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Epistemology and Methodology of Comparative Law

Edited by

Mark Van Hoecke

Katholieke Universiteit Brussel



• H A R T •
P U B L I S H I N G

OXFORD AND PORTLAND OREGON

2004

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Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences

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THE PURPOSE OF this chapter is to examine the extent to which theories of knowledge fashioned in the realm of the natural sciences and social sciences can be of relevance to the question of what it is to have knowledge of law in the context of comparative law. In particular, the examination will focus upon the relevance of these theories to methodology in comparative legal studies. Care must obviously be taken here since transference is fraught with danger. But given the central role that comparative law is now seen as having with regard to legal knowledge and methodology, it may be opportune to look in some depth at several of the contributions being made to epistemology from outside of law, always bearing in mind of course that, in the common law tradition, law is, anyway, very much a part of social science and is often located in social science faculties.

I. INTRODUCTION

Comparative law is, intellectually speaking, undergoing something of a renaissance thanks to a number of factors. Leaving aside the obvious point about its centenary, the calls for harmonisation of private law within the EU and the counter-current of dissent that these calls have attracted is one such factor.¹ The increasing awareness of the poverty of comparative law theory is another.² A third factor, admittedly interrelated with the theory question, is the lack of any serious recent work on comparative methodology;

and this third factor, again together with the second, has generated a fourth. This fourth factor can be labelled the ontology and epistemological dimension. These terms are perhaps not of central usage in legal studies and thus it might be valuable at the outset to define what one means by these words. Ontology is about the *existence* of things—the term ‘things’ being understood in its widest sense and thus embracing beliefs, desires and the like—whereas epistemology is concerned with *knowledge* of things.³ Ontology, then, deals with what exists while epistemology poses the following basic question: what is it to have knowledge of law?⁴ These ontological and epistemological dimensions become strikingly evident the moment one poses the two fundamental questions associated with the term ‘comparative law’. What is meant by ‘comparison’? And what is meant by ‘law’?

Pierre Legrand has shown that both of these questions can only be answered from, so to speak, outside of law.⁵ This is perhaps relatively obvious with respect to ‘comparison’. However when it comes to the ‘law’ question it would be idle to say that there is not a considerable body of work, by jurists, on the definition and nature of law. Yet this huge body of work by legal philosophers is less helpful to the comparatist than might first appear. As Richard Susskind has observed, most of it premised on the assumption that to have knowledge of law is to have knowledge of rules;⁶ the debate in legal philosophy has largely been one focusing on what constitutes a valid source of legal rules. This rule thesis is not of course irrelevant to comparative law. But once it is recognised that, whatever its ideological strength, the thesis is epistemologically quite fragile, then recourse to a strictly internal thesis of what constitutes law becomes problematic for the comparatist. In short comparative law will never ever move beyond being an exercise in comparing rules unless the rule-thesis, which, as we have mentioned, has traditionally been the dominant model in respect of what constitutes legal knowledge, is abandoned as the sum-total of legal knowledge.⁷ Legrand questions this rule-model and to support his arguments he has, by definition, had to move beyond the traditional boundaries of positive law. Locating himself in a tradition of law-as-culture, his definition of ‘law’ embraces the ‘deep structures of legal rationality’;⁸ positive rules, for

³ J-M Berthelot, ‘Programmes, paradigmes, disciplines: pluralité et unité des sciences sociales’, in J-M Berthelot (ed), *Épistémologie des sciences sociales* (Presses Universitaires de France, 2001), 457, 550 (this latter work herein after cited as Berthelot, *Épistémologie*).

⁴ See generally C. Atias, *Épistémologie juridique* (Presses Universitaires de France, 1985); *Épistémologie du droit* (Presses Universitaires de France, 1994).

⁵ See generally P Legrand, *Le droit comparé* (Presses Universitaires de France, 1999).

⁶ R Susskind, *Expert Systems in Law* (Oxford University Press, 1987), pp 78–9.

⁷ G Samuel, ‘Comparative Law and Jurisprudence’, (1998) 47 *International & Comparative Law Quarterly* 817.

⁸ P Legrand, ‘European Legal Systems are not Converging’, (1996) 45 *International and Comparative Law Quarterly* 52, 60–1.

¹ B De Witte, ‘The Convergence Debate’, (1996) 3 *Maastricht Journal of European and Comparative Law* 105.

² P Legrand, ‘Comparative Legal Studies and Commitment to Theory’, (1995) 58 *Modern Law Review* 262.

Professor Legrand, are merely superficial. Any kind of comparative law that seeks to investigate culture and mentality must therefore by its very nature be interdisciplinary; and while this might not as such imply any need to have recourse to epistemology and (or) philosophy in the natural sciences, it certainly suggests that social science theory ought not to be ignored.⁹ In truth comparing legal cultures raises a host of questions about the paradigms, concepts, schemes of intelligibility, processes of explanations and so on with respect not just to the various social sciences themselves relevant to the cultural question, but to the trans-disciplinary 'science' of comparison and comparative law.

Even some of the more traditional comparatists—that is to say those who appear at first sight to be functioning largely from an internal position in law—might well be implicitly advocating methods and practises that are trans-disciplinary. In particular Marquesinis' assertion that what comparatists should be comparing are cases¹⁰—in effect putting the emphasis on litigation facts—raises fundamental ontological and epistemological questions about how 'facts' are to be perceived and understood. Again this is hardly a matter upon which social science theorists have been silent.¹¹ However the relation between science and reality is one of the issues that is central to epistemology in the natural sciences and this suggests that the natural sciences may have contributions to make to legal epistemology. One obvious contribution, it should be said at once, is with respect to the definition, domain and approaches of epistemology itself.¹² Yet the *perception of fact* by lawyers and the more general relationship between science and object of science are matters that ought to interest not just the comparatist but any jurist keen to understand legal reasoning. For example the debate, so central in the epistemology of the social sciences, on the dichotomy between holism and individualism finds expression in legal analysis from Roman to modern times,¹³ thus confirming a view expressed in the philosophy of the natural sciences. This view is that at a certain level of reflection one sees reappearing old metaphysical controversies and these controversies would seem to respect no subject boundaries.¹⁴ The comparatist who wishes to compare the facts of cases must ask him or herself exactly what constitutes the object of comparison. What are the entities upon which the mind fixes

⁹ J Bell, *French Legal Cultures* (Butterworths, 2001), pp 1–24.

¹⁰ B Marquesinis, 'Comparative Law—A Subject in Search of an Audience', (1990) 53 *Modern Law Review* 1.

¹¹ See generally Berthelot, *Épistémologie* above n 3.

¹² On which see R Blanché, *L'épistémologie* 3rd ed. (Presses Universitaires de France, 1983), pp 12–45.

¹³ D.S.1.76. For a modern example see G Samuel, *The Foundations of Legal Reasoning* (Antwerp, Maklu, 1994), pp 149–51; G Samuel, *Epistemology and Legal Method* (Aldershot, Ashgate, 2003), pp 318–29.

¹⁴ Blanché, *L'épistémologie*, above n 12, p 20; B Valde, 'De l'explication dans les sciences sociales: holisme et individualisme', in Berthelot, *Épistémologie*, pp 357–405.

and to what extent do such entities have a reality independent of the science of which they are the object? Do civil lawyers and common lawyers, for instance, perceive money in the same way? Or what about an accident, or indeed the formation of an agreement, in a supermarket?

What the theorists from the natural sciences and the social sciences can contribute to this fact issue is an appreciation of the complexity of the relationship between a science and its object. At first sight it might well seem that the natural sciences can offer approaches that fix upon objective and independent realities, whereas the social sciences concern themselves only with weak facts because such facts include not only the observers themselves but subjective notions such as beliefs, desires, preferences and the like.¹⁵ Yet as Granger asserts this is misleading in as much as scientists do not work directly upon actual facts; they construct abstract schemes or models based on a reaction to these facts and it is these models that act as the object of science.¹⁶ Granger talks of *virtual facts* which are schematically determined by the conceptual model acting as the object.¹⁷ At first sight this idea of virtual fact might appear appealing to the social scientist as well. Yet Jean-Michel Berthelot has specifically rejected such reductionism on the basis that an historical or sociological fact can only be properly understood in the context of all its surrounding details.¹⁸ He proposes instead a number of specific schemes of intelligibility brought to bear on social fact.¹⁹ Now what is interesting about both these contributions to the understanding of fact in epistemology is that, arguably, they have a direct relevance to law and go far in explaining not just the construction of fact by lawyers but differences between juristic doctrinal and reasoning methods.²⁰ In addition, the epistemological reflections of Berthelot suggest that work on comparative methodology is seriously underdeveloped. It might be useful, accordingly, to start with this underdevelopment.

2. FUNCTIONAL METHOD

Zweigert and Kötz, in their chapter on method, state categorically that the 'basic methodological principle of all comparative law is that of *functionality*'. And it is from 'this basic principle [that] stem all the other rules which determine the choice of laws to compare, the scope of the undertaking, the

¹⁵ R Ogien, 'Philosophie des sciences sociales', in Berthelot, *Épistémologie*, pp 521–75.

¹⁶ G.G Granger, *La science et les sciences* 2nd ed. (Presses Universitaires de France, 1995), p 70.

¹⁷ *Ibid.*, p 49.

¹⁸ J-M Berthelot, *Les vertus de l'incertitude* (Presses Universitaires de France, 1996), p 73.

¹⁹ J-M Berthelot, *L'intelligence du social* (Presses Universitaires de France, 1990), pp 43–85; summarised in Granger, above n 16, pp 90–2.

²⁰ G Samuel, *Sourcebook on Obligations and Legal Remedies* 2nd ed (London, Cavendish, 2000), pp 169–77.

creation of a system of comparative law, and so on'.²¹ This would be a fairly extraordinary claim to make even if the authors had exhaustively considered the various methods which might act as an alternative to functionality. In the context of a complete absence of any discussion of other methods one can only conclude that the authors are overstating their case in order to highlight an important point. This point is that legal notions such as 'trespass' or 'natural obligation' are rarely to be understood in terms of a strict definition; indeed, and this no doubt is Zweigert and Kötz's main point, comparison of concepts—voidness with *nullité* for example—is often dangerous. Concepts and rules need to be contextualised within a range of factual situations so that their function can become evident. The comparatist can then ask how a particular factual situation in one system would be handled in another. Thus one function of say trespass is to provide a cause of action by which a person can obtain compensation for a physical injury deliberately caused. Another function is to provide the basis of an action to test a property right in a piece of land or in a chattel. Yet, as important as this functional approach is, research and reflection in the social sciences in general suggest, as we shall see, that it is only one scheme of intelligibility amongst several. Comparative methodology, if it is to be a serious focal point for the comparatist, would need to embrace and reflect upon these alternative schemes.

In stressing functionality, then, Zweigert and Kötz wish to make the not unreasonable point that the comparatist needs to investigate the facts behind the law. Yet research and scholarship in the natural and social sciences show that facts themselves are not unproblematic. The relationship between science and reality is a relationship fraught with difficulty and part of this difficulty lies in the actual methods employed by both natural and social scientists in comprehending and in representing fact.²² Again such difficulties can hardly be ignored by the comparatist. Indeed, in asserting the principle of functionality, Zweigert and Kötz, actually locate the problem centre-stage. The authors make the valid point that the comparatist must move far beyond 'purely legal devices' if only because he might find 'that the function performed in his own system by a rule of law is performed in a foreign system not by a legal rule at all, but by an extralegal phenomenon'.²³ What perhaps is less valid about this assertion is that it seems to assume that the frontier between the legal and extralegal is the same with respect to both systems. This is dangerous and not just because it runs counter to the general comparative methodological principle concerning

cultural imperialism. It is dangerous because it assumes that the reasoning processes in law itself are based on a clear distinction between legal rules and extralegal phenomena.

