
Comparative Contraventions

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When the comparatist-at-law offers a critique of a particular legal culture, individuals committed to that culture may seek to repress dissemination of this alternative opinion. The author thus provides a personal narrative of his failed attempts to publish texts critical of the *Civil Code of Quebec* in various Canadian law journals while meeting with repeated success abroad. He shows how Quebec academics used the peer-review process to stifle an argument seen as liable to undermine a local intellectual endeavour. The peer-reviewer is exposed as a censor seeking to silence the expression of comparative, critical thought.

Lorsque le comparatiste se livre à la critique d'une culture juridique, les juristes s'étant investis dans cette culture même pourront vouloir réprimer la dissémination de l'argumentaire dissident. L'auteur relate ici comment ses tentatives répétées de publier une critique du *Code civil du Québec* dans différentes revues de droit canadiennes se sont ainsi révélées infructueuses alors qu'elles étaient couronnées de succès à l'étranger. Il démontre de quelle manière des universitaires québécois sont intervenus auprès des comités de rédaction pour exclure une perspective envisagée comme susceptible de porter atteinte à une oeuvre intellectuelle façonnée localement. L'universitaire est dès lors révélé en tant que censeur souhaitant entraver l'expression d'une pensée comparative critique.

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c'était bon pour l'essai
c'était philosophique
c'était du journalisme
il n'y manquait que les noms¹

Nearly fifty speakers from approximately fifteen countries gathered in Quebec City on 19, 20, and 21 September 2004 to celebrate the tenth anniversary of the *Civil Code of Quebec*. I find it necessary to supplement the encomium that was produced on that occasion by recalling in what circumstances over the years comparative interventions taking the new Code as their object of critical study have been apprehended as comparative contraventions and suppressed as such. These repeated acts of censorship are an important part of the story. They hardly, however, call for celebration.

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Notwithstanding a theoretical commitment to enculturation and interdisciplinarity and the assumption of a critical perspective such as might be expected to recommend them as strategic hermeneuts of legal experience, comparatists-at-law would be ill-advised to assume that legal cultures will readily accredit their observations as valid knowledge. Rather than question its own understanding of itself, a legal culture may seek to marginalize the comparatist's account in various ways: for example, by admitting it only in reduced and distorted versions or by depriving it of a forum. Thus, censorship offers another instantiation of the presence of power within the field of comparative legal studies. The story I wish to tell is intended to show how challenging it can be for the comparatist-at-law to find an audience within the observed legal culture when the views being circulated about that legal culture *within that legal culture itself* fall foul of received and interested orthodoxies stubbornly seeking, especially against the most compelling evidence, to preserve a certain image of themselves. Specifically, my narrative illustrates the abuse of the academic peer-review process to obviate the menace represented by the comparatist's singular perspective.²

The reviewer-as-censor is not simply concerned with the good working order of the community, but with the preservation of what he regards to be its *foundational and constitutive* fabric. He is entrusted with the constant reassertion of power and must accordingly remind the author at all times of what the author must not think and

¹ Gérald Godin, *Ils ne demandaient qu'à brûler*, ed. by André Gervais (Montréal: Éditions de l'Hexagone, 2001) at 295.

² Recent statements arguing for the merits of narrativization include Jane Gallop, *Anecdotal Theory* (Durham: Duke University Press, 2002) and Homi Bhabha, "Writing Rights" in Matthew J. Gibney, ed., *Globalizing Rights* (Oxford: Oxford University Press, 2003) 162 at 180.

of what the author must not *not think*. In exercising authority over the author, as he prescribes what he proscribes, the censor ensures that the dissentient is aware of the inevitable presence of the “prior law”, which cannot be undermined because it grounds the whole community order; the censor must, therefore, delineate a space of inhibition and repress any statement that might unsettle the collectivity and its shared achievements (whether illusory or not). Consequently, the heterodoxy of the comparatist-at-law finds itself suppressed by jurists occupying positions of power (deemed legitimate) from which they derive ascendancy to do violence to others and to their ideas. The comparatist becomes *malum nomen* and must bear an *ignominia*. It soon appears to him that individuals, for whom censorship mediates a sentiment that they themselves and their community are beleaguered, simply cannot apprehend the restorative implications flowing from the act of critique, such as the way in which tension between conformance and dissent might be creative and confer meaning to the academic endeavour. In short, it is the predicament of the comparatist-at-law—whose critical vocation *impels* him to privilege a heterodox discourse—to encounter opposition from the academic-as-censor, who has failed to grasp how the “[dissolution of] antagonism” and the “[emasculat[i]on of] hostility” effectively intervene to render the university “culturally irrelevant”,³ and who is unable to appreciate that the basis for critique need not arise from detachment or enmity, but can find its source in idealism.

