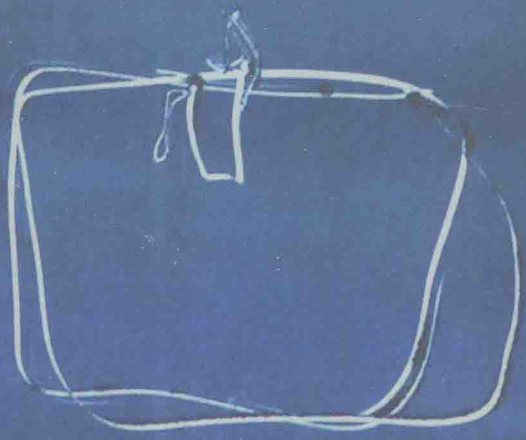
Examining Practice, Interrogating Theory: *Comparative Legal Studies in Asia*

Edited by

Penelope (Pip) Nicholson

& Sarah Biddulph



MARTINUS NIJHOFF PUBLISHERS

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MARTINUS
NIJHOFF
PUBLISHERS

LEIDEN • BOSTON
2008

Cover illustration: Moods of moving, Bridget Nicholson 2007, Monoprint on paper 15 × 20cm, Courtesy of Bridget Nicholson.

This book is printed on acid-free paper.

Library of Congress Cataloging-in-Publication Data

Examining practice, interrogating theory : comparative legal studies in Asia
edited by penelope (pip) nicholson and sarah biddulph.
p. cm.
Includes bibliographical references and index.
ISBN 978-90-04-16518-2 (hardback : alk. paper) 1. Law—Southeast Asia.
2. Law—China. I. Biddulph, Sarah. II. Nicholson, Penelope.

KNC79.E87 2008
349.5—dc22

2008026644

ISBN 978 9004 16518 2

PRINTED IN THE NETHERLANDS

To Michael Crommelin, Zelman Cowan Professor of Law, Melbourne Law School, Australia, for his unstinting support of Asian and comparative legal studies.

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Acknowledgements

From inception this has been a collaborative project. Originally colleagues from the Asian Law Centre, Melbourne Law School, Australia convened to debate their approaches to the study of foreign legal systems in 2004. Professor Pierre Legrand critiqued the work presented in a day-long workshop and the book was born. The collaboration grew to include other scholars known to be working at the junction of comparative legal studies, area studies and legal change. And a further workshop was held in 2006, when revised papers were presented, along with contributions by our new research partners.

The then Dean of the Melbourne Law School, Professor Michael Crommelin, generously funded the comparative law seminar series from his 'discretionary fund' enabling us to bring both Professors Pierre Legrand and Andrew Harding to the Law School. In addition, the publication was partly supported by a Melbourne Law School Research Grant. We are very grateful for both grants. Without them the project could not have proceeded.

As we all know, however, money alone does not enable the production of workshops and publications. We are deeply indebted to Kathyrn Taylor, Manager of the Asian Law Centre, who with her customary charm and quiet efficiency organized two workshops and myriad details to bring us together.

Simon Pitt, student editor of this publication, has been the source of countless emails. Not only from him to contributors, but emails back from contributors proclaiming their praise for Simon's attention to detail, charm, good humour and organisational flair. Simon's exceptional skill as an editor and manager of the editorial process ensured that working on this publication was a pleasure for all of us. It also ensured the publication's timely completion. We thank him profoundly here and wish him well with his future undertakings, wherever they may lead.

Our partners and families have, as always, maintained their invaluable support for our wanderings and vagueries and this is deeply appreciated by each of us.

Finally, we have been graciously supported by the unobtrusive efficiency of Bea Timmer at Brill. Thank you Bea.

Pip Nicholson and Sarah Biddulph
Melbourne
March 2008

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Preface

Comparing in Circles

PIERRE LEGRAND*

We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.

T.S. Eliot[1]

How old is the *Odyssey*?