The difficulty can be illustrated by recourse to the facts of an English case. A local authority invited tenders for the running of a small airport and the claimants spent time and money preparing a submission. There were strict conditions of tender, one of which stipulated that the tenders had to be delivered to the local authority before a strict deadline. The claimants put their tender into the authority's letterbox several hours before the deadline but, owing to the carelessness of the local authority employees, the box was not cleared until some time after the stipulated hour; as a result the claimants' tender was deemed late and was rejected from consideration. The Court of Appeal upheld an award of damages to the claimants.²⁴ Now these facts are interesting for the European comparatist in that they can, from the position of a jurist trained in the civilian tradition, appear to be a set of facts clearly falling within the domain of two or more categories of abstract rules. The first category, particularly relevant for a French jurist, is administrative law where the situation could be analysed in terms of a public body making a decision (to reject the tender) not in conformity with the law for reasons of its own fault. The situation could be conceptualised, in other words, in terms of an abusive exercise of political power. The second category, perhaps relevant for civilians coming from systems where the distinction between public and private law is less rigid, is pre-contractual liability, or *culpa in contrahendo*. Here the abstract rule could be seen as being founded in some kind of contractual obligation, perhaps based on good faith, or upon the extra-contractual obligation not to cause damage through fault. However if the comparatist applies these legal categories to the facts of the airport case there is a real danger that the actual reasoning processes used by the Court of Appeal could be eclipsed by the formal nature of the legal rules seemingly relevant. There is no doubt that the case can be analysed *ex post facto* in terms of either civilian category, but this is the very problem that can distort the comparison. Of course, the division between administrative and civil liability is difficult if not impossible to make in English law, partly because strict public law remedies (judicial review) cannot normally be used to obtain compensation.²⁵ The claimant must establish a cause of action in private law.²⁶ Yet the functionalist is likely to conclude that contract and tort remedies against local authorities are simply fulfilling an 'administrative liability' function. Similarly the French contract lawyer might conclude that the Court of Appeal was applying an obligation of good faith to the facts, particularly as *bona fides*

²¹ K. Zweigert & H. Kötz, *An Introduction to Comparative Law* 3rd ed (Oxford, OUP, 1998; trans T. Weir), p. 34.

²² L. Soler, *Introduction à l'épistémologie* (Paris, Ellipses, 2000), pp. 74–88. And see J. Revel, 'Les sciences historiques, in Berthelot', *Épistémologie*, pp. 44–52.

²³ Zweigert & Kötz, above n. 21, p. 38.

²⁴ *Blackpool & Fylde Aero Club Ltd v Blackpool BC* [1990] 1 WLR 1195.

²⁵ But see Human Rights Act 1998 s. 8.

²⁶ *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 730.

was mentioned in passing by one of the appeal judges.²⁷ Functionalism, in short, suggests a frontier between legal rules and principles on the one hand and a set of facts on the other.

At one level it has to be stressed that this functional approach does not lack analytical relevance in respect of the airport case. It can be valuable to conclude that the collateral contract held to exist by the Court of Appeal has the same function as rules to be found elsewhere in the system in say German or French law. One is comparing different patterns of rule models to similar fact situations. However, if one looks in detail at the reasoning employed in the main judgment in the Court of Appeal, the rule-model comparative approach becomes more problematic in that Bingham LJ does not actually start out from a legal rule. He does not apply a pre-existing rule to the facts before him. He starts out from what appears as a detailed description of a tendering procedure. Accordingly he asserts first of all that:

A tendering procedure of this kind is, in many respects, heavily weighted in favour of the invitor. He can invite tenders from as many or as few parties as he chooses. He need not tell any of them who else, or how many others, he has invited. The invitee may often, although not here, be put to considerable labour and expense in preparing a tender, ordinarily without recompense if he is unsuccessful. The invitation to tender may itself, in a complex case, although again not here, involve time and expense to prepare, but the invitor does not commit himself to proceed with the project, whatever it is; he need not accept the highest tender; he need not accept any tender; he need not give reasons to justify his acceptance or rejection of any tender received. The risk to which the tenderer is exposed does not end with the risk that his tender may not be the highest or, as the case may be, lowest.²⁸

He then continued:

But where, as here, tenders are solicited from selected parties all of them known to the invitor, and where a local authority's invitation prescribes a clear, orderly and familiar procedure—draft contract conditions available for inspection and plainly not open to negotiation, a prescribed common form of tender, the supply of envelopes designed to preserve the absolute anonymity of tenderers and clearly to identify the tender in question, and an absolute deadline—the invitee is in my judgment protected at least to this extent: if he submits a conforming tender before the deadline he is entitled, not as a matter of mere expectation but of contractual right, to be sure that his tender will after the deadline be opened and considered in conjunction with all other conforming tenders or at least that his tender will be considered if others are.²⁹

²⁷ Stocker LJ in *Blackpool & Fylde Aero Club Ltd v Blackpool BC* [1990] 1 WLR 1195 at p 1204.

²⁸ *Blackpool & Fylde Aero Club Ltd v Blackpool BC* [1990] 1 WLR 1195 at pp 1201–02.

²⁹ At p 1202 emphasis added.

And he supported this shift from 'expectation' to 'right' in observing:

Had the club, before tendering, inquired of the council whether it could rely on any timely and conforming tender being considered along with others, I feel quite sure that the answer would have been 'of course'. The law would, I think, be defective if it did not give effect to that.³⁰

The interface here between fact and law is by no means clear. Certainly one can locate the exact point where Bingham LJ jumps from the descriptive ('mere expectation') to the normative ('contractual right'), but this 'right' is not given expression as part of a set of contract rules. Indeed an examination of the whole judgment will reveal little in the way of rules or precedents about collateral contracts and the like. What appears to be happening in the judgment is that a fact is being transformed into a legal concept by a kind of 'descriptive' sleight-of-hand that allows the judge to conclude in favour of the claimant. This sleight-of-hand shift is then immediately justified by reference to another factual notion, the hypothetical local authority employee giving the 'of course' answer. Now if one locates the legal and extralegal frontier between 'expectation' and 'right' this will have the effect of excluding 'expectation' from the gallery of legal concepts, which would be as serious error as excluding say 'damage' or 'interest' from the world of law. The truth is that these kinds of notions exist at one and the same time in the legal and extralegal with the result that reality and law become merged within the same scientific discourse. In other words law is not applied to facts as such; the facts get transformed into a kind of legal 'reality' which allows them to assume a normative dimension with greater ease. Thus Bingham LJ was able to establish a contractual right not through the application of a pre-existing rule abstracted from precedents. He did it through the creation of a factual 'expectation' capable, by its very nature, of attracting a normative relation. Functionalism as a method could, if it is not used carefully, eclipse this process in implying a model in which legal rules and concepts have certain functions in a world beyond law (social reality). To an extent this can be helpful in that one can certainly talk about the function of 'descriptive'—or 'quasi-normative'³¹—concepts such as an 'interest', 'fault' or 'damage' in the world of fact. But to say that the collateral contract is performing the same function as a rule based on *culpa in contrahendo* or on some principle of administrative liability is to set up a kind of tool-function dichotomy which can so easily create a distorted image of legal methodology as a whole.

Once one starts to see the ambiguity in any frontier between the legal and extralegal one begins to appreciate, also, that one of Zweigert and

³⁰ At p 1202.

³¹ On which see P Dubouchet, *Sémiotique juridique: introduction à une science du droit* (Presses Universitaires de France, 1990), pp 144–5.

Kötz's own, rather interesting, comparative examples is problematic. The authors present the reader with an example showing 'how the comparatist must sometimes look outside the law'.³² The example concerns the German land registry system set up to protect purchasers of interests in land from harm which could result from the assertion of real rights held by third parties but unknown at the time of purchase. In the United States such a general and comprehensive system is on the whole non-existent; instead there are 'Title Insurance Companies' which offer private insurance against the kind of harm envisaged in respect of land purchases. These insurance companies, having been in business for almost a century, have their own very comprehensive files and books that give a virtually complete picture of land conveyancing throughout America. Zweigert and Kötz are implying, when they observe that 'the function performed by the German land register is performed in the United States by the files and books of Title Insurance Companies',³³ that the latter are somehow extralegal. This may be true to a lawyer whose definition of law is limited to positive rules arising out of strictly defined sources; but it is by no means clear why an insurance company and its archives, whose whole business, if not existence, is based on contract, should be located outside of the law. The companies are as much legal institutions as the German land register. Functionalism has the effect, once again, of distorting the notion of law so as to make it conform to a particular culture-specific image.

3. VIRTUAL FACTS

It is in respect of this interface between legal science and reality that thinking in the natural sciences may have an important contribution to make to legal epistemology. For the question of the relationship between science and reality is one that has been reflected upon by epistemologists. According to one such theorist, who has specialised in this question, the actual object of the empirical sciences is never reality itself. The object consists of an abstract model or scheme of this reality and it is the abstract relations and elements that make up this model, rather than the empirical phenomenon, which acts as the basis of knowledge.³⁴ This is because it is the model—often a mathematical one—and not reality that can be manipulated to produce explanations and predictions. One important role, then, for the philosophy of science is this. It is to examine the relationship not just between the structure and content of the model and the actual experience of reality but between the model and scientific theories.

³² Zweigert & Kötz, above n 21, p 39.

³³ *Ibid.*

³⁴ Granger, above n 16, pp 70–5.

A further role, particularly for the epistemologist, is to investigate the procedures by which the model and the information that it produces can be validated. Here there are several possibilities.³⁵ A model can gain its force and credibility from its *correspondence* with one's perception of reality. Thus a model which plots the movement of comets and predicts when and where they will be at any given moment is likely to be treated seriously if the predictions can be independently verified by observation. However a model can also gain its validity from its own internal *coherence*. Here the emphasis is on the formal qualities of the abstract elements and relations; and if an explanation or prediction is exempt from internal contradiction in respect of all the other explanations and predictions that can be drawn from the model then this will act in itself as a means of verification. In truth few scientists will be satisfied with such a test and will use coherence as just one, minimal means of verification.³⁶ A third method of verification is *consensus*. A model or indeed theory will gain its force and credibility if members of a specified community are agreed amongst themselves that it is valid. Of course, of all the three verifications, this is undoubtedly the weakest in as much as it is unlikely that many members of the scientific community will accept a model or theory as valid or true simply on the basis that the members say that it is. Nevertheless the historian of science Thomas Kuhn has shown that, from an historical and social viewpoint, consensus has been of immense importance within the scientific community. He has talked of accepted paradigms in science; and when these consensual paradigms no longer prove adequate, because they are clearly out of say correspondence with the perception of reality, they get discarded and replaced. This process of replacement of one paradigm with another was, to Kuhn, a scientific revolution; but it is a revolution in respect of consensus.³⁷

What emerges from these epistemological reflections is that all three forms of validation have their relevance and that this in turn impacts upon the relationship between science and reality. Objects of science are always abstract objects which are more or less *indirectly* connected to empirical phenomena. Science is about the construction of schemes and models and empirical reality is understood not so much by imposing the model onto this reality but by schematising an empirical phenomenon and inserting it into a system of concepts where it gains its scientific and referential sense.³⁸

³⁵ Soler, above n 22, pp 43–5.

³⁶ Mathematics of course gains its epistemological force entirely from its internal coherence, but in its role as the basic language of science and technology mathematical errors will often have very clear implications in terms of correspondence with the real world. A small mathematical error can send a spacecraft crashing into the planet upon which it was supposed to soft-land.