So, to my tale—bearing in mind, all along, Edward Said’s reminder that “the intellectual must be involved in a lifelong dispute with all the guardians of sacred vision or text, whose depredations are legion and whose heavy hand brooks no disagreement and certainly no diversity.”⁴

On the occasion of a teaching engagement I undertook in Germany a little over ten years ago, Reiner Schulze, the executive editor of the then soon-to-be-established *Zeitschrift für Europäisches Privatrecht* and current director of the *Institut für Deutsche und Europäische Rechtsgeschichte* of the *Westfälische Wilhelms-Universität*, in Münster, invited me to contribute a brief text in English on the new Quebec Civil Code (which was just about to come into force on 1 January 1994). The fact that I had studied and taught law in Quebec was, of course, what chiefly recommended me to my German colleague, although it so happens that I had spoken and written about an early rendition of the Civil Code in the making.⁵ By the time I was asked to contribute to the German journal, however, I had been living in England for three years and had somewhat lost touch with the often perplexing political events that preceded the implementation of the new Code. Yet, I decided to accept the

³ Alasdair MacIntyre, *Three Rival Versions of Moral Enquiry: Encyclopaedia, Genealogy, and Tradition* (Notre Dame: University of Notre Dame Press, 1990) at 219.

⁴ Edward W. Said, *Representations of the Intellectual* (London: Vintage, 1994) at 65.

⁵ See Pierre Legrand, “Consolidation et rupture: les ambiguïtés de la réforme des contrats nommés” (1989) 30 C. de D. 867 (being the revised version of a conference given at Université de Montréal on 7 April 1989).

invitation extended to me because it offered a salutary occasion to write about Quebec law not as an “insider”, but from a decidedly more external perspective, away from the pressures and anxieties that inevitably ensnare critique from within (which is not to say that I was able to ignore my own goals in formulating my theoretical ideas).

One obvious problem involved getting reacquainted with the situation. Fortunately, I had ready access to the Bodleian Law Library, in Oxford, where a wide range of Canadian law periodicals can be found. I also received material assistance from friends based in Quebec. And, in the course of a few timely weeks spent in Montreal, I was able to raise various matters with a number of academic colleagues and practicing lawyers. On the basis of this information, I began to work in earnest on my paper, which I completed during a prolonged teaching visit at Uppsala University in the spring of 1993. The article was duly forwarded to Germany, peer-reviewed, accepted for publication with minor emendations, and published in December of that year.⁶

In the short space at my disposal in this paper, I focused on what I regarded as three salient features of the Quebec codification. First, I felt compelled to underline that the writing and intellectual organization of the Code were so poor as to be unworthy of a primordial legal text.⁷ Second, it seemed necessary to document the fact that the Code in various significant ways marginalized the minority anglophone community established in Quebec since the eighteenth century. In this respect, the Quebec codification broke with the civil law tradition in which civil codes have been used by the state to promote harmony within a society, either through the consecration of a political unity (as in Germany) or through the institution of a legal unity (as in France). Third, I wanted to highlight how the codifiers and the Quebec government sought to deny having derived any meaningful inspiration from outside of Quebec law even though the available data clearly demonstrated otherwise. This unwillingness to acknowledge the Code’s sources also contrasted with the civilian practice of making available lengthy *travaux préparatoires* detailing the provenance of the various provisions.⁸ The wish to efface the anglophone presence, on the one hand, and to obliterate external influences, on the other, illustrates a narrow, language-based, nationalistic agenda, which, although spawned by the subordination of Quebec francophones by the British conqueror and the ensuing struggle of the francophone community to proclaim the legitimacy of its cultural identity, is arguably obsolete in

⁶ See Pierre Legrand, “Civil Law Codification in Quebec: A Case of Decivilianization” (1993) 1 *Zeitschrift für Europäisches Privatrecht* 574.

⁷ For a similar argument, see Maurice Tancelin, “Les faiblesses logiques du Code civil du Québec” in *Scintillae iuris: studi in memoria di Gino Gorla*, t. 2 (Milan: Giuffrè, 1994), who notes that the new *Civil Code of Quebec* was enacted “in its draft form” (“à l’état de brouillon”) (*ibid.* at 960).

⁸ For a recent application of this practice, see the publication, in seventeen volumes numbering more than eleven thousand pages, of the *travaux préparatoires* to the new Dutch Civil Code, which progressively replaced the 1838 codification as of 1970: C.J. van Zeben et al., *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek* (Deventer: Kluwer, 1961-93).

its stridency.⁹ In the way they purported to reflect a society's intellectual and moral allegiances—and sought to institutionalize societal forms for generations to come—I regarded these crucial features of the new Code, all partaking in the sphere of tacit knowledge, as infinitely more important than any amendment that might have been effected to the posited law.¹⁰ In fact, given the significance of the information that had become available to me, I soon resolved that the matter ought to be addressed more extensively than what had been possible to achieve within the confines set by the German law review.