For more than twenty centuries before the first printed edition of the text appeared in Florence in 1488, and ever since, the epic has been ascribed to someone who came over time to be known as 'Homer'.[2] However, many analysts now take the view that this authorship is implausible and should be taken as apocryphal. While today's scholars have no reliable information about 'Homer' and must be content with speculation, many opine that the *Odyssey*, allegedly composed around 800BC, consists in effect of short, ballad-like poems preserved by memory through native Greek practices of storytelling, themselves tapping into Mesopotamian narratives going back thousands of years.[3] The full text of the work as it came to us would have been woven together by anonymous compilers and editors long after the death of 'Homer'. One key argument comforting the view that the *Odyssey* is not so much an act of literary creation as the inscription of a millennia-old oral tradition is that the first examples of Greek alphabetic writing are not dated before 750BC, which means that anyone living in the time of 'Homer' would have been illiterate and unable to write the book.[4] Indeed, in his ferocious dictionary of hackneyed expressions published more than thirty years after his death, Flaubert offered the following

* Translations are mine, unless I indicate differently.

1 T.S. Eliot, 'Little Gidding', V, in *Four Quartets* (Faber and Faber, London, 1999), at p. 43. This poem was first published in 1942.

2 These liminary paragraphs draw closely on Bernard Knox, 'Introduction' in Homer, *The Odyssey* (Robert Fagles, Penguin, New York, 1996) [trans. of: *Odusseia*], pp. 1–73.

3 See M.L. West, *The East Face of Helicon: West Asiatic Elements in Greek Poetry and Myth* (Oxford University Press, Oxford, 1997).

4 Salient aspects of this dispute are canvassed in Andrew Dalby, *Rediscovering Homer* (Norton, New York, 2006). Fascinatingly, Dalby also investigates the view that the author of the *Odyssey* might have been a woman — a hypothesis first raised in Samuel Butler's work. See Samuel Butler, *The Authoress of the Odyssey: Who and What She Was, When and Where She Wrote* (Jonathan Cape, London, 2nd ed., 1922), edited by Henry F. Jones. The book was initially published in 1897.

definition of '*Homère*': "Never existed".[5] Earlier, Vico and Nietzsche had expressed similarly sceptical views.[6]

Be that as it may, neither the centrality of 'Homer' nor of the *Odyssey* to the Western literary canon is in doubt. Indeed, 'Homer' is considered the most important author in Western literature. In Harold Bloom's words, "[e]veryone who now reads and writes in the West, of whatever racial background, sex or ideological camp, is still a son or daughter of Homer".[7] The underlying idea points to the 'Homeric' text as a matrix of archetypal figures, images, and motifs constituting a kind of archive for later writers and artists, especially (although clearly not exclusively) in the West.[8] Chronologically, the *Odyssey*, which has now been available in its written form for nearly three thousand years, stands as the second literary work of the Western canon — the *Iliad*, also long attributed to 'Homer', being the first. But, not least on account of the large number of literary endeavours that it has inspired, the *Odyssey* is regarded as "the basic text of European civilization".[9]

What, then, does this ancestral narrative bound to myth have to tell us? The word 'odyssey' comes from the Greek '*Odusseia*', which means but "the story of Odysseus", a Trojan war hero more familiar to many according to its Latinate spelling, 'Ulysses', a variation which English poets like Shakespeare, Milton, and Tennyson derived from their readings of Virgil and Ovid.[10] The tale recounts Ulysses's voyage as he takes ten years to return from the sack of Troy (in what is now Turkey), his ships loaded with booty, to his home on Ithaca, one of the Ionian islands off the western coast of Greece. The protagonist's woes are narrated in the form of an epic poem consisting of more than 12,000 lines of hexameter verse.

Dante could not have read the *Odyssey* even if he had seen a copy, for in early fourteenth century Florence, knowledge of Greek had yet to be recovered. His

[5] "*N'a jamais existé*": Gustave Flaubert, *Le dictionnaire des idées reçues* (Le Castor Astral, Paris, 1990), at p. 57. The book was initially published posthumously in 1913.

[6] For Vico, 'Homer' was not a person but "an idea" ("*un'idea*"): see §873 in *Principi di scienza nuova*, the third volume of Giambattista Vico, *Opere* (Riccardo Ricciardi, Milan, 1953), edited by Fausto Nicolini. The reference is to the 1744 edition. Cf. Friedrich Nietzsche, 'Homer und die klassische Philologie' in *Philologische Schriften 1867–1873* at pp. 247–269 of vol. II/1 of *Werke* (Walter de Gruyter, Berlin, 1982), edited by Giorgio Colli and Mazzino Montinari, at p. 257: "Has a person been made out of an idea or an idea out of a person?" ("*Ist somit aus einer Person ein Begriff oder aus einem Begriff eine Person gemacht worden?*"). This text is based on Nietzsche's inaugural lecture at the university of Basel in 1869. The reference is to the *KGW* edition. See generally James I. Porter, 'Homer: The History of an Idea' in Robert Fowler (ed.), *The Cambridge Companion to Homer* (Cambridge University Press, Cambridge, 2004), pp. 324–343.