³⁷ See generally T Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 1970) 2nd ed.

³⁸ Granger, above n 16, pp 130–15.

The emphasis, then, is on systems of concepts and advances in scientific knowledge often depend upon the invention of new concepts, or at least the extension of existing ones. The French epistemologist Gilles-Gaston Granger has developed out of this modelisation the notion of *virtual facts*. By this he means that science does not take as its object *actual facts* but facts which have been schematised, that is to say completely determined within a system or network of concepts.³⁹ These *virtual facts* are different from *actual facts* because they are idealised; that is to say that their connection with actual reality is not complete because they are deliberately 'simplified' by the process of schematisation itself. Thus the object of science cannot ever retain the full richness of the empirical object as conceived directly by the mind. Granger gives as an example the theory that objects of different weights nevertheless fall at the same speed; this, he says, is true only at the level of virtual facts since the theory leaves out of account the actual factual reality of say wind speed and air resistance. In terms of method, this is not to suggest that actual facts have no role. They might, for example, be relevant in the falsification of a theory. Yet even here, in the realm of falsification, the science is not as such responding to actual facts; it is a question of how accurate are the concepts in relation to what they are trying to represent.⁴⁰ Actual facts are being modelled once again, but this time by a theory of verification. Weak concepts that cannot be proved or falsified are not true scientific concepts, but the falsification process is one that is achieved only through a modified model.

How does any of this impact on law or, more particularly, on comparative law and its methods? The point must be made at once that transposition is always very dangerous; some might well argue therefore that epistemological notions fashioned within the empirical sciences might well have no relevance, or at least limited relevance, to the social sciences. In fact this kind of argument, as important as it is, must in turn be treated with caution, particularly by the comparatist; for models, as we have seen, have been said to have an important role to play in comparative law. Indeed scientific models can themselves be used directly to secure a decision. Take the following observation:

Scientific thought is, starting out from the observation of reality, to construct a model. Then, within this model, to make deductions, calculations, developments, sequences of theorems, to get results and then to forecast ... I give you another example: in the Paris constituency a candidate in the legislative elections suspected fraud in a number of voting offices. He thought that in these offices there was this risk because he did not have confidence in those running the offices. He had taken some very precise opinion polls, he had studied

³⁹ *Ibid.*, p 49.

⁴⁰ *Ibid.*, p 80.

previous elections and, armed with these figures and results, hundred upon hundred, he went to the administrative court and said that chance could not have produced any of this ... The court thought he was right. On simple probability, it estimated that the chance of fraud was stronger than the presumption ... that everything had gone according to the rules.⁴¹

A similar argument has been used quite recently in English criminal law to secure a (now quashed) conviction of a mother in respect of the cot deaths of two of her children. The prosecution case was based upon the statistical model that the chance of two cot deaths in the same family was so remote that the deaths had to be attributed to another cause.⁴² Are these models not in effect creating 'virtual facts'?

It is of course very tempting to reply positively to this question and such a reply might indeed be justified. Yet the point of these examples is not actually that they should act as direct support for the virtual fact transposition. These two examples are basically statistical models and few would argue that such mathematical data have no role to play in the social sciences including law. They are raised here therefore only to make the point that one should not dismiss out of hand what might be termed epistemological transposition. What is arguably more interesting for the comparatist is the extent to which models of traditional legal concepts act as schemes for constructing the objects of legal science. These models are not mathematical but institutional. That is to say they use concepts based in natural (rather than mathematical) language and they establish relationships that are visual or metaphorical in the way they attempt to mediate between law and reality.⁴³ However such visual or metaphorical images lack neither relative precision nor a powerful ability to mediate, like mathematics, between science and reality. In short, institutional legal models are capable of constructing sets of facts which are schematic in the sense that they are abstractions from actual facts.⁴⁴ As such they qualify as a kinds of virtual facts.

At a very general level one might refer to Article 1384 of the *Code civil* which states that a person 'is liable not only for the damage that one causes by one's own act, but also for that which is caused ... by things which one has in one's keeping'. The factual structure in this proposition is centred on 'damage', 'cause', 'thing' and 'keeping' (*sous sa garde*) and while these are seemingly descriptive terms—that is to say they describe aspects of social reality—they are equally abstracted from particular circumstances to transcend any single set of *actual facts*. For example, this text was drafted at the end of the eighteenth century, evidently well before the advent of motor vehicles; but in the early

⁴¹ J-L Boursin, in É. Noël (ed), *Le hasard aujourd'hui* (Éditions du Seuil, 1991), pp 37, 39.

⁴² For the background of this, and other, quashed convictions see eg *The Observer* 25 January 2004.

⁴³ Samuel, *Foundations*, above n 13, pp 171–90.

⁴⁴ Samuel, *Epistemology*, above n 13, pp 335–7.

twentieth century the article was held to apply to damage arising out of traffic accidents.⁴⁵ No doubt an argument could have been advanced that the article should have no relevance to motor vehicles since the legislature could not possibly have envisaged this particular 'thing'. Yet the comparatist knows that one key to the success of the great codes is that they have been flexible enough to be adapted to changing conditions; indeed one of the drafters of the *Code civil* actually wrote that the long-term success of a code depended on its being able to escape from what might be called the tyranny of detailed fact.⁴⁶ When viewed from the position of descriptive terms within the legal propositions which make up a code—terms such as 'person', 'thing', 'fault', 'damage' and so on—it is possible to see such factual realities as 'virtual' in the sense that they are factual models which transcend actual factual reality. Some kinds of damage may not amount to 'damage', while some types of things may not amount to a 'thing'.⁴⁷ Indeed, commercial law is now dependent upon what might be termed the 'virtual' person (or *la personne morale* as the French jurists would express it), whereas slavery in Roman law was founded upon the non-actuality of the real person. In Roman law a slave was of course a 'thing' and it was the *décalage* between this 'virtual' fact and the 'actual' reality itself that went far in stimulating new developments within the law. For example, principles dealing with the assessment of damages with regard to a slave gradually got transposed to the assessment of damages with respect to injuries caused to free persons.⁴⁸

4. DEGREES OF ACTUALITY

However, despite the attraction of the virtual fact analogy, care must be taken. In the natural sciences it is possible to see the distinction between schematic model (virtual fact) and perceived reality (actual fact) as a clear-cut dichotomy. The object of science is the schematic model. In law, on the other hand, the comparatist is aware that differences between legal traditions can depend, to an extent, on the distance between legal conceptualisation and perceived reality. As Zweigert and Kötz observe in respect of the difference between civil and common law thinking, on 'the Continent lawyers operate with ideas, which often, dangerously enough, take on a life of their own; in England they think in pictures'.⁴⁹ What the authors are recognising here is the tendency of common lawyers to think at much lower levels of

⁴⁵ *Jand'heur* cass. civ. 13.2.1930; DP 1930.1.57.

⁴⁶ Portalis, *Discours préliminaire* (1799).

⁴⁷ For some interesting English cases see *Lazenby Garages Ltd v Wright* [1976] 1 WLR 459; *Ex p Island Records* [1978] ch 122; *In re Campbell (A Bankrupt)* [1997] ch 14.

⁴⁸ F Lawson, *Negligence in the Civil Law* (Oxford University Press, 1950), pp 21–22.

⁴⁹ Zweigert & Kötz, above n 21, p 69.

abstraction; and so, for example, there are many fewer rules that are code-like in their style.⁵⁰ Common lawyers have no general principle of liability for damage done by a thing under the control of another; they prefer, instead, to think of individualised—some might be tempted to say 'actualised'—objects such as bottles of ginger-beer, flagpoles, aircraft, lorries, walls, dwelling houses and so on.⁵¹ In other words common lawyers can easily appear to be operating with more 'actual', as opposed to 'virtual', facts.

Such appearances are probably misleading. Even if the common lawyer functions more that the level of species than genus it may well be that the different individualised objects are still idealised conceptions of perceived reality. The concrete is, as a French epistemologist observed, the abstract rendered familiar through usage.⁵² Thus for example where a jurist justifies liability for wrongful damage to, say, a will by reference by way of analogy to wrongful destruction of an IOU both the will and the IOU are in effect being turned into abstract things (*res*) where one can replace the other.⁵³ The same is true for objects dropped onto a public highway which cause injury to a passer-by. The law might be expressed in terms of individual factual examples such as a pruner who throws down branches or a workman on scaffolding who carelessly drops a tool; but clearly the analysis is structural in orientation. Liability will attach to any *persona* who allows a *res* to fall onto a place where he ought to have appreciated that members of the public might be passing.⁵⁴ Persons, things and public spaces are in truth generic notions.

Nevertheless there is something of a tension, as Zweigert and Kötz indicate, in Western legal thought between legal systems that tend to function at different levels of abstraction. And thus Roman law can be contrasted with modern civil law just as the *mos Italicus* can be compared to the *mos Gallicus*.⁵⁵ With respect to English law, Lord Simon once explained how the rule in *Rylands v Fletcher*⁵⁶ functioned. It was not a question of starting out from some established proposition about 'anything likely to do mischief if it escapes' and applying it deductively to all factual situations involving 'things' escaping and doing damage. Rather one moves outward from the facts (which of course in *Rylands* involved the escape of water) of *Rylands v Fletcher* itself. Thus, said Lord Simon, when some years later a case

⁵⁰ The increasing complexity of rules in English law can be observed if one compares s 14 in the original Sale of Goods Act 1893 with its modern amended version in the Sale of Goods Act 1979 (as amended).

⁵¹ See eg *Animals Act* 1971.

⁵² R Blanché, *La science actuelle et le rationalisme* 2nd ed (Presses Universitaires de France, 1973), p 54.

⁵³ See D.9.2.41.

⁵⁴ See D.9.2.31.

⁵⁵ See A Wijffels, 'European Private Law: A New Software-Package for an Outdated Operating System?', in M Van Hoecke & F Ost (eds), *The Harmonisation of European Private Law* (Oxford, Hart Publishing, 2000), pp 101–16.

⁵⁶ [1866] 1 R 1 Ex 265 (Ex); [1868] L.R. 3 H.L. 330 (H.L.).

subsequent to *Rylands* arose concerning the escape of electricity, it was necessary to compare the facts of this new case with those of the *Rylands*. Was electricity analogous to water? If so, not only would the rule established in the precedent apply but the new case, with electricity as its material fact, would act as the point of reference for the next case involving any object that was neither water nor electricity.⁵⁷ These facts may therefore be less 'virtual', or more 'actual', in as much as the common lawyer is forced to compare one specific object with another specific object; and such factual comparisons appear to be operating directly on the actual objects themselves.

How does this tension compare with the virtual and actual fact thesis from the natural sciences? One approach is to say that civil law has, as an historical fact, always been much more closely identified with science in general. Thus the importance of the Humanist revolution was, according to some civilians, that it took legal thinking from the world of fact to a level of rational systematisation; the law is the product of reason said Grotius (*dictamen rectae rationis*) and is not to be drawn from things.⁵⁸ It is, like mathematics, a question of deduction.⁵⁹ The analogy between law and mathematics was a powerful one in the minds of the seventeenth century civilians and their successors and the importance, of course, of this analogy is that mathematics does not have as its object any specific reality.⁶⁰ It is a science based upon *coherence* rather than *correspondence* and thus the science, in a sense, becomes the object of its own science.⁶¹ In civilian thinking there are echoes of this *mos geometricus* tradition in as much as conceptual coherence remains a fundamental characteristic of the German and (to a lesser extent) French mentalities.⁶² Put another way, advances in legal science from the humanists to the German Civil Code were largely measured in terms of ever-greater internal coherence. The common law, which escaped the influence of the legal humanists, can from this perspective be seen as belonging to an 'older' stage of science; its methods are closer to the *Mos Italicus*,⁶³ the school of legal thinking against which the humanist jurists were reacting. The more descriptive the legal mentality the more actual the facts.