In the early spring of 1994, having submitted to a funding body a detailed research project endorsed by two renowned academics, I was fortunate to obtain a scholarship to finance an extended stay in Canada for the purpose of collecting further materials. Toward the end of June 1994, I was ready to submit a revised and amplified version of my argument for publication. It seemed clear, however, that the paper might not be publishable in Quebec itself. My experience as an academic in Quebec (albeit brief) had familiarized me with the existence of a tradition of reflexive loyalty to codification, which, while no doubt common to most civil law jurisdictions, is perhaps compounded in Quebec by a permanent trait of intellectual life: that any position marking its distance from an indigenous noetic enterprise, such as a civil code, is immediately rejected as contemptuous.¹¹ This brand of “academic parochialism” (a phenomenon that requires further analysis) has been said to reveal an “alienation syndrome” characterized in part by “low aspirations” and a “tendency to avoid intellectual engagement and competition”¹²—hence the apposite designation of Quebec scholars as “apparatus intellectuals”,¹³ an epithet having rather little to do with the intellectual-as-*éveilleur*. A documented example of this defensive reactivity

⁹ See e.g. the view expressed in apodictic fashion—thus making its heuristic function evident—by Quebec Minister of Justice Gil Rémillard to the effect that the Quebec Civil Code “follows no other legislative model” (*Commentaires du ministre de la Justice*, t. 1 (Québec: Publications du Québec, 1993) at viii: “Le Code civil du Québec ne suit aucun autre modèle législatif”). One illustration of the substantial role that foreign influences have effectively played in the making of the new Code is offered in H.P. Glenn, “Le droit comparé et l’interprétation du Code civil du Québec” in *Le nouveau Code civil: interprétation et application* (Montreal: Thémis, 1993) 175 at 188-90, 197-222.

¹⁰ Taking the view that the achievement of a critical rationality is an epistemological task, I have argued that comparative legal studies should move away from its habitual (and deleterious) insistence on posited law. For a programmatic statement, see Pierre Legrand, *Le droit comparé* (Paris: Presses Universitaires de France, 1999).

¹¹ See e.g. Marc-Henry Soulet, *Le silence des intellectuels: radioscopie des intellectuels québécois* (Montreal: Éditions St-Martin, 1987): “for the intellectual ... there is no salvation ... outside of his attachment to the Quebec *oeuvre*” (“pour l’intellectuel, ... il n’est point de salut ... en dehors de son attachement à l’oeuvre du Québec”) (*ibid.* at 63). Thus, a leading Quebec sociologist enjoins the Quebec intellectual “not to rupture the solidarity with the people to whom he belongs” (Fernand Dumont, *Raisons communes* (Montreal: Éditions du Boréal, 1995) at 247: “ne point rompre la solidarité envers le peuple auquel nous appartenons”).

¹² Catherine Valcke, “Legal Education in a ‘Mixed Jurisdiction’: The Quebec Experience” (1995) 10 Tul. Eur. & Civ. L.F. 61 at 115 (referring to anthropological and psychological research).

¹³ Soulet, *supra* note 11 at 61 (“intellectuel d’appareil”).

is offered by a Quebec judge, who tried to ensure that the new Civil Code would not have to face criticism either from without or from within the Quebec legal community.¹⁴

I determined, therefore, that the best course of action so as to circumvent summary opposition to my paper was to send it to a bilingual law review located outside of Quebec, but having a large readership within Quebec itself. (I shall refer to this journal as *ABC*.) This periodical regularly publishes articles concerning Quebec law, and, accordingly, I expected that there might be editorial interest in my text. In any event, it had been suggested to me by a distinguished Canadian academic—an acknowledged expert on the history of codification in Quebec—that I should seek to make the argument available to a broader Canadian audience. Moreover, I was aware of only one relatively short paper having been published in *ABC* bearing on the new Code. The article in question had been written by a member of the small group of individuals entrusted with the drafting of the Code and, thus, presented the institutional view of the codification process. I regarded my contribution as a counterpoint, offering a critical reflection on that process and on its outcome.

The editor of *ABC* acknowledged receipt of my manuscript in July 1994. In his note, he indicated that he had sent the paper for assessment to a (francophone) law teacher in Quebec. This development was not good news. Indeed, barely two weeks later, the editor informed me that he was rejecting the paper on three grounds. First, it was too long. Second, he “envisage[d] publishing occasional essays on the Civil Code in French by Québec [sic] scholars so that the field will be covered in full.” Third, he had “sent the manuscript to an expert reviewer” and “[t]he reviewer’s opinion [had] not [been] positive.”