[7] Harold Bloom, *A Map of Misreading* (Oxford University Press, Oxford, 1975), at p. 33.

[8] To illustrate the relevance of 'Homer' beyond the West, suffice it to mention that "even a superficial survey of Homeric translations published in the twentieth century shows that Homer was deemed relevant to readers of, to quote but a few, Ukrainian, Arabic, Chinese, Esperanto, Albanian, Turkish, and Korean": Barbara Graziosi and Emily Greenwood, 'Introduction' in Barbara Graziosi and Emily Greenwood (eds.), *Homer in the Twentieth Century* (Oxford University Press, Oxford, 2007), pp. 1–24, at p. 1.

[9] "*[D]er Grundtext der europäischen Zivilisation*": Max Horkheimer and Theodor W. Adorno, *Dialektik der Aufklärung* (Fischer, Frankfurt, 1969), at p. 52. This book was initially published in 1947.

[10] For an authoritative discussion concerning the names Odysseus and Ulysses, see W.B. Stanford and J.V. Luce, *The Quest for Ulysses* (Phaidon, London, 1974), at pp. 13–14.

acquaintance with the poem — he puts 'Homer' in his limbo of non-Christian poets — must therefore have come from such Latin works as the *Aeneid*. For Dante, the Greek hero is the embodiment of the intrepid pioneer who loves exploration and manages to tame the vagaries of itinerance. In *Inferno*, Dante has Ulysses exclaim:

> Neither the sweetness of my son, nor the devotion for my elderly father, nor the love I owed Penelope that would have made her happy, could overcome the passion I felt within me to become an expert of the world and of the vices of men and of their worth.[11]

This topos has continuously been rehearsed since the fourteenth century, for example in such works as Tennyson's poem, 'Ulysses',[12] to the point where it has come to inform the *Oxford English Dictionary*'s standard definition of odyssey: "A long series of wanderings, a long adventurous journey". Mario Vargas Llosa's contemporary appreciation illustrates the persistence of the theme of "the questing explorer of the unknown".[13] For him, the appeal that the *Odyssey* and Ulysses's peregrinations continue to hold has something to do with "the fascination for human beings that overcome the limits, who, instead of bowing to the servitudes of what is possible, seek, against all logic, to pursue what is impossible".[14]

Yet, such palimpsestic visions of Ulysses — from Dante to Vargas Llosa — as "the restless explorer, hungry for new worlds" are extravagant.[15] Referring to the teaching of the humanities at US universities, a literary critic stigmatises the fact that "courses transform the Homeric epics … into 'masterpieces' that … become simplistically affirmative expressions of 'our' 'Western' cultural heritage".[16] Such discrepant accounts suggest a one-dimensional approach hampered by an overt presentist framing and thus stand at considerable variance with the character of 'Homer', "*who wants above all things to find his way home and stay there*".[17] Beyond any temporary desire, Ulysses's purpose is to get home in order to be born again *there*. The *Odyssey* is thus a '*nostos*' — the Greek word for 'homecoming' (which generated such terms as 'nostalgia').[18] It features "a kind of folktale, 'The

[11] "*[N]é dolcezza di figlio, né la pieta/del vecchio padre, né 'l debito amore/lo qual dovea Penelopè far lieta,/vincer potero dentro a me l'ardore/ch'i' ebbi a divenir del mondo esperto/e de li vizi umani e del valore*": Dante Alighieri, *Inferno*, XXVI, 94–99. The Italian text is from 1314 and based on the 1965 Petrocchi edition.

[12] Alfred Tennyson, *The Poetical Works of Alfred Tennyson* (Adamant, Boston, 2006), vol. IV/2, at pp. 99–102. This book is a facsimile of the 1860 Tauchnitz edition.

[13] Barry B. Powell, *Homer* (Blackwell, Oxford, 2nd ed., 2007), at p. 224.

[14] "*[L]a fascinación por los seres humanos que rompen los límites, que, en vez de acatar las servidumbres de lo posible, se empeñan, contra toda lógica, en buscar lo imposible*": Mario Vargas Llosa, 'Odiseo en Mérida', *El País* (Madrid), 30 July 2006, pp. 13–14, at p. 14.