5. EXAMPLE: MISTAKE IN CONTRACT

This idea of stages of legal science needs examination in itself. However before leaving the dichotomy between actual and virtual facts something

⁵⁷ *EA & AB Ltd v Lupton* [1972] AC 634, 658–9.

⁵⁸ M. Villey, *La formation de la pensée juridique moderne* 4th ed (Montchrestien, 1975), p. 538.

⁵⁹ F. Wieacker, *A History of Private Law in Europe* (Oxford University Press, 1995), trans. T. Weir p. 204; Dubouchet, above n. 31, p. 55ff.

⁶⁰ Wieacker, above n. 59, pp. 343–4.

⁶¹ G.-G. Granger, *Essai d'une philosophie du style* (Odile Jacob, 1988), p. 117.

⁶² Wieacker, above n. 59, p. 439; Dubouchet, above n. 31, p. 155ff.

⁶³ See Wijffels, above n. 55 pp. 105–8.

further should be said about the relevance of these notions to comparative law. The degree of 'actuality', or 'virtuality', always assuming the dichotomy to be a valid one, might be useful to the comparatist in that it can help determine the extent to which codification, or at least textualisation, of law is valuable in representing legal knowledge. Take for example the complex subject of mistake in contract. In the leading English authority on this area the House of Lords had to decide whether contracts made between a corporate employer and two of its directors were void. The company decided that it wanted to end the employment contracts of two of its directors and negotiated an agreement whereby the two employees agreed to terminate their employment in return for large compensation payments. After this termination contract had been executed by both sides, the company discovered that there were grounds upon which they could have legally terminated the directors' contracts without having to pay them compensation. It appeared the directors had been guilty of misconduct but had kept silent about this behaviour. Accordingly the company brought an action against the directors to recover the compensation payments on the ground that the termination contracts were void for mistake. The House of Lords refused to accept the company's claim.⁶⁴

Now, before turning to the reasoning of the House of Lords, it might be useful to examine the facts of the case in the light of the new European contract code, the *Principles of European Contract Law* (PECL). This states in article 4:103 that:

- (1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:
 - (a) (i) the mistake was caused by information given by the other party; or
 - (ii) the other party knew or ought to have known of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error; or
 - (iii) the other party made the same mistake, and
 - (b) the other party knew or ought to have known that the mistaken party, had it known the truth, would not have entered the contract or would have done so only on fundamentally different terms.
- (2) However a party may not avoid the contract if:
 - (a) in the circumstances its mistake was inexcusable, or
 - (b) the risk of the mistake was assumed, or in the circumstances should be borne, by it.

From the company's point of view, this text would appear to support their argument that the contract should be avoided in that sub-section (1)(a)(ii) seems to cover the facts in issue. Did the other party know of the mistake?

⁶⁴ *Bell v Lever Brothers* [1932] AC 161

Given that it was the directors' own behaviour which formed the foundation of the error, the response must surely be positive. Indeed, the doctrine of good faith would suggest that the two employees might even have been under a legal obligation to disclose to the company their past misconduct.⁶⁵ Furthermore it appears evident that the company, had it known of the misconduct, would never have contracted to pay the employees large compensation sums. It is possible to go even further. It could just be argued that the facts fall within sub-section (1)(a)(i) in that the failure of the directors to speak out about their past misconduct amounted to 'information given'. Admittedly this is *prima facie* a weak argument in as much as lawyers traditionally draw an important distinction between positive statements and silence; yet, taken together with sub-section (iii), it could, so to speak, add weight to the company's claim. For their part, the defendants could argue that the facts fell within sub-section (2)(b): the company, in failing to investigate the employment records of the directors, simply took the risk that the employment contracts were watertight. What can be said with certainty is that it is by no means clear from Article 4:103 what the solution should be. Much will depend upon the background of the judges deciding the case. Those coming from the civilian tradition might well feel that a party to a contract is under a good faith obligation to disclose information; those whose mentality have been formed at the commercial Bar might well, in contrast, view the facts strictly in terms of the distinction between positive (representations) and negative (silence) acts and of risk.⁶⁶

The point to be stressed therefore is that the text itself is insufficient with regard not just to the legal knowledge but equally to the various factual situations envisaged by the proposition. It is extremely difficult to construct, simply on the basis of the article, a paradigm set of virtual facts. Indeed the text is worse than this. For sub-sections (1) and (2) largely contradict each other with the result that the methodology implied by the article must involve different kinds of schemes of intelligibility; deduction is impossible without first the employment of, for example, dialectical and hermeneutical techniques. One might note therefore that a comparatist trained only in the functional method will be at a serious disadvantage. Again this topic of differing schemes of intelligibility is something that will need to be investigated in more depth. For the moment one can observe how the dialectical method implied by a text like Article 4:103 has the effect not of actually envisaging a set, or sets, of virtual or actual facts, but of allowing each individual jurist to construct his or her own set of facts. The solution to any mistake problem where the PECL apply is dependent entirely upon a construction of fact in the mind of the person applying Article 4:103; the

⁶⁵ P. Malauric & L. Aynès, *Cours de droit civil: Tome VI: Les obligations* 10th ed (Éditions Cujas, Paris, 1999) n° 634.

⁶⁶ See eg *University of Nottingham v Eyett* [1999] 2 All ER 437.

employees can be fashioned as *personae* lacking *bona fides* within a relationship that requires each side to consider the other's interests and within a society that is communitarian in outlook.⁶⁷ Alternatively the two directors can be regarded as entrepreneurs in an individualistic environment looking after their own legitimate interests.⁶⁸ 'Actual' facts seem to make little sense here.

When one turns to the reasoning of the House of Lords the ability to construct individual factual situations becomes evident. Lord Atkin begins the substantive part of his reasoning by making an important procedural observation: that it

is essential on this part of the discussion to keep in mind the finding of the jury acquitting the defendants of fraudulent misrepresentation or concealment in procuring the agreements in question.

For grave

injustice may be done to the defendants and confusion introduced into the legal conclusion, unless it is quite clear that in considering mistake in this case no suggestion of fraud is admissible and cannot strictly be regarded by the judge who has to determine the legal issues raised.⁶⁹

Article 4:103 does not of course require any fraud before the mistake can operate to avoid the mistake. Yet what Lord Atkin was seemingly doing was to construct a factual environment in which the interests of the company were not being placed at the forefront of economic environment. He then continued by stating that in his view it would be wrong to determine a definite specified contract where 'the party paying for release gets exactly what he bargains for' and where it 'seems immaterial that he could have got the same result in another way, or that if he had known the true facts he would not have entered into the bargain'.⁷⁰ Lord Atkin justifies this conclusion in referring to a number of factual situations:

A buys B's horse; he thinks the horse is sound and he pays the price of a sound horse; he would certainly not have bought the horse if he had known, as the fact is, that the horse is unsound. If B has made no representation as to soundness and has not contracted that the horse is sound, A is bound and cannot recover back the price. A buys a picture from B; both A and B believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy. A has no remedy in the absence of representation or

⁶⁷ See eg C. Jamin, 'Plaidoyer pour le solidarisme contractuel', in *Études offertes à Jacques Chénier: Le contrat au début du XXI^e siècle* (LGDJ, 2001), 441–72.

⁶⁸ See eg Lord Ackner in *Walford v Miles* [1992] 2 AC 128, 138.

⁶⁹ *Bell v Lever Brothers* [1932] AC 161, at p 223.

⁷⁰ At pp 223–4.

warranty ... A buys a roadside garage business from B abutting on a public thoroughfare: unknown to A, but known to B it has already been decided to construct a by-pass road which will divert substantially the whole of the traffic from passing A's garage. Again A has no remedy.⁷¹

And he continued:

All these cases involve hardship on A and benefit B, as most people would say, unjustly. They can be supported on the ground that it is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts ie, agree in the same terms on the same subject-matter they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them.⁷²

It is tempting to say that Lord Atkin is going to the other extreme from the PECL text. His legal solution is founded on concrete—on actual—facts and not on some dialectical contradiction between moral good faith and economic risk, a contradiction that makes the envisaging of even virtual facts difficult. However two points need to be made here. The first is that Lord Atkin could indeed be said, from a structural viewpoint, to be constructing an idealised 'virtual' factual situation and one that, once the structure is pointed out to a reader of the PECL, might well be said to be inherent in Article 4:103. It is probably true to say that nearly every lawyer brought up in the Western capitalistic tradition would have few hesitations about affirming the validity of a sale of goods contract where a buyer purchases an article from Shop A only subsequently to discover that he could have got the very same thing at half the price from Shop B. Even if the seller in Shop A knew that Shop B was selling at half the price no one would assert that A is under a duty to inform. Now the dialectical contradiction in Article 4:103 clearly tries to capture this 'paradigm' mistake problem and to this extent it could well be said that what separates the PECL code provision from the House of Lords precedent is one of schematic method. The 'virtual fact' situation captured by the structural foundation to Lord Atkin's factual examples is simply being translated into a linguistic propositional form. In other words all mistake cases are to be constructed and deconstructed in relation to these paradigm facts. What makes the directors case difficult is not so much the law as contained in rules like Article 4:103; it is the possibility of being able to construct two quite contrasting factual situations, one along the structural lines of the Shop A and Shop B example the other conforming to a long-term social relationship between employer and employees. The factual examples used in Lord Atkin's reasoning, not to mention the

⁷¹ At p 224.

⁷² At p 224.

facts of the case before him, are no more 'actual' than any other schematic model of elements and relations and thus it would be very dangerous to assert that the law Lord was working directly upon actual facts.

6. STAGES OF LEGAL SCIENCE

The second point is more mundane from a methodological viewpoint. The difference between the approach of the House of Lords to the mistake problem in the case of the two directors and the approach of a court having to apply Article 4:103 to the same facts is one of reasoning technique. Codes involve the movement from a universal proposition—the general—to a particular set of facts and the reasoning technique traditionally associated with going from the general to the particular is deduction. Now few civilians still believe today that legal reasoning is purely deductive; argumentation is as, if not more, important⁷³ and such a dialectical methodology conforms, as we have seen, to the structure itself of texts such as Article 4:103. Nevertheless the starting point is a general proposition. The technique to be found in Lord Atkin's judgment, in contrast, is reasoning by analogy; the proposition that a definite specified contract should not be set aside is seemingly arrived at, and certainly justified, by reference not to some universal principle but to specific concrete examples. The reasoning is of a type that goes from the particular to the particular. From an historical point of view this difference of technique between jurists working within the codified systems and those in the common law reflects a more general distinction between scientific stages; analogy was once seen as a primitive form of reasoning which produced unreliable results and was eclipsed by an epistemological revolution, associated with rationalists like Descartes, who stressed analysis, synthesis, induction and deduction.⁷⁴ What the history of science can offer, then, to legal reasoning is a conceptual framework that encapsulates methodology within differing stages of development.

These stages go further than a mere two part model of the scientific or rational and the pre-scientific or primitive. According to the epistemologist Robert Blanché:

Rather than a binary division [between concrete and abstract science] it is necessary to deal here with a continuous development. One should speak more of the distinction between deductive science and inductive science. Mathematics started out by being inductive, and the sciences said to be inductive often take, and always aspire to take, the deductive form. Deduction

⁷³ See eg J-L Bergel, *Méthodologie juridique* (Presses Universitaires de France, 2001), pp 362-4.