It was readily apparent to me that the issue of format was a distraction as the essay was of average length for a law review article and not in the least out of line with the practice prevailing at *ABC*. The second observation struck me as more cryptic. I was not prepared to believe that the fact that my paper had been written in English and had been submitted from outside of Quebec had intervened in the decision not to publish. It simply seemed too implausible that this sort of linguistic and geographical discrimination could have played a significant role in the editorial determination. The key had to lie in the expert reviewer’s negative report. It was then common for Canadian law journals to forward to authors the assessors’ evaluations of their work under cover of anonymity with a view, I assume, to ensure that rejections are seen to have been motivated. Strangely, no copy of the assessment was made available to me by *ABC*. I therefore asked that the manuscript be returned to me along

¹⁴ See Jean-Louis Baudouin, “Reflections on the Process of Recodification of the Quebec Civil Code” (1991-92) 6/7 *Tul. Eur. & Civ. L.F.* 283, who, making reference to the new Quebec Civil Code, claimed that critics had forfeited the right “to cast doubt on the recodification of our law,” apparently on account of the fact that the reform was “well underway and ... entering into its final stage” (*ibid.* at 290).

with the negative recommendation in the customary way. On the specific question of the referee's evaluation, I wrote in these terms:

I trust you will feel able to append the negative report presented to you by the anonymous reviewer. I would hope that the reviewer's comments would afford me the opportunity to improve the paper.

My request was never acknowledged, and no assessment ever followed.

Undaunted, I submitted the paper to one of the established academic law reviews in Canada, once again a periodical based outside of Quebec. (I shall style this journal *DEF*). Though this review cannot claim to have an extensive readership in Quebec, it enjoys enough visibility so that if an article were to be accepted for publication, the paper would reach a fair number of Quebec academics. My experience with *ABC* having confirmed my suspicion that if invited to comment on the piece Quebec academics would try to suppress it, I included this *captatio benevolentiae* in my cover letter to the editor:

As you will note, my paper adopts a critical stance *vis-à-vis* the new code. I would hope that this would not disqualify it from consideration for publication in your [journal]. Although I am aware that some of my colleagues from Quebec are sensitive to criticism of the code, I am firmly of the view that new codes ought to spark a free and lively discussion. I should like to think of my paper simply as a scholarly contribution to a debate of that kind. A large number of articles set out the case for the new code. It should not surprise or upset anyone that my paper sets out a case against it. I regard a continuing dialogue and interchange between the two sides of the argument as crucial given the code's importance. Clearly, a meaningful debate can only arise if there exists a range of opinions in print.

Upon reception by *DEF*, the paper was sent to a first reviewer, apparently someone associated with the law school under whose auspices the journal was being published. The written recommendation of the assessor was subsequently communicated to me. It advised the editor to "accept" the article "with minor revisions." The following comments were handwritten by the reviewer on the manuscript itself:

I fear the author is exactly right. I think we should publish—he/she may not get a hearing in Quebec.

Despite this intimation, the editor obviously failed to appreciate how readily the Quebec legal community would rise in the defense of its Civil Code and seek to marginalize dissent. The paper was, therefore, submitted to a second reviewer whose anonymity, under the circumstances, could not realistically be sustained and whom I could identify as a member of a law faculty at a Quebec university, although not the same individual as mentioned previously. Unsurprisingly, this referee's report concluded that the paper should not be published. The assessment was later mailed to me. It included these passages:

This article contains numerous assertions which are completely unsubstantiated.

The research is not thorough enough to make ... a scholarly argument ...

Parts of [his condemnation of the new Civil Code] could also be construed as culturally intolerant.

[H]is argument is polemical rather than scholarly.

Apart from the polemical nature of the piece, there is little that could be considered an original or useful contribution to knowledge in the area.

Reference was also made to the fact that the text had been submitted “in the guise of” a scholarly article, that it was “insulting”, that it sought to “condem[n] an entire culture”, that “it [was] short on fact and long on conjecture”, that it was “completely undocumented”, that it provided analysis that was “skimpy at best”, and that it was “disjointe[d]”. In sum, and at the risk of some repetition, the assessor concluded that “[t]he article thus contributes little or nothing new or interesting to an understanding of the new Civil Code and the process of reform.” The verdict ensued: “I would strongly recommend that this article be rejected.”

For reasons that were not explained, but that suggest a hierarchy amongst reviewers, the opinion of the Quebec academic carried over that of the first assessor. A letter from the editor duly followed, informing me that the article would not be published and inviting me to raise “any questions or concerns” I might have. I availed myself of this opportunity. Having referred to the observation from the internal reviewer that I “[might] not get a hearing” in Quebec, I wrote as follows:

In the light of this percipient remark, it is, to say the least, unfortunate that you ... chose to send the piece to a Quebec reviewer. In feminist circles, the strategy used by the Quebec reviewer is known as “silencing”. I am surprised and disappointed that your [journal] was prepared to condone it.