[15] Knox, *supra* note 2, at p. 25.

[16] Seth L. Schein, 'An American Homer for the XXth Century' in Barbara Graziosi and Emily Greenwood (eds.), *Homer in the Twentieth Century* (Oxford University Press, Oxford, 2007), pp. 268–285, at p. 284.

[17] *Ibid.* (emphasis added).

[18] Indeed, there are allusive references in the *Odyssey* to homeward journeys by characters other than Ulysses. That is, there are *nostoi* hidden within the principal *nostos*. Thus, in book III Nestor sings his own *nostos* and in book IV Menelaus tells the story of his.

Homecoming Husband'",[19] or more accurately the story of the Returning-Husband-as-Conqueror and the Waiting-Wife-Bound-by-Taboo-and-Tending-the-Hearth, a popular epic theme.[20]

As the opening ten lines of the poem make clear, "the story of Ulysses' return is the real story of the *Odyssey*".[21] On his quest to reunite with his local insular audience — physically, politically, socially, and emotionally — Ulysses must endure one agony after another. While his encounters with various strangers show him as being dependent on their generosity as hosts, he obstinately refuses all offers to forget his home (reference has been made to "the unequivocal purposiveness of his own self-preservation, and his return to his homeland and fixed estate").[22] Most famously, he rejects Calypso's invitation, who would make him her ageless and immortal husband and have him live with her in an enchanting environment so beautiful that before it Hermes, messenger of Zeus, "stood … spellbound".[23] "The eternal life that she offers [Ulysses], if he will stay, is an eternal death for the man … who loves his home".[24] Ultimately, and somewhat contradictorily, "the *Odyssey* is an epic with a thoroughly domestic base".[25] The poem is "more interested in domestic drama than magical adventure" — despite the fact that it features "the most famous adventures in world literature" ("what many think of as being the subject of the *Odyssey*").[26] The question whether the Odyssean voyage is ultimately successful or marred by rejection is, of course, troublesome since 'Homer', offering an insight into the psycho-dynamics of *nostos*, has the main character's return configured simultaneously as a homecoming and as an infernal journey.

While there have been countless re-enactments of the *Odyssey*, the most spectacular is arguably James Joyce's *Ulysses* first published in 1922. In this sprawling, polyphonic text, "the most famous literary work, in any language, of the twentieth century",[27] "considered by some the greatest novel written in English",[28] *nostos* features prominently with the third and final section of the book bearing that very

19 Powell, *supra* note 13, at p. 155.

20 Consider the *Nostoi*, a work in five books, now lost, attributed to the Cyclic poet Agias or Hegias, circa the sixth or seventh century BC. The work took the form of a poem narrating the return from Troy of various Greek heroes (except Ulysses).

21 Alberto Manguel, *Homer's* The Iliad *and* The Odyssey*: A Biography* (Atlantic Books, London, 2007), at p. 211.

22 "*[D]er Eindeutigkeit des Zwecks seiner Selbsterhaltung, der Rückkehr zu Heimat und festem Besitz*": Horkheimer and Adorno, *supra* note 9, at p. 53.

23 Homer, *The Odyssey* (Robert Fagles, Penguin, New York, 1996) [trans. of: *Odusseia*], at p. 154, § 5.84.

24 Powell, *supra* note 13, at p. 163.

25 Knox, *supra* note 2, at p. 41.

26 *Ibid.*, at p. 169.

27 Derek Attridge, 'Introduction' in Derek Attridge (ed.), *James Joyce's* Ulysses*: A Casebook* (Oxford University Press, Oxford, 2004), pp. 3–16, at p. 3. Perhaps an indication of the reach of Joyce's *Ulysses* can be gleaned from the fact that "[it] has been translated forty-three separate times, into a total of thirty-two different languages. Of these languages, twelve are western European[,] … thirteen are eastern European[,]… and seven are Asian": Patrick O'Neill, *Polyglot Joyce* (University of Toronto Press, Toronto, 2005), at p. 34.