⁷⁴ D Durand, *La systémique* 5th ed (Presses Universitaires de France, 1992), p 52.

and induction mark two stages in the development of science, the stages themselves being framed within an initial stage and a final stage. In fact it appears that all the sciences follow, in distinguishing themselves only by their degree of advancement, a similar course, passing or being called to pass, successively through the descriptive, inductive, deductive and axiomatic stages.⁷⁵

This four-stage process seems particularly relevant to the history of legal thinking in the West. The very earliest legal texts such as the XII Tables could be seen as little more than descriptive in style and structure; by the time of Ulpian, however, the methodology had clearly moved to a second, inductive stage. Ulpian himself provided a leading example when he observed that *conventio* is to be found within all the different Roman contracts;⁷⁶ another example is perhaps Paul's reporting of Mucius' assertion that *culpum autem esse cum quod a diligente provideri potuerit non esset provisum*.⁷⁷ Michel Villey argued that the medieval Romanists continued these methods and that the great intellectual revolution came with the humanists. In turning law into a rational discipline analogous to mathematics, that is to say a discipline completely divorced from fact, it would seem that law had now arrived at the third scientific stage. The 'law is not drawn from things, with their variable nature; it is the product of reason separated from man (*dictamen rectae rationis*), what can be deduced by the wise'.⁷⁸ With this 'rejection of fact outside of legal science' the law was ready to 'take the form (as Grotius at least tended towards) of an axiomatised system, deduced from principles of reason'.⁷⁹ And this final 'axiomatised' stage was apparently achieved by the Pandectists who considered law as a closed system of institutions and rules where 'one only had to apply logical or "scientific" methods in order to reach the solution of any legal problem'.⁸⁰ Thus the German Civil Code has been described as nothing but 'the legal calculating machine par excellence'.⁸¹

Despite the apparent fit, the idea of a movement from a descriptive to an axiomatic stage in law is, of course, fraught with difficulty. For a start, the notion that code provisions are analogous to mathematical axioms is nothing but a myth. As we have seen with the PECL provision concerning mistake in contract, an 'axiom' consisting of an abstract linguistic proposition is incapable in itself of containing the precise and definitive knowledge information needed to make it a genuine universal. It is quite simply too

⁷⁵ Blanché, *L'épistémologie*, above n 12, p 65.

⁷⁶ D.2.14.1.3.

⁷⁷ D.9.2.31.

⁷⁸ Villey, *Formation*, above n 58, p 538.

⁷⁹ *Ibid.*

⁸⁰ Zweigert & Kötz, above n 21, p 140.

⁸¹ See Zweigert & Kötz, above n 21, p 145.

weak to allow knowledge to be reliably obtained through rigid and formalised deductive logic. As Professor Bergel has observed:

Mathematical logic implies not only an axiomatic presentation and a deductive form of method, but also symbolisation substituting calculus based on signs for reasoning based on ideas, in such a way that mathematical type deduction is of indeterminate inventiveness. Now this method is irreconcilable with legal method. The law is teeming with departures from logical solutions deduced from an axiom. These exceptions result from other preoccupations, other principles and other axioms whose sheer number, confusion and differing intensity render impossible an expression of positive law in mathematical form.⁸²

Moreover, continues Bergel, legal concepts are not at all susceptible to precise definition. In fact there are a range of notions like public policy (*ordre public*) or good morals (*bonnes mœurs*), which play the role of correcting elements and of translators from the legal rule to the facts and whose contours are deliberately uncertain, so much so that one talks now of the 'fuzziness of the law'.⁸³ In short, the four stage process appears more as an ideological rather than a genuinely epistemological scheme.

A second difficulty, given Bergel's observations, is that a four-stage process is clearly inadequate in itself of encapsulating the complete historical picture of legal methodology. If an axiomatic approach is now regarded as a myth, this implies that legal thinking has moved on to a stage beyond the axiomatic. One might talk here either of a fifth 'post-axiomatic' stage or of a return to some earlier state of development. Thus a careful analysis of the methods employed by the Glossators and Post-Glossators—jurists who worked within the inductive stage if one employs the Blanché and Villey schemes—would indicate that lawyers were not just inducing general principles from specific cases. They were employing methods that can be labelled 'hermeneutical' and 'dialectical' and, as we shall see, these are schemes of intelligibility that can be said to be epistemologically *sui generis*. In other words simply to place the various legal methods under categories such as 'inductive' and 'deductive' is inadequate; what is required, when it comes to 'legal science' is a scheme of analysis that is more sophisticated in structure. What is needed is a scheme that can capture the true complexities of legal reasoning.

Nevertheless the Blanché scheme ought not be totally discarded by jurists, if only because in suggesting a fifth 'post-axiomatic' stage the scheme is indirectly providing a positive epistemological insight. Moreover the scheme might be of help to the comparatist in that it can go some way in explaining what Zweigert and Kötz see as stylistic differences between civil and common lawyers or what Pringsheim saw as an 'inner relationship'

⁸² J.-I. Bergel, *Théorie générale du droit* 3rd ed (Paris, Dalloz, 1999), p 273.

⁸³ *Ibid.*, p 274.

between English and Roman law.⁸⁴ Rather than talking, as Pringsheim did, in terms of some 'spiritual' affinity between Roman practitioners and common lawyers, it would surely be more rational to say that what unites the two groups of jurists is that they both function within the inductive stage. Modern civil lawyers, in contrast, in passing to a deductive and axiomatic stage were bound to adopt methods, even if motivated unconsciously by ideology, that were different. To this extent, then, epistemology in the natural sciences has something genuine to offer legal 'science'; it is providing a framework that does account, on the one hand, for the Cartesian school of jurists who tried to discipline law with *mos geometricus* methods⁸⁵ and, on the other, for the medieval (*mos Italicus* and common law) practitioners who were little interested in systems-building.⁸⁶ The absence of common law faculties in England before the end of the nineteenth century meant that there was never a corps of professors interested in prising law from its procedural forms, themselves determined largely by patterns dictated by commonly occurring factual situations.⁸⁷ Descriptive and inductive approaches are closer to actual facts than deductive and axiomatic methods even if, in the end, one is, as we have already suggested, talking of different degrees of 'virtual'.

7. SCHEMES OF INTELLIGIBILITY

One problem, then, with the Blanché scheme is that it is too general to explain the intricacies of legal methods. This shortcoming, it must be said at once, is not a matter of something inherently inadequate about the four-stage scheme; rather it is a question of transposition from the natural to the social sciences. In the natural sciences the passage from the descriptive to the axiomatic was a matter of ever increasing conceptual formalisation marked by an equally increasing rigour and precision. The social sciences, in contrast, are characterised by a lack of such formalisation, rigour and precision. 'A multitude of schemes of intelligibility (explanation, comprehension etc)—and not one single and reliable method—are', so it is commonly said, 'at work from one science to another or within the same science—a clear sign of immaturity'.⁸⁸

Whether or not the qualification of 'immaturity' is helpful in this context is by no means clear, although in fairness the writer is simply stating what

⁸⁴ Zweigert & Kötz, above n 21, pp 63–73; F Pringsheim, 'The Inner Relationship Between English and Roman Law', [1935] *Cambridge Law Journal* 347.

⁸⁵ On which see S Strömholm, *A Short History of Legal Thinking in the West* (Lund, Norstedts, 1985), pp 175–91.

⁸⁶ See Wijffels, above n 55.

⁸⁷ On which see M Lobban, *The Common Law and English Jurisprudence 1760–1850* (Oxford University Press, 1991), pp 9–10 and R Coe, *Sir Henry Maine: A Study in Victorian Jurisprudence* (Cambridge, 1988), pp 46–51.

⁸⁸ Soler, above n 22, p 198.

she sees as a common prejudice. Other epistemologists talk for example of a lack of mathematical formalisation in the social sciences.⁸⁹ What is clear is that the idea of a multitude of schemes of intelligibility is a characteristic of social science epistemology and it is these schemes that need to be the object of attention, at least when it comes to legal methodology, for two main reasons. First, because the history of legal thought has, as we have seen, already revealed the failure of the *mos geometricus* as an epistemological route; the reduction of law to a formal logic would, as Bergel has asserted, be contrary to the essential purpose of any legal system since its function is to regulate social life. It 'cannot ignore concrete reality nor can it ignore the evolution of facts and desires'.⁹⁰ This concrete reality, with its mass of interrelating and contradicting interests, together with the need for law to embrace the diversity of social situations to be found in human desires, decisions and acts, cannot be reduced to an axiomatic scheme of algebraic symbols existing in its own abstract world. Secondly, because the grand theories of social science such as Marxism or game theory, as useful as they are, are limited in their explicative power. They assume too much uniformity either, for example, in terms of class interests (the differing interests of men and women are eclipsed by notions such as 'working class') or, say, in respect of desires such as the desire to maximise profit or act rationally.⁹¹ Methodological pluralism, in other words, is probably a more promising route when it comes to social science since it is not a question of immaturity but one of diversity of objects,⁹² of complexity, of natural (as opposed to mathematical) language and of impossibility of separation between *intellectus et res* (humans studying humans).

Two main questions need to be considered: what are the various schemes of intelligibility and what is their relevance to law? With regard to the first question, the leading contribution, recognised not just by social scientists but equally by a leading epistemologist in the natural sciences,⁹³ is by the social theorist Jean-Michel Berthelot. He has isolated six schemes themselves reducible to a duality representing one of the fundamental ontological and epistemological oppositions. Berthelot himself has recently very briefly summarised these six schemes of intelligibility. They are:

the *causal* scheme (if x , then y or $y = f(x)$); the *functional* scheme ($S \rightarrow X \rightarrow S$, where one phenomenon X is analysed from the position of its function— $X \rightarrow S$ —in a given system); the *structural* scheme (where X results from a system founded, like language, on disjunctive rules, A or not A); the *hermeneutical*

⁸⁹ See eg Granger, above n 16, pp 92–7.

⁹⁰ Bergel, *Théorie générale*, above n 73, p 274.

⁹¹ Soler, above n 22, p 200.

⁹² *Ibid.*, p 199; R Boudon, *Les méthodes en sociologie* 10th ed (Presses Universitaires de France, 1995), pp 125–6.

⁹³ Granger, above n 16, pp 90–2.

scheme (where X is the symptom, the expression of an underlying signification to be discovered through interpretation); the *actional* scheme (where X is the outcome, within a given space, of intentional actions); finally, the *dialectical* scheme (where X is the necessary outcome of the development of internal contradictions within a system).⁹⁴

These six schemes can in turn be distributed between the two grand opposing categories of holism and individualism.⁹⁵ Thus the functional, structural and dialectical schemes put the emphasis on the totality of the system in play; the elements upon which they depend cannot, in other words, be understood individually and outside of the scheme of elements and the relations between them as a whole. The causal and actional—together with, to some extent at least, the hermeneutical schemes—are based on the individual element or ‘atom’. From this perspective, there is no such thing as society, only individual men and women. This methodological individualism

is opposed head-on the explanatory model common to functionalism, to structuralism and to dialectical materialism that can be categorised, by simplification, as *culturalism*: these are the cultural norms and values of the group or of the society which, across the mediation of socialisation, culturalisation or inculcation define the sense of behaviour or, according to certain vocabularies, of practices.⁹⁶

One might add that this dichotomy between holism and individualism reaches far beyond sociology. It has philosophical and methodological implications that underpin many of the great debates and not just in the social sciences and humanities; the ontological argument between nominalists and universalists reappears as a metaphysical question in the natural sciences each time one arrives at a certain level of reflection.⁹⁷

This nominalism versus holism debate has a direct connection to the second main question: what is the relevance of Berthelot’s schemes to law? Michel Villey, in his history of legal thought, used the nominalist revolution, associated with the medieval philosopher William of Ockham, as the key focal point in the development of modern rights thinking in law, a technical development he seemed to abhor for its philosophical consequences.⁹⁸ ‘The nominalist education that we have received has’, he said, ‘the consequence of restricting our catalogue of values only to those

⁹⁴ Berthelot, ‘Programmes, paradigms etc’, in Berthelot, *Épistémologie*, p 484.