Having shared my “concerns” with the editor, I never heard from *DEF* again.

These two rejections confirmed that it was unlikely that I could get my paper published in a Canadian law journal as long as editors continued to rely on Quebec academics for approbation. Having anticipated that I would soon be forced to reach that very conclusion, I had elected some weeks earlier to submit the manuscript to the *British Journal of Canadian Studies*, based at the University of Edinburgh. The ready advantages of publication in that review were two-fold: not only would I avoid suppression of the argument by Quebec academics, but I would in all likelihood reach a wider constituency of readers than could have been expected on the basis of a contribution to a law journal. Unfortunately, however, to publish with the *British Journal of Canadian Studies* would mean, once again, that the text would not appear in Canada. Upon reception of my paper, the editor of the *British Journal of Canadian Studies*, not feeling himself adequately conversant with law, apprised me that he wanted to submit the piece to colleagues from the Faculty of Law at the University of Edinburgh. The recommendations were positive, and the paper was duly accepted for

publication in the fall of 1994. Having benefited from minor stylistic revisions, the article appeared a few months later.¹⁵

As the 1994 Christmas season approached, I was thus in a position to point to published or forthcoming contributions on the Quebec Civil Code in Germany and in the United Kingdom, not to mention a third piece that would be released in New York in the spring of 1995 as part of a collection of essays devoted to the semiotics of law.¹⁶ Ironically, I could also boast two rebuffs in Canada. On the basis of these statistics, it seemed that the time had come to close the file I had been prompted to open on Quebec's codification and to turn to other research endeavours.

In late December 1994, however, I had lunch in Montreal with a leading Canadian public figure, who, as a former politician, a concerned citizen, and a lawyer, revealed genuine interest in my argument and in the fact that I could not get my views published in Canada despite consistently meeting with positive responses abroad. By then an acquaintance of mine, this individual had been the driving force behind the founding of *Cité libre*, a famous public affairs, Montreal-based review that, as of June 1950, had sought to challenge the stultifying orthodoxies—political, religious, and otherwise—that had frozen Quebec in a time warp on the road toward modernization and democratization. The journal remains credited with a major contribution to the extensive renewal of Quebec society that began in the early 1960s. My acquaintance informed me that, after a prolonged hiatus, the review had been resurrected a few years earlier. While he no longer played a leading role, he remained actively involved with the publication. Recalling the way the editorial team of the 1950s would publish, under the banner “*Textes refusés*”, submissions that other journals would not entertain on account of their perceived radicalism, he graciously suggested that my critique of the new Code needed to appear in Quebec and deserved to be printed in the pages of *Cité libre*. If I could compress the argument, write it in French (*Cité libre* had always been first and foremost a francophone periodical), and adapt the paper for dissemination across a general readership, he would be prepared to recommend publication to the editor of *Cité libre rediviva*. I was honoured by the enthusiasm shown for my work by a man whose intellect, cosmopolitanism, and *engagement* I had long admired. I proceeded to do precisely what my acquaintance had advised. I eventually forwarded the text to him in February 1995. A few weeks later, my acquaintance kindly wrote to say that he had found the paper “interesting, clear, erudite, and energetic” (“intéressant, clair, érudit et vigoureux”). He also confirmed that he had transmitted it to the review.

¹⁵ See Pierre Legrand, “Bureaucrats at Play: The New Quebec Civil Code” (1995) 10 *Brit. J. of Can. Stud.* 52.

¹⁶ See Pierre Legrand, “Civil Codes and the Case of Quebec: Semiotic Musings around an *accent aigu*” in Roberta Kevelson, ed., *Conscience, Consensus, and Crossroads in Law: Eighth Round Table on Law and Semiotics* (New York: Peter Lang, 1995) 195.

The editor, as fate would have it, succumbed to the temptation to send the text for assessment to a Quebec academic. (The name of this referee would later be communicated to me; he, too, was a law teacher at a Quebec university, although not one of the two individuals implicated previously.) The firm recommendation was, of course, that the article should not be published, which it was not. Although the evaluation had taken place orally in the course of a telephone conversation, I was later provided with the notes scribbled by the editor on that occasion. Excerpts follow (in translation from the French):

I find that the tone of this article is unhealthy and excessive (“malsain et outrancier”), that it must not be published (“il ne doit pas être publié”).

He studied at Oxford ... where he was unable to complete his degree because he could not agree with his thesis supervisor.