28 Margot Norris, 'A Critical History of *Ulysses*' in Margot Norris (ed.), *A Companion to James Joyce's* Ulysses (Bedford Books, Boston, 1998), pp. 21–46, at p. 21.

title. In these pages, the narrative tracks the book's central character, Leopold Bloom, from the moment he leaves his terrace-house at 7 Eccles Street, Dublin, after breakfast until the time he returns home and goes to bed late into the night. For Jacques Derrida, Joyce's novel represents "the entire archive of culture — at least of what is called Western culture and of that which, within it, returns to itself according to the Ulyssean circle of the encyclopedia".[29]

If one wished to aestheticise in all its graphic simplicity the Odyssean paradigm of (deferred) homecoming more or less mimetically replicated throughout the history of Western literature, if one sought to identify one geometric figure purporting to capture the idea of *nostos*, one would obviously select the *circle*: "Ithaca … is not only the point of arrival but also … that of departure".[30]

∽

I claim that every comparison — and, specifically, every comparison-at-law — offers a variation on the timeless Odyssean theme of *nostos*. Every comparison is haunted by *nostos*. No discourse about the other, the other-in-the-law, or the other's law can fail to involve a 'homecoming' on the part of the comparatist who is, therefore, inevitably following a circular trajectory. It is not that the other is unnarratable — although it is unnarratable *as such*.[31] Nor is it that a description of the other will inevitably *reduce* it to the self. My point is rather that the other, as it comes to discursivity, for example as it happens in language, inevitably irrupts in the self or through the self. This is because the language in which the other emerges is that of the self, not in the sense in which it would be owned by the self (language, understood as a system of signs, does not belong, or at least one belongs to language more than language belongs to one),[32] but in the way it is marshalled by the self as an extension of self. And because the other's story is told, and can only be told, in that discourse which the self employs to express its self, otherness's being is subjected to this particular manifestation of selfness. *The other is in the self's language*. Any ethically inflected comparative discourse must recognise the fact that as the other unfolds in the self's language, that language, no matter how hospitable it wishes to be, cannot make it possible to preserve the other in all its otherness (ultimately, absolute preservation would require perfect identification between the self and the other, in which case there would no longer be otherness). Even as it purports to grant recognition to the other, language enacts the very experience of

29 "*[T]oute l'archive de la culture — au moins de la culture dite occidentale et de ce qui en elle revient à elle-même selon le cercle ulysséen de l'encyclopédie*": Jacques Derrida, *Ulysse gramophone* (Galilée, Paris, 1987), at p. 97.

30 Manguel, *supra* note 21, at p. 212.

31 Cf. Jacques Derrida, *La voix et le phénomène* (PUF, Paris, 1967), at p. 117: "the thing itself always slips away" ("*la chose même se dérobe toujours*").

32 See Jacques Derrida, *Apprendre à vivre enfin* (Galilée, Paris, 2005), edited by Jean Birnbaum, at p. 39. For an analogous claim with specific reference to literature, see Roland Barthes, *Essais critiques* (Le Seuil, Paris, 1964), at p. 14. Barthes argues that the raw material of literature is not the unnamable but the named since language is always anterior to any writing.

unrecognisability as it brings the other into the presence of the self. Even as it aims to represent the other, language finds itself confined to *re-presentation*. The self's discourse thus *regulates* the other: its own measure is the other's measure of possibility. Indeed, the more the self speaks of the other, the more the other must yield to the self (which is another way of saying that the closer the self gets to the other, the more the other goes away). There is a circle from the self to the other to the self, and there is no way out of that circle. There is no point of no-return: the self always returns 'home'. The comparative itinerary, then, is not linear. It does not go from A to B, because here B is A, such that the comparison is, in effect, from A to A. (And yet, in what one could call after Jacques Derrida a *coherent contradiction*,[33] the second A is not the first A. Upon returning home, the home is now seen through the comparatist's wandering eyes, eyes that have been addressed by the other even while they were addressing it, eyes that have *become*.)