⁹⁵ For a full account see Berthelot, *L’intelligence du social*, above n 3, pp 43–85, 152–61. For a more detailed discussion in English see Samuel, *Epistemology and Method in Law*, above n 13, pp 295–334.

⁹⁶ J.-M Berthelot, ‘Les sciences du social’, in Berthelot, *Épistémologie*, p 247.

⁹⁷ Blanché, *Épistémologie*, p 20.

⁹⁸ See generally Villey, above n 58, p 199ff. However Villey’s thesis has now been seriously challenged: B Tierney, *The Idea of natural Rights* (Scholars Press for Emory University, 1997), pp 13–42.

values of interest to individuals—or to groups fictionally conceived as individuals, having the status of ‘corporate persons’ (*les personnes morales*)’. And he continued:

Only individuals exist for nominalism. The only values that can serve, in a word, will be the economic or moral well being of individuals or corporate groups; which are the ends of moral or economic policy; whilst the law is reduced to no more than a mass of rules with a coercive function, a technique, an instrument in the service of the economy or individual morality. It has no end in particular.⁹⁹

At a lower level of abstraction, the dichotomy between a whole and its parts can be found as a technique in legal reasoning and in legal conceptualisation.¹⁰⁰ For example the notion of a patrimony is based on the idea that the whole remains a permanent and unchanging *res* while the individual things that make it up freely come and go without affecting the form; subrogation is founded upon the same type of structural reasoning.¹⁰¹ In one famous English case involving the interpretation of a will the difference between the majority decision, as represented in the judgement of Russell LJ, and Lord Denning’s dissenting opinion, is to be found in the dichotomy between a universalist and nominalist view of facts. Lord Denning considered that when a small ship sank taking with it a the two testators the deaths were ‘simultaneous’; however Russell LJ viewed the facts as a series of individualised events pointing out that when a disaster occurred at sea people could die at different times through different causative events.¹⁰² Now these oppositional forms of reasoning have been discussed in detail elsewhere.¹⁰³ And so it might be more valuable for present purposes to move to the level of the six schemes identified by Berthelot. Is Berthelot’s work providing a means by which comparatists can start to think seriously about alternatives to functionalism?

8. COMPARATIVE LAW AS A HERMENEUTICAL EXERCISE

Zweigert and Kötz, as we have seen, emphasise the functional method as the most appropriate for the comparatist. This approach has, however, been seriously challenged by Pierre Legrand who argues that comparative law is largely a hermeneutical exercise.¹⁰⁴ The job of the comparatist is not simply

⁹⁹ Villey, above n 58, p 400.

¹⁰⁰ See eg D.S.1.76.

¹⁰¹ G Samuel, *Law of Obligations and Legal Remedies* 2nd ed (Cavendish, 2001), pp 165–8.

¹⁰² *Re Rowland* [1963] ch 1.

¹⁰³ G Samuel, *Foundations*, above n 13, pp 149–51.

¹⁰⁴ See generally Legrand, *droit comparé*, above n 5.

to compare rules since these are nothing more than strings of words; they are the surface appearance of law.¹⁰⁵ And what the comparatist must do is get below their surface in order to discover the cultural *mentalité* that these rules express. It is not the rule itself that should be the focus of comparison but what the rule *signifies* in terms of the political, social, economic and ideological context from which it has emerged. This exercise is not some quest for a positive truth attaching to the existence of this or that rule; it is not, in other words, a search for function. The comparatist is involved in a *démarche herméneutique* that goes well beyond a jurist just reading other jurists.¹⁰⁶

Berthelot explains that the hermeneutical scheme is different from the functional approach in that it involves a *vertical* relationship between two elements (A and B) in which A is the signified (what it expresses) and B is the signifier (what is).¹⁰⁷ Rules, then, represent the element B in this schematic relationship while A is the cultural mentality. The functional scheme, in contrast, is based on a *circular* relationship between A and B (and C etc) in which A has a specific function measured not just in relation to B's specific function but in relation to the function of the system (A→B→C) as a whole.¹⁰⁸ Legrand would seem to see, at least implicitly, functionalism as encouraging the comparatist to be superficial. In looking only at rules, 'comparatists' do not (want to) see: they stop at the surface, looking merely to the rule or proposition—and they forget about the historical, social, economic, political, cultural, and psychological context which has made that rule or proposition what it is'.¹⁰⁹ The price to be paid for this 'unwillingness or inability to practise... "deep" comparative enquiries ... is that of an *illusion* of understanding of the other legal tradition within the European Union'.¹¹⁰ In particular, says Legrand, civilians think they understand the common law, but in failing to indulge in serious hermeneutical investigation 'the "comparatist"... does not realise that the common law of England operates on the basis of epistemological assumptions which are hidden behind the judicial decision or the statute and which determine them, and that these assumptions distinguish in a fundamental way the common law tradition from the civil law world'.¹¹¹

The problem, therefore, with functionalism is twofold. First, it assumes, as we have seen, that there is between two legal systems a common epistemological understanding of what is meant by 'law'. Difference is measured in terms of difference of elements (concepts and institutions) and patterns

¹⁰⁵ See in particular P Legrand, 'The Impossibility of "Legal Transplants"', (1997) 4 *Maastricht Journal of European and Comparative Law* 111.

¹⁰⁶ Legrand, *droit comparé*, pp 30-1.

¹⁰⁷ Berthelot, *L'intelligence du social*, pp 72-3.

¹⁰⁸ *Ibid.*, p 65.

¹⁰⁹ P Legrand, 'How to Compare Now', (1996) 16 *Legal Studies* 232, 236.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, pp 236-7.

of relations between systems as measured by functions that are assumed to be common. In asserting the hermeneutical scheme of analysis Legrand in effect cuts across this comparison of a *circular* epistemological scheme to put the emphasis on a *vertical* scheme that immediately leaves the functional approach open to the charge of superficiality. The second problem is the assumption that 'facts' are somehow outside the comparative methodological scheme in as much as the circular discourse is measured in terms of its practical function. To an extent it is of course arguable that an exploding washing machine or a car accident is a factual situation capable of being perceived independently of law in all European countries if not everywhere in the world. However facts, as we have gone some way in showing already, are much more ambiguous to the epistemologist. Are victims of car accidents, for example, victims of acts or activities? Is a dwelling house factually similar to a huge munitions factory? Facts are never evident in themselves; they 'never directly thrust themselves upon one, and it can be said that they exist neither *a priori* nor separately': they 'have sense only in relation to a system of thought, through a pre-existing theory'.¹¹²

This is not to suggest, it must be stressed at once, that the hermeneutical scheme is inherently superior to the functional method. It can certainly seem superior in certain contexts and one of the strengths of Professor Legrand's thesis is that comparative legal studies is a 'context' where a vertical analysis cannot be ignored. Nevertheless there are degrees of hermeneutics. All forms of interpretation in law that involve a signifier (for example a word in a statutory text) and a signified (meaning of the word) could be said to be hermeneutical and thus the comparatist needs to distinguish between a 'deep' hermeneutical scheme and a more superficial one. Furthermore, with respect to the idea of 'contexts', one might assert that there is no single 'context' of comparative legal studies. And so, for example, the European law practitioner might be seen to be working within a particularised context that is very different from the academic comparative lawyer interested in legal theory and legal epistemology. This 'practitioner context' is one where there is a shared assumption about the nature of law. This shared assumption might appear superficial and simplistic to anyone who applies a vertical deep analysis and, indeed, may actually generate many misconceptions and errors of the type mentioned by Legrand.¹¹³ But it must never be forgotten that law is an ideology and that international commercial lawyers have an ideological interest, like legislators, in assuming that knowledge of law is knowledge of rules. Indeed it might well be said that they have a professional interest in maintaining a superficial epistemological model, as Christian Atias has suggested. Legal science,

¹¹² J-P Astolfi & M Develay, *La didactique des sciences* 4th ed (Presses Universitaires de France, 1996), p 25.

¹¹³ See generally Legrand, 'How to Compare Now', above n 109.

he says, 'tends to be eclipsed by the law' in as much as the 'primary, indeed exclusive mission that jurists give themselves is the analysis of constitutional, legislative, administrative or caselaw texts; their ideal is faith to the will [of the legislator] expressed via "sources of law"'.¹¹⁴

This rule-based assumption can be strengthened by recourse to schemes other than the functional and hermeneutical. For example criminal lawyers rely heavily on the causal and actional schemes since criminal law itself is premised on free-will and intended actions. Thus a person is not normally guilty unless he or she behaved in a certain manner, with the required intention (*mens rea*),¹¹⁵ and that the behavioural act caused the harm envisaged by the rule (*actus reus*). The causal scheme is premised on the idea that one phenomenon (B) is dependent upon another phenomenon (A) according to a relation whereby it is impossible to have B without A. As Berthelot points out, it 'follows that A and B are distinct either in reality (different objects or realities) or analytically (different levels of a global reality) and that the element A is conceived as being necessarily prior, chronologically or logically, to the element B'.¹¹⁶ This individualistic analysis is given added support by the actional scheme in which the phenomenon B is considered the result of the behaviour of implicated actors within a given space. States of mind become matters of objective implication often defined in relation to the objective act. Thus a person who puts a bomb on an aircraft or deliberately sets fire to a house is deemed to have 'intended' any deaths that arise out of the explosion or fire whatever the actual subjective state of the actor's mind. Here culture and mentality become, seemingly at least, rather meaningless; what is important is the system of rules and concepts and the results they are designed to achieve. It thus becomes very easy to compare, say, a modern English tort case about spreading fire or falling objects with similar delictual cases in Roman law.¹¹⁷

The great temptation facing the comparatist with these schemes is that a deep vertical analysis is both unnecessary and irrelevant since what one is comparing is the pattern of differing systems whose functions are, as between themselves, identical. Indeed this temptation can infect not just the 'law' question but also the nature of the 'comparison'. The deep hermeneutical vertical approach is implicitly premised on the idea of *difference* since comparative cultural studies places great emphasis, *inter alia*, on time and place. One could not easily assume that third century Rome was culturally similar to twentieth century London. However comparing phenomena via causative, actional and functional schemes of intelligibility is very different. And so 'if we leave aside the topics which are heavily impressed by

¹¹⁴ Atias, *Épistémologie juridique*, above n 4, p 36.

¹¹⁵ See eg *Nouveau Code Pénal* art 121-3. See also D.48.8.14.

¹¹⁶ Berthelot, *L'intelligence du social*, above n 19, pp 62-3.

¹¹⁷ See eg D.9.2.30.3; cf *The Wagon Mound (No 1)* [1961] AC 388.

moral views or values, mainly to be found in family law and in the law of succession, and concentrate on those parts of private law which are relatively "unpolitical", we find that as a general rule developed nations answer the needs of legal business in the same way or in a very similar way'.¹¹⁸ The functional method, along with the causative and actional schemes, lead inexorably towards a comparative methodology based on a *praesumptio similitudinis*, 'a presumption that the practical results are similar'.¹¹⁹ The deep hermeneutical approach, not surprisingly, will lead to quite the opposite methodological presumption. Social science epistemology suggests that this fundamental schism between schools of comparative lawyers results from differing schemes of intelligibility, from a horizontal (cause) and (or) circular scheme (rules and concepts as system) as opposed to a deep vertical analysis.