He was hired by the University of Ottawa, from which he resigned to work at McGill, where he stayed for one year before leaving to teach in England in two places.

He does not know who he is fighting. This whole recodification was done by people who did not even know what they were doing.

My acquaintance was as surprised as he was irritated by what was obviously a more “cautious” editorial line than that which he had followed in former times. Indeed, he declared himself “outraged” (“indigné”). We agreed that it was pointless to take the matter further. In October 1995, I submitted the piece to the distinguished legal philosopher, François Ost, of the Facultés universitaires Saint-Louis, in Brussels, for publication in his noted *Revue interdisciplinaire d'études juridiques*. A month later, the paper was duly accepted for publication with minor stylistic emendations having been performed by the reviewers. It has since appeared in print.¹⁷

It is curious that my thesis, although no doubt disputable and perfectible, was found to meet the exacting standards of the *Zeitschrift für Europäisches Privatrecht*, the *British Journal of Canadian Studies*, and the *Revue interdisciplinaire d'études juridiques*, but to fall abysmally short of the editorial thresholds set by the three Quebec academics having acted as evaluators for *ABC*, *DEF*, and *Cité libre*.

Possibly, the internal reviewer at *DEF* and all reviewers for the three European journals (not to mention my acquaintance!), who all found the argument worthy of publication, were all systematically deluded by a major case of academic imposture. Perhaps they all neglected to see that my papers were but frauds and that, because they disclosed a commitment to some particular standpoint, the essays could make no justifiable claim whatsoever to being serious academic undertakings. It remains, though, that *ABC* never offered any substantive reasons upon which to found its rejection although it remarked that it was only prepared to publish pieces on the new

¹⁷ See Pierre Legrand, “De la profonde incivilité du Code civil du Québec” (1996/36) *Revue interdisciplinaire d'études juridiques* 1.

Code that were *in French* and that came *from within Quebec* or, in other words, contributions that could presumably be considered “safe”. As I mentioned previously, no fundamental critique is to be expected of the Code from within the civilian community, if only because civilians derive an important measure of legitimacy from the very existence of the Code itself.¹⁸ For its part, the rhetoric of invective pursued by the external assessor for *DEF* discloses that the reviewer was guided by concerns extraneous to the soundness of the argument submitted for evaluation. It seems surprising that this assessor should not have found himself in a position to identify a *single* redeeming feature about the paper, considering that an early version of it had already been published by a group of leading German academics and that the selfsame text was soon to be accepted for publication by the *British Journal of Canadian Studies* on the strength of the recommendations of law teachers at the University of Edinburgh, one of the United Kingdom’s principal law faculties. If any doubt subsisted as to the unduly biased character of the review assessments, such misgivings can hardly survive a reading of the loose vituperation emanating from the evaluator acting for *Cité libre*, who engages in a selective restatement of my academic career labouring under the apparent conviction that these “facts” (largely erroneous, as it happens) have a bearing on the quality of the article being submitted for publication. In any event, even this reviewer seemed prepared to concede that the codification process that had taken place in Quebec had been problematic (indeed, the codifiers “did not even know what they were doing”). Yet, it remained that my paper “*must* not be published.”

What was perceived as a rival and antagonistic view would simply not be allowed openly to conduct its own intellectual inquiry; the articulation of deviant representation would be contained and the occupation of public space, controlled. By thus being deflected so that it would not enter Canadian territory, my argument would not contaminate the marketplace of ideas in Quebec. My thought would not be made available to the Quebec readership, which would thereby be protected from a brand of ignorant and irrational ruminations of the flat-earth persuasion. Other disciplines might countenance critique (even if written in an unfamiliar mode), but lawyers would not license such eccentric importations.¹⁹ Dissent (especially dissent from outside, a fortiori dissent from an “outsider” who used to be inside) would not be permitted to infiltrate order. Acting as secular theodiceans, having arrogated to themselves the authority to speak on behalf of others, the self-appointed custodians of tradition and of “the” correct interpretation of the Civil Code would guarantee that the prevailing dogma would not be confused by the intrusion of an alternative view, of another text that would claim to be another law, that would purport to constitute a law

¹⁸ For an exploration of this theme, see Pierre Legrand, “*Antiqui juris civilis fabulas*” (1995) 45 U.T.L.J. 311.