Given the inevitability of this 'homecoming' process, which precludes the self from accounting for otherness's singularity, which prevents the circle from being shattered, what can be achieved? Adopting and adapting Derrida's insight, my answer turns on the polysemy of the French verb *entamer*.[34] On the one hand, *entamer* means to take a part away from the whole. Thus: '*il a entamé le pain*' or '*il a entamé son capital*' or, figuratively, '*rien n'avait entamé sa conviction*', that is, 'he bit into the bread' or 'he dipped into his capital' or 'nothing had shaken his conviction'. The general idea is that of the break, of the incision — of something cutting into the fabric of the whole. On the other hand, *entamer* also means to begin or to initiate: '*il a entamé un discours*' or '*il entama des négociations*', that is, 'he began a speech' or 'he initiated negotiations'. To return to comparative legal studies, then, my claim is that while the comparative circle cannot be *entamé*/broken, something about the circularity of comparative interventions can be *entamé*/initiated by the comparatist. To use the noun derived from the verb: while comparative interventions cannot consist of an *entame* in the sense of a cut, they can embody an *entame* in the sense of a beginning. The fact that the self-same word is involved in both cases wants to show the ever-so-close proximity of the two gestures. In other words, a beginning is as close as possible to a cut even as it cannot be a cut. It remains, of course, to identify what could be an apposite beginning in the light of the specific circumstances pertaining to comparative inquiry as lawyers have habitually known it (as that which, in its sheer, unalloyed *ennui*, confines itself to familiar legal artefacts like statutes and appellate judicial decisions), the kind of beginning which, although it would not constitute a breaking of the circle, would come as close as intimated by graphic identity (*entame* = *entame*).

[33] Jacques Derrida, *L'écriture et la différence* (Le Seuil, Paris, 1967), at p. 410.

[34] In her preface to Derrida's *De la grammatologie* which she translated into English, Gayatri Spivak indicates that of all the "'untranslatable' words" she came across, *entamer* was her "special worry". She used "breach" (to break into) and "broach" (to begin): 'Translator's Preface' in Jacques Derrida, *Of Grammatology* (Gayatri C. Spivak, Johns Hopkins University Press, Baltimore, 1997), pp. ix–xc, at pp. lxxxv–lxxxvi. This text was first published in French in 1967 and the English translation initially appeared in 1976.

Here, within the framework of this preface, inspired by the semantic instability of the *entame*, I want to offer but one suggestion, which I derive from the work of the editors of this volume and from the insights of the contributors. Short of breaking the circle, what can be done is to initiate a *widening* of it, an expansion of the circle of knowledge — which is another way, the next best way perhaps, to get out of the circle as it exists, and which is indeed the epistemological move that governs the various comparative studies collected in this book. Instead of the United States, the reader is treated to China, instead of England to Indonesia, instead of Germany to Malaysia, instead of France to Thailand, instead of Italy to Vietnam, instead of Belgium to Singapore. To be sure, a comparative circle remains as processes of legal transformation taking place in these Asian countries are expressly assessed vis-à-vis an assemblage of recent critical re-examinations of comparative legal studies having largely arisen in North America and Europe and being brought to bear as an architext measuring Asian possibilities. But — short of acceding to the Lotus-eaters' entreaties — no comparatist-at-law can eschew the 'homecoming' pattern. What deserves attention in this book, then, is not so much the predictable presence of a circle, but the fact of a different circle — a circle permitting comparatists-at-law to renew with an era which, long before the Age of the Carpenter, had put Western comparatists in touch with the East, Montesquieu's *Lettres persanes* offering one signal illustration of this alternative enunciatory site.[35] As controllers of the record, inscribers of the data, framers of the agenda, the nine comparatists-at-law writing in this volume have extended the circle beyond the familiar comfort zone to embrace fragments of life-in-the-law that have been kept outside of the usual loop and which will now feed into the individual memory of their readership and into the collective memory of the field. They have said yes — joyously, insistently, searingly also — to this other otherness. They have elected to play in it, mine it, negotiate with it, and, yes, imagine it, *create* it. By inviting what comparatists-at-law have excluded or held at bay, by encircling what had been eccentric, they have interrupted the habitual circular itinerary and affirmed another.

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For Heidegger, translation is, precisely, an "*Irrfahrt*" — an odyssey.[36] And what he said of translation, he could just as easily have said of comparison, another exercise in circumscription. Within comparativism, there cannot be anything other than an insurmountable circumnavigation. There is no horizon beyond circulation. *Nostos* is inescapable. One way in which the comparatist-at-law can respond to this predicament is by extending the range of the circle. In this manner, and not by pretending to be cutting into the circle, comparative interventions *entame*/initiate the

[35] Montesquieu, *Lettres persanes* at pp. 129–373 of vol. I of *Oeuvres complètes* (Gallimard, Paris, 1949), edited by Roger Caillois. This book was initially published in 1721.

[36] Martin Heidegger, *Heraklit* in *Gesamtausgabe* (Klostermann, Frankfurt, 1994), vol. LV, at p. 45. This text is based on a series of lectures delivered in 1943–1944.