9. COMPARATIVE LAW AS A STRUCTURAL EXERCISE

Can the epistemological positions on each side of this schism be reconciled? At one level the response is, and ought to be, a negative one. However if one applies to this schism the dialectical scheme of intelligibility it would seem that opposition and contradiction is a fundamental aspect of knowledge. It is to consider a phenomenon (A) as a moment in a future stage (B) and thus can be expressed as A and non-A→B. The Zweigert and Kötz functional method on the one hand, and the Legrand hermeneutical scheme on the other (A and non-A→B), are simply stages for a future position (B) where the contradiction will reveal itself as unreal.

Berthelot himself identifies problems with this dialectical scheme as to whether it is a genuine epistemological model. As he says, the difficulty consists in actually grasping the internal processes at work; if this cannot be done then the scheme becomes simply descriptive.¹²⁰ Nevertheless Legrand perhaps offers a means by which some kind of reconciliation could be developed, if not between himself and the methods advocated by Zweigert and Kötz, then at least between a circular and vertical approach. In defining what he means by *mentalité* Professor Legrand says it is a matter of cognitive structures; and the 'essential key for an appreciation of a legal culture lies in an unravelling of the cognitive structure that characterises that culture'.¹²¹ The job of the comparatist is, according to this thesis, to focus upon these structures within any given culture 'and, more specifically, on the epistemological foundations of that cognitive structure'. For it 'is this epistemological substratum which best epitomises ... the legal *mentalité*

¹¹⁸ Zweigert & Kötz, above n 29, p 40.

¹¹⁹ Above n 21.

¹²⁰ Berthelot, *L'intelligence du social*, above n 19, p 82.

¹²¹ Legrand, 'European Legal Systems are not Converging', above n 8, p 60.

(the collective mental programme), or the interiorised legal culture'.¹²² Referring to Lévi-Strauss, Legrand talks of bringing to light these 'deep structures of legal rationality'¹²³ which in effect means that, beneath the surface rules (signifier), there lies a set of deep structures that act as the signified. In other words, the deep vertical hermeneutical approach, when it gets to the required depth, will encounter a set of structures which by definition, or at least by Berthelot's definition, form a scheme of intelligibility, that is to say the structural scheme.

According to Berthelot, the structural scheme is characterised by elements that are inserted into a system of oppositions where objects, properties and relations 'become signs, elements of a system operating as a code'.¹²⁴ In such a code one term (A) takes its signification in comparison with other terms within the system (B, C, D) which are in opposition to it. Natural language is, of course, the paradigm example of a closed structural code and it is no accident that structuralism as a theory of knowledge has its roots in the work of linguistics.¹²⁵ But codes can be much more simple: a set of traffic lights based on the opposition between 'green light' and 'red light' is as much a structural code as any complex language system.¹²⁶ When applied to law the structural scheme manifests itself in a number of ways and at a number of levels. Clearly the idea of law as a closed system consisting of rules and concepts expressed in language allows it to be analysed in terms of opposition between the various legal notions. Thus in the great European codes, structural forms of law *par excellence*, real rights (A) for example gain their significance only in opposition to personal rights (B); moveable property (C), to give another example, can be understood only in relation to immovable things (D). The law of obligations (A) has little or no meaning in isolation from its opposing category, the law of property (B) and these two categories, when taken together as the foundation for the generic notion of 'private law' (C), can be opposed to the category of 'public law' (D).¹²⁷

This kind of structuralism has its immediate roots in the dialectical and hermeneutical methods of the medieval Glossators. As Professor Carhasse has observed:

In the 12th century, the scientific method in use in all branches of knowledge—scholasticism—was at the base of classification. But there were for sure jurists who practised this art in the most systematic way. In the schools, the students were invited to learn lists of words or concepts presented in contrasting

¹²² *Ibid.*

¹²³ *Ibid.*, p. 61.

¹²⁴ Berthelot, *L'intelligence du social*, above n. 19, p. 70.

¹²⁵ J. Piaget, *Le structuralisme* 11th ed (Presses Universitaires de France, 1996), pp. 63–81.

¹²⁶ Berthelot, *L'intelligence du social*, above n. 19, p. 70.

¹²⁷ See further G. Samuel, 'Classification of Obligations and the Impact of Constructivist Epistemologies', (1997) 17 *Legal Studies* 448.

couples and in an alternative method (either ... or ...): public/private, general/special, common/particular, absolute/relative, moveable (property)/immovable, paternal/maternal, personal (goods)/community (goods) etc. They were the famous *distictiones*, lists of which were circulating in ever more expanded length, then some systematic collections where the terminological 'pairs' were presented in the form of rhyming verse—this, of course, to facilitate the memorisation of them. It is this old practice of the systematic distinction which explains the jurists' still current preference for the two-part plans, the best of which present clearly a complex law question.¹²⁸

Yet when the humanists, in supposedly reacting against these scholastic methods, switched the emphasis from the 'caselaw' texts of the *Digest* to the systematised 'nutshells' of the *Institutes*,¹²⁹ it might be said that they were moving to an even 'deeper' structure. A structure which had been identified by the classical Roman jurist Gaius in his student textbook, the *Institutes of Gaius*.¹³⁰ The 'institutional system', founded upon Gaius' *persona, res and actio*, took structuralism to the heart not just of legal classification but, more importantly, of factual analysis. For the notion of a 'person' and a 'thing', together with the idea of a legal remedy, are notions that have as much meaning for the sociologist and the economist as for the jurist. Gaius had in effect produced a structure that operates at one and the same time in the world of law and in the world of fact and the importance of this structure was that it was capable of acting as the 'scientific' object of law. Gaius, to use a modern scientific idea, had fashioned a model of virtual fact. He had provided the 'bricks' by which lawyers could construct their own juridical worlds.¹³¹

Are these 'bricks', or institutions, the means by which legal *mentalités* are constructed? Professor Legrand asserts that for the civil law tradition the institutional system lies at the very foundation of its epistemological structure. 'When the Romanist jurist carries the argument from fact to rule', he says, 'he inevitably passes through this Gaian classification of legal subjects, legal objects and legal remedies'.¹³² It is this structure which defines the civilian mentality and it is a structure to be found in all the European civil codes.¹³³ The common lawyer, on the other hand, does not, according

¹²⁸ J.-M. Carhasse, *Introduction historique au droit* (Presses Universitaires de France, 1998), pp. 160–1.

¹²⁹ Cf. A. Watson, 'The Importance of "Nutshells"', (1994) 42 *American Journal of Comparative Law* 1.

¹³⁰ On which see P. Stein, *The Character and Influence of the Roman Civil Law* (London, Hambledon, 1988), pp. 73–82.

¹³¹ The expression is taken from O. Kahn-Freund; see his Introduction to K. Renner, *The Institutions of Private Law and Their Social Functions* (Routledge & Kegan Paul, 1949; trans. Schwarzschild, A; reprint 1976), p. 6.

¹³² Legrand, *droit compare*, above n. 5, p. 92.

¹³³ Stein, above n. 130.

to Legrand, recognise himself through this Gaian classification. The judicial decision is, in the eyes of the common lawyer, not a matter of asking *quid juris* but a question of *quid facti*; and thus the French jurist, never really uncomfortable in any legal system influenced by Roman law, will not feel *chez nous* in English law.¹³⁴ The common lawyer, seemingly, does not pass from fact to law through the institutional structure, but 'reserves for thought the liberty of losing itself and transforming itself in its meeting with its object—something which does not allow for the primacy of logical coherence'.¹³⁵ Now it is certainly true that the common law has never reached, if one thinks in terms of Blanché's epistemological stages of science, a deductive and axiomatic level and this goes some way in explaining the absence not just of civil codes but of any significant codification movement founded upon ideas from the *mos geometricus*. The English have no need of axiomatic structures. Nevertheless it can be asked if, deep within the love of facts, there are structures at work.¹³⁶ As has already been observed, the concrete might well be nothing more than the abstract rendered familiar through usage and while common lawyers may function closer to 'actual' facts than the modern civilian these facts may still be 'virtual' in that they are an abstract model of reality.

If this is so, then the comparatist may well be in a position to compare structures. Yet how might the structures used by common lawyers differ from those employed by the civilian jurists? One possible response, already suggested elsewhere, is that the common lawyer does make use of the Gaian structure founded upon the three institutions of *persona*, *res* and *actio* but in a way that transgresses the 'axiomatic' model developed by the civilians.¹³⁷ For example, the common lawyer (or more precisely perhaps the Chancery lawyer) is quite happy to use the proprietary relationship between *persona* and *res* as the basis for a claim against a sum of money; the claimant can assert, in short, that the money in another's bank account is owned by the claimant and should be handed over for that reason alone.¹³⁸ This kind of institutional claim is unthinkable in the Romanist systems because money is generic, and consumable, rather than specific and non-consumable; consequently it can be reclaimed only through the law of obligations.¹³⁹ Of course it is possible to assert that this type of claim is 'unthinkable' to civilians only because they classify money in a different way than common lawyers.¹⁴⁰ The problem, it might be said, is not so much institutional as

one simply involving a reaction to an ambiguous 'fact'. However two points need to be made here. The first concerns the relationship between fact and the institutional system. Categorising money as a generic *res* goes some way in illustrating, once again, how law, like other sciences, uses as its object virtual rather than actual fact. Money is the same in England and in France at the level of actual fact but not at the level of legal (virtual) fact. Secondly, on closer examination of the whole notion of tracing, the legal structure turns out to be much more complex since remedial and substantive ideas interrelate in a way that is different from the interrelation in Romanist thinking. At common law (rather than equity) a person can assert, it would seem, a proprietary claim to a debt on the basis of a substantive right *in rem*, that is to say on the basis that a debt is not only an obligation but a form of property.¹⁴¹ Yet the actual *actio*, an action for money had and received, is strictly *in personam*.¹⁴² In short, in the common law tradition, one can base an *actio in personam* on a *ius in rem*, just as one can assert, as a 1991 case illustrates, a claim *in rem* on the basis of a *ius in personam*.¹⁴³

A very similar pattern emerges in relation to another 'axiomatic' distinction in the civil law, the dichotomy between public and private law. At the historical and substantive levels the distinction is very difficult, if not impossible, to find in common law systems; the 'private' law of contract, tort, unjust enrichment and property applies equally to all *personae*, public as well as private. And, as Professor Oliver has highlighted recently, even if one can now talk of an independent Administrative Law in England and Wales, this law is largely based on ideas and principles taken from 'private' law.¹⁴⁴ The distinction, she says, is meaningless. However, despite the force in Oliver's arguments, it cannot be asserted that the distinction between public and private law has no formal existence in the common law tradition. At the level of remedies the distinction between a claim for debt, damages and certain equitable remedies has to be distinguished, as a matter of procedure, from an action for judicial review.¹⁴⁵ Moreover, even in an ordinary damages claim, the courts do differentiate between claims against 'private' persons or bodies, on the one hand, and public organs, such as local authorities and the police, on the other.¹⁴⁶ The distinction can, on occasions, be important in relation to plaintiffs: certain public bodies do not,

¹³⁴ Legrand, *droit compare*, above n 5, p 93.

¹³⁵ *Ibid*, p 95.

¹³⁶ See eg G Samuel, 'Roman Law and Modern Capitalism', (1984) 4 *Legal Studies* 185; G Samuel, 'Epistemology and Legal Institutions', [1991] *International Journal for the Semiotics of Law* 309.

¹³⁷ Samuel, *Law of Obligations*, above n 101, pp 523–59.

¹³⁸ *Ibid*, pp 129–33.

¹³⁹ See further G Samuel, 'Comparative Law and the Legal Mind', (2001) 21 *Legal Studies* 444.

¹⁴⁰ Money was a consumable item since it could be used only by spending: D.7.5.5.1.