¹⁹ I draw on Peter Goodrich, “Translating Legendre or, the Poetical Sermon of a Contemporary Jurist” (1998) 16 *Cardozo L. Rev.* 963 at 965.

unto itself.²⁰ Heresy would be excluded beyond the bounds of the community and what was believed *semper, ubique et ab omnibus*, that is, that the new Code signaled in brilliant fashion the political adulthood of Quebec, would be allowed to govern without more ado and, certainly, without any introspection disclosing “experiences incompatible with its righteous image.”²¹ I would, in effect, be *terrorized*.²²

Although the censor sits in judgment of the author’s work (and of the author), he is seen to be acting differently from a judge. For example, the censor’s interposition is essentially revealed as arbitrary (recall *ABC*’s silence on the reasons for the negative assessment registered by the reviewer). In other words, the censor’s mandate is such that he need not explain himself as he performs his task. He wishes to certify that certain forms are respected (although no one knows for sure what they effectively are) and, to that end, readily engages in condemnatory utterances. In other words, while the judge builds an order, the censor more accurately deconstructs a disorder: that produced (in his eyes) by the victim of censorship himself. The censor seeks to define the text he examines, to elucidate what he regards as the truth of that text. The censor’s task is to make the author of the text see what his text is missing, what to be an author presupposes, what is implied by the fact of giving one’s name to a work and making it public. The censor intervenes to ensure submission, to enlist necessary deference (recall the insistence by *Cité libre*’s reviewer on my “disagreement” with the instruction that was given to me in Oxford, not to mention my seemingly inappropriate peripatetic inclinations—strange indeed that a comparatist-at-law should want to experience different law-worlds). Thus, the censor aims to avoid the discrediting event, that is, the event discrediting the established order. Indeed, censorship intrudes *before* publication; while a judgment also recalls the priority of the law, it does so *ex post facto* as the occasion arises to exercise control over the abuse that *has happened*. The censor, in the final analysis, incarnates what no one can understand and what no one can gloss except to say that it exists and that an individual is responsible for warranting that it occurs (recall the omission by the

²⁰ For insightful considerations on the role of “gatekeepers” directing the flow of scholarly knowledge from producers to ultimate consumers so as to facilitate conformist tendencies within a given interpretive community, see Richard F. Hamilton, *The Social Misconstruction of Reality* (New Haven: Yale University Press, 1996) at 197-216.

²¹ Mary Douglas, *How Institutions Think* (Syracuse: Syracuse University Press, 1986) at 112, who also observes that “[a]ny institution that is going to keep its shape needs to control the memory of its members” (*ibid.*). Meanwhile, though, the capacity for democratic *government* is linked to the capacity for *critical thinking* in Octavio Paz, *The Labyrinth of Solitude*, trans. by Lysander Kemp, Yara Milos & Rachel P. Belash (London: Penguin, 1990) at 219-20 (originally published in Spanish in 1950).

²² See Jean-François Lyotard, *La condition postmoderne* (Paris: Éditions de Minuit, 1979): “Terror means the efficiency derived from the elimination of a partner out of the game of language we were playing with him. He will be silent or assent not because he has been disproved, but because he has been threatened not to be allowed to play.” (“On entend par terreur l’efficiencie tirée de l’élimination d’un partenaire hors du jeu de langage auquel on jouait avec lui. Il se taira ou donnera son assentiment non parce qu’il est réfuté, mais menacé d’être privé de jouer”) (*ibid.* at 103).

external reviewer acting at the behest of *DEF* of any purported specification of the parameters of scholarship, thus stultifying any possible opposition to the grounds allegedly founding his decision; it was enough for that assessor to conclude peremptorily that what was being examined was *not* scholarship—the strength of the language used to disqualify the text possibly reflecting the strength of the threat believed to be represented by the author and his argument). There is, therefore, a certain dimension of vertiginous infinity to prohibition. In this sense, censorship recalls the sacred character of power.²³ The censor does *what is expected of him by people around him* (which is something infinitely more complex than doing what he is told or doing what he is meant to be doing). The censor’s “strength ... lies in not doubting [him]self; [his] weakness lies in not being able to afford to doubt [him]self.”²⁴

It will not have escaped attention that, in all three instances recounted here, the *ars censoria* was practiced by an *academic* reviewer (*ah! ces chers collègues...*). Pierre Legendre does well to remind us that “the University remains fundamentally an efficient censorship apparatus.”²⁵ He is also right to encourage comparative legal studies, as it seeks to move beyond the traditional expository practices and cease to be simple technology, to uncover the censored elements within the legal cultures under scrutiny and to mark for them a space of visibility.²⁶ He might also have mentioned the need for comparatists-at-law to alert the scholarly community to the censorship of their own work as they purport to illuminate the repressed aspects of the legal cultures they choose to examine.

The moral of the story must be that responses to comparative legal studies will be determined in part by affective reactions to the comparatist’s analysis (or to the comparatist himself); it is this measure of irrationality that will, in fact, largely police the dissemination of the comparative argument being propounded. Only by mustering forbearance and steadfastness will the comparatist-at-law usefully contend with such vehement expressions of scholarly *frilosité*—which, along the way, will test even his staunchest commitment to charitable collegiality.

