*, Art 1, 3ff., available at www.bepress.com/gi/frontiers/vol2/iss1/art1.

¹²² Mireille Delmas-Marty, *Les forces imaginantes du droit[:] Le relatif et l'universel*, (2004); Anne-Marie Slaughter, 'The Real New World Order', (1997) 76 *Foreign Affairs* 183 ff; Slaughter, *A New World Order* (2004); Julie Allard, Antoine Garapon, *Les juges dans la mondialisation: La nouvelle révolution du droit* (2005), 5 ff.

¹²³ Slaughter (n. 122); Delmas-Marty (n. 122). They agree that new configurations of legal significance are emerging, but interpret them differently.

apparent, the less visibly foreign, the foreign is, the more comparative law's task of translation involves finding and forming the vocabulary to transmit new configurations that resist detection and articulation. The field is acquainted with the uneasy transitions of words and concepts from foreign legal contexts to a targeted audience's frames of reference. This acquaintance is its arsenal for discerning new manifestations of legal significance.

However much comparative legal analysis can clarify, the process itself is not amenable to scientific method. Like language, inevitably imprecise and perpetually in flux, comparative law can not be frozen once and for all, to be captured for future application if only it is developed with sufficient acuity and insight. It shares what Isaiah Berlin attributed to philosophy and distinguished from the scientific: it does not carry within itself the way or method of its own solution, and therefore does not lend itself to formulaic approaches.¹²⁴ This means that comparative law can not be transmitted from one generation to the next. Each generation bears the task of developing methods that will allow the field to remain an effective interpretant of contemporaneous legal meaning.

Great scientists show how generalizations can be integrated into formulae that become the basis for future scientists of lesser abilities to use, in order to make deductions in what Berlin called 'uninspired progress'.¹²⁵ Comparative law evolves differently. Its progress cannot be accomplished in such small linear advances, but requires changing the very perspective from which problems are conceived, and debunking entrenched, established orthodoxies:

'To take so vast a step as to liberate oneself from the incubus of an entire system of symbols – and it is scarcely possible to distinguish symbols from thoughts – to shake oneself free of so obsessive a framework, requires genius and intellectual

¹²⁴ Isaiah Berlin, *The Sense of Reality [:] Studies in Ideas and Their History* (1996), 58 ff.

¹²⁵ *Ibid.*, 60.

strength and independence of the highest order. The new construction, if it is created by a man of creative as well as destructive talent, has an immense and liberating effect upon his contemporaries, since it removes from them the weight of a no longer intelligible past, and a use of language which cramps the intellect and causes the kind of frustrating perplexity which is very different from those very real problems which carry the seeds of their own solution in their own formulation. The new system, born of an act of rebellion, then becomes a new orthodoxy, and disciples spring up on all sides, eager to apply the new technique to new provinces to which the original man of genius had perhaps not conceived of applying them. This is sometimes successful, [but] sometimes leads to a new and equally arid and obfuscating scholasticism. Once the new orthodoxy has won the day, this in its turn, by making concepts rigid, by creating an ossified system of symbols no longer flexible in response to the situations which had originally led to the revolt, creates new frustrations, new insoluble problems, new ... perplexities.’¹²⁶

As translator of legal meaning, comparative law always has had to invent and reinvent tools with which to translate. The paradox is that this undertaking, however descriptive in nature its ultimate objective may be, requires the ability to destroy its own past rigidities and manners of perceiving, its own methods of decoding and transmitting, in order to construct a new modality of analysis, a new vocabulary better adapted to changed contemporaneous meaning in the perpetually chameleon-like world of new presences, claims, standards and influences, in which the legal and extra-legal increasingly crisscross to the point of becoming indistinguishable, and whose junctures are the more difficult to perceive to the extent that they are unexpected.¹²⁷ Comparative law, like Berlin’s rendition of philosophy, can and must maintain logical rigor, but it is the antithesis of final answers, of absolute truths, such that, in comparative legal analysis there can be ‘no final method of dealing with problems’.¹²⁸

The field’s strength lies in exposing law’s complexities, and its tentacles lodged in every aspect of life. Comparative law’s fragility is the fragility of law, a concept no sooner defined than changed in meaning. The discourse of law has been characterized as ‘a creative

¹²⁶ *Ibid.*, 62.

¹²⁷ Delmas-Marty (n. 122).

¹²⁸ Berlin (n. 124) 63.

language, which gives existence to that which it articulates'.¹²⁹ Like the law of the 'other' it seeks to transmit, comparative law ultimately also is subject to the language in which it is couched, that gives it sense, and that, as Paul de Man believed to be the distinctive privilege of all language, is equally adept at hiding as at bestowing meaning.¹³⁰

It has been said that the distance 'between the same and the other [is] the gap in which language stands ...'¹³¹ This does not make language transparent or efficacious, honest or able. Rather, it situates language and evokes its pitfalls and potentials. Like language, comparative law also stands in the gap between the same and the other. Like language, comparative law faces the stark pitfalls of miscommunication and misunderstanding, but, also like language, it possesses the unique and breathtaking potentials of learning to see, to communicate and to shed light in that elusive, inevitable, shifting and ever-reconfiguring gap between the same and the other.

¹²⁹ Pierre Bourdieu, *Ce que parler veut dire* (1982), 21 ("Le discours juridique est une parole créatrice, qui fait exister ce qu'elle énonce".)

¹³⁰ Paul de Man, *Blindness and Insight: Essays in the Rhetoric of Contemporary Criticism* (1983) (1971) 11 ("It is the distinctive privilege of language to hide meaning behind a misleading sign."). Kertesz (n. 45) 121, has gone a step further: 'Language indicates something that the understanding is not able to follow: is language also an illusion of the senses?' ('La langue indique quelque chose que la connaissance est incapable de suivre: la langue est-elle aussi une illusion des sens?')

¹³¹ Emmanuel Levinas, *Entre nous: Thinking-of-the-Other* (trans. Michael B. Smith & Barbara Harshav) (1998) 32.

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