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There is a final episode to the anecdote. A journalist reporting for a leading daily francophone newspaper in Quebec chanced to find my article in the *British Journal of Canadian Studies*. Having been attracted to the theme of the paper, he approached me

²³ Within the civil law tradition, sacrality and power have been linked at least ever since the Justinianic era. For an examination of this question, see Legrand, “*Antiqui juris civilis fabulas*”, *supra* note 18.

²⁴ J.M. Coetzee, *Giving Offense: Essays on Censorship* (Chicago: University of Chicago Press, 1996) at ix.

²⁵ Pierre Legendre, *Jouir du pouvoir: traité de la bureaucratie patriote* (Paris: Éditions de Minuit, 1976) at 90 (“l’Université demeure fondamentalement une efficace machine à censurer”).

²⁶ *Ibid.* at 180, n. 4.

for further discussion. Telephone interviews and correspondence ensued. Although he made it clear that he did not necessarily concur with my views, the journalist firmly believed that my contentions deserved to be aired in Quebec. Accordingly, he wrote a short article devoted to my critique of the *Civil Code of Quebec*, which appeared in March 1996. In the text, the journalist also briefly referred to the censorship issue. He indicated that he had contacted various Quebec jurists to persuade them to reply to my observations. It is apparent that the journalist was unable to elicit any substantive reaction to my substantive argument—a failure that exposed an evasive technique typical of the “siege” *mentalité* prevailing in Quebec.²⁷ What responses were offered intervened at the personal level to dismiss me as “arrogant” and “insufferable” (“arrogan(t)”; “insupportable”). Evidently, character traits can suffice to disqualify a discordant stance on the new Civil Code. Moreover, it was claimed that my views were shared by a “very small minority” (“toute petite minorité”) of people (which, so the subtext goes, is enough for them to become an ineffective contender for the community’s loyalties). It may have been this resounding silence in response to the substantive issues raised in the article that prompted one of Quebec’s leading radio presenters to arrange a live telephone interview with me in Paris, where I was then teaching as visiting professor at the Sorbonne, the day after the appearance of the newspaper article.

While I failed to overcome the protective devices erected by Quebec’s legal culture against the dangers of subversive discourse, I eventually gained a very public hearing within the society that had been my object of study. As they face compulsive denigration for remaining loyal to their critical vocation by imperturbable members of a professoriate engaging in unacknowledged repression and suppression in order to control the external image of the legal culture to which they belong, not all comparatists-at-law shall be so lucky.

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Why this “poussée en scène” (as Mallarmé would perhaps have it)? Why commit this narrative to print? Why is this knowledge worth disseminating? These questions will be asked, and it seems appropriate for me to seize this opportunity and to offer a cluster of answers by anticipation.

First, I argue that any contribution to comparative legal studies that, on account of its counterintuitivity or anti-mimetism, helps to rescue the possibility of an elucidatory, theoreticized, and, ultimately, emancipatory practice of comparison-at-law is inherently valuable.

Second, I take the view that my narrative illustrates at least two theoretical assertions that are relevant for comparatists-at-law: that legal cultures can prove unwilling to accommodate comparative observations issuing from without; and that

²⁷ Pierre Elliott Trudeau, *Le fédéralisme et la société canadienne-française* (Montreal: Éditions HMH, 1967) at 39 (“mentalité d’assiégés”).

legal cultures can consider certain achievements, especially those envisaged as autochthonous, to be beyond critique.

Third, I hope—although I must say that I do not express this point with any confidence (recall the first paragraph of this paper)—that Quebec legal culture (or, more accurately, key agents within that legal culture) can learn from such an incident and, specifically, can learn to withstand with greater fortitude the kind of critique that is apprehended locally as unsavoury and, perhaps, can even learn to validate a brand of knowledge that appears in unfamiliar form.

Fourth, I find that there is something like an “ethical call” prompting me to overcome quietism and tell the story publicly. The rejections that I recount happened. The words that I quote were written. These rejections and these words are “fact” to the extent that anything can be “fact”. As such, I cannot see why the incident should remain forever obliterated. Who would be served—and what values would be honoured—if I agreed to be beaten into muted submission? What would resignation on my part—restless or otherwise—achieve? On the contrary, circumspect resistance to the act of repression and suppression that was repeatedly performed at my expense and at the expense of the ideas I was promoting seems defensible in the name of integrity or authenticity.

Fifth, I am prepared to accept, of course, that the publication of this narrative may also wish to have a cathartic effect, that it may even owe its *raison d’être* to a necessity that escapes it. I like to think, however, that any therapeutic desire having impacted on my decision to go to press has been less influential than my conscious commitment to strategic criticality.