¹⁴¹ This point was particularly well brought out in Lord Denning's judgment in *Beswick v Beswick* [1966] ch 538. He was of course overruled by the House of Lords ([1968] AC 58), but the point seems to have been re-established by Lord Goff in *Lipkin Gorman v Karpanale Ltd* [1991] 2 AC 548.

¹⁴² Above n 141.

¹⁴³ Above n 141.

¹⁴⁴ D Oliver, 'The Human Rights Act and Public Law/Private Law Divides', [2000] *European Human Rights Law Review* 343.

¹⁴⁵ See generally *O'Reilly v Mackman* [1983] 2 AC 237.

¹⁴⁶ See eg *Stovin v Wise* [1996] AC 923.

for example, have the same right to sue in defamation as private or commercial claimants.¹⁴⁷

10. COMPARING SYMMETRIES

All this is, as Professor Legrand recognises, very strange when viewed from the 'axiomatic' structure of the codes where rights *in rem* and rights *in personam*, and public and private law, are strictly separated both at the substantive and the remedial levels.¹⁴⁸ The question, however, is whether there is in this strangeness a structural thinking that is so different that comparison between the two traditions is, epistemologically, impossible. As suggested, it is possible to say that the difference, which undoubtedly exists, is not a difference founded in the existence in one system of an institutional structure and its absence in the other system. The difference is one of symmetry. In the civil law system, thanks both to a long history of academic legal science and to a legislature which has ordained via the codes a fixed pattern of institutional thinking, there is a symmetry that cannot be transgressed. A claim cannot, for example, be real and personal at one and the same time. In the common law, in contrast, the symmetry of the institutional structure can be transgressed; institutional patterns can be manipulated in ways sometimes unthinkable to the Romanist. For example, a litigation dispute can, in substance, be one located within the *ius publicum* relationship between individual and the state while at the same time the actual remedial claim is one belonging to the *ius privatum*.¹⁴⁹ Thus a claim for money owed pursuant to an employment relationship that is entirely public, rather than contractual, in its legal foundation may, at the level of the remedy, be entirely private in form. A more complex example can be found in the area where equity, remedies, tort and property meet. In one case, now admittedly rendered obsolete by statute, a number of artists and their record companies were granted an injunction against a person who had been making illegal ('pirated') recordings of live performances by the artists. Because of a technicality the injunction could not be based upon a breach of statutory duty in the law of tort, despite the criminal nature of the behaviour. Nevertheless the Court of Appeal granted the injunction on the basis that it was the role of equity to protect property rights and artists had a 'property right' in their live performances.¹⁵⁰ A similar intermixing of conceptual ideas has been identified recently by

¹⁴⁷ *Derbyshire CC v Times Newspapers* [1993] AC 534.

¹⁴⁸ Legrand, *droit compare*, above n 5, pp 94–5.

¹⁴⁹ See eg *Roy v Kensington & Chelsea & Westminster Family Practitioner Committee* [1992] 1 AC 624.

¹⁵⁰ *Ex parte Island Records* [1978] ch 122.

Professor Waddams in his analysis of a famous nineteenth century litigation dispute also involving the world of music.¹⁵¹

In an 'axiomatic' institutional system this kind conceptual intermixing of ideas is much more difficult, if not on occasions impossible. The idea that an artist might be granted a remedy on the basis that he or she is the 'owner' of a live performance would create 'logical' difficulties since the civilian would want to know how such a proprietary relationship could exist between a person and a 'thing' as ephemeral as a live performance. Can one 'enjoy' and 'dispose' of such a *res* as required by Article 544 of the *Code civil*? Of course, this is not to say that the civilian would be lost for any suitable conceptual analysis. The French lawyer could well arrive at the conclusion that a live performance by a musical artist is part of the artist's actual person; it is an invasion of a personality right rather than a property right.¹⁵² Nevertheless the point to be made is that the civil law's institutional structure is founded upon the conceptual device of a 'right' (*droit subjectif*) and it is the code and not the remedy that defines these rights. The whole system functions at a single level, or perhaps one might say in a 'flat' two-dimensional world, in as much as it is a structure that has as its foundational element the *droit subjectif*. The common law, in contrast, is able to be more complex, institutionally speaking, in that it is a structure that operates in at least three dimensions; it can in one dimension operate with rights while, in another (third) dimension, create or contradict, the right in issue by use of the institution of the remedy together with the concepts, such as an 'interest', that attaches to this institution. Thus, in one case, a third party to a contract was held to have an interest capable of recognition by the law of actions even although, at the level of the law of things, the party had no rights.¹⁵³

The key, therefore, is the pattern of institutional structures rather than the actual existence of an institutional model in one system and absence in another. To assert this, however, is not to contradict the thesis of Professor Legrand about the need for a 'deep' hermeneutical analysis of legal cultures. Rather, it is to argue that differences between the civil and the common law traditions are to be found in the symmetry of institutional thinking. In one system the pattern of the relationships between persons and persons and between persons and things, together perhaps with the relationship between person and the state (as legal institution), creates a normative structure that leads in turn to certain general types of 'virtual' fact situations. One thinks of the general pattern of liability to be found in Article 1384 of the *Code civil* where liability can be incurred as a result of

¹⁵¹ SM Waddams, 'Joanna Wagner and the Rival Opera Houses', (2001) 117 *Law Quarterly Review* 431.

¹⁵² A Sérioux, *Les Personnes* (Presses Universitaires de France, 1992), p 70.

¹⁵³ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

damage done by a thing under the control of the defendant. This structural pattern means that each time there is an accident involving some object—an escalator or an exploding bottle of lemonade for example—the French jurist has the means by which he or she can immediately think in terms of liability without fault.¹⁵⁴ This pattern is not impossible in the common law. However because of a liability system traditionally based on a list of forms of action the pattern of liability is much more 'compartmentalised'.¹⁵⁵ The English mind does not immediately turn towards some abstracted *res*, moving from there to some abstracted 'control' relationship with an abstracted *persona*. It asks, instead, what type of thing, and what class of defendant (and perhaps claimant), are involved and any normative pattern might well be dependent upon differentiating between a dangerous animal and a dangerous item of ordinance.¹⁵⁶ Thus while it might seem odd to a civilian that the actual place where an injury occurs can act as a determining factor between liability and non-liability, it is not at all bizarre to a mind which distinguishes between different kinds of dogs before deciding whether the keeper of the animal is to be responsible for the dog's behaviour.¹⁵⁷ All the same, it would be dangerous to generalise and to assert that the common lawyer is always more 'nominalistic' (methodological individualism) in the analysis of facts while the civilian is more 'universalist' (holistic). The common lawyer might distinguish between a tiger and an artillery shell for the purposes of liability but might not distinguish between a dwelling house and a munitions factory.

Legrand is, then, right to identify the Gaian scheme as the foundational model in the civil law when it comes to an understanding of the movement between fact and law.¹⁵⁸ But this identification should not be used to imply that institutional structures are absent in the common law; they are simply more complex. This is partly because the institutions of *persona* and *res* are too abstract to act in themselves as focal points—the common lawyer often prefers more specific items—and partly because the still active role of the *actio* has helped create a third dimension in the epistemological institutional model in which the Gaian symmetry can be transgressed. A proprietary remedy does not necessarily, as we have seen, require the invasion of a strict proprietary right.¹⁵⁹ The common law lacks 'logic' because it can create institutional structures that, according to civilian science, it should not be able to do.

The common lawyer is free to do all of this for a range of reasons. The most immediate reason is of course the absence of codes with their

fixed symmetries. However this absence of an imposed pattern simply allows the history of legal thought in the common law tradition to continue to exert its influence. Lists of remedies and causes of action dominate the textual surface of the judgments.¹⁶⁰ Hermeneutically speaking these lists are signifiers for a complex institutional structure that, as in the civil law, act as the means of translating facts into law. The point is important to stress because one of the lessons that law can take from epistemological thinking in the sciences is the notion of virtual facts. What the institutional structure is doing is something more than merely translating actual fact into legal institutional patterns; the *persona*, *res* and *actio* structure is instrumental in turning actual fact into 'virtual' fact. The epistemological importance, then, of the Gaian system is not just to be found in the way it organises the law; its fundamental role is to be found in the way it organises fact. The common law thus appears more complex, more 'exotic' as one civilian has put it,¹⁶¹ because its institutional symmetry is far more complex thanks to a much more active law of actions, itself the result of typical fact situations. What the common law can do is to create more complex virtual facts than the civil law because its lists of actions contain many more 'exotic' distinctions than are to be found in the codes. In addition, as Michael Lobban has shown, the strong emphasis on procedural structures in the history of the common law allowed, perhaps ironically, rather greater freedom when it came to substantive legal reasoning.¹⁶² English judges were never constrained, thanks to the absence of a strong *corps de professeurs*, by a legal science dominated, during the Enlightenment at least, by the influence of logic and mathematics. This meant that 'exotic' distinctions could be carried into the heart of legal reasoning with the effect that even when the distinctions between various forms of action gradually became blurred thanks to the growth of general theories of liability based on contract and fault they nevertheless survived within the reasoning structures.¹⁶³ For example, distinctions between direct and indirect damage, between acts and words, between different kinds of things, between different classes of parties, can be kept alive within the duty of care question.¹⁶⁴

The obvious conclusion to be drawn here, for the European comparatist, is the danger of thinking that harmonisation of law can be achieved through the production of European codes. Such codes would simply act as a superficial structure. Much more useful is harmonisation through a deep

¹⁵⁴ Malaurie & Aynès, above n° 191.

¹⁵⁵ On which see Samuel, *Law of Obligations*, above n 101, pp 27–30.

¹⁵⁶ See eg *Read v J Lyons & Co* [1947] AC 156.

¹⁵⁷ See eg *Curis v Betts* [1990] 1 WLR 459.

¹⁵⁸ Legrand, *droit compare*, above n 5, p 92.

¹⁵⁹ See recently *Manchester Airport Plc v Dutton* [2000] 1 QB 133.

¹⁶⁰ See in particular B Rudden, 'Tortiles', (1991–2) 677 *Tulane Civil Law Forum* 105.

¹⁶¹ N Rouland, *Introduction historique au droit* (Presses Universitaires de France, 1998), p 306.

¹⁶² Lobban, above n 87, pp 90–8.

¹⁶³ D Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999), pp 294–302.

¹⁶⁴ *Ibid.*, pp 188–95.

understanding of epistemological structures and how they relate to institutional elements and how these elements, in turn, relate to actual fact. Why is money a generic and consumable *res* in one scheme of thought and a specific and non-consumable thing in another scheme of thought? Why is a live performance capable of being a 'thing' in one scheme but not in another? Why is a spillage of oil to be treated differently from a spillage of sewage? As Legrand indicates, a vertical approach is the only means of discovering the deep structures that determine these surface differences.

11. SOCIAL SCIENCES AND LAW

It is in relation to these deep structures that epistemological work in other disciplines has its relevance for law. Yet, speaking generally and by way of some concluding observations, what does this work mean for comparative law? What, in short, are the main lessons that epistemology in the sciences and in the social sciences can usefully give to comparative law? Several comparative conclusions can be tentatively asserted. First, comparative methodology framed entirely around the functional method is far too restrictive and can easily result, as Legrand demonstrates, in a comparative enterprise that is, essentially, superficial. To escape from this restricted methodological vision, work by theorists like Berthelot in the social sciences is invaluable. Not only does he articulate a number of schemes of intelligibility alternative to the functional analysis, but his schemes can act as a means by which functionalism in comparative law might be harmonised, in a sophisticated way, with the deep hermeneutical approach advocated by Legrand. In addition, Berthelot's schemes are invaluable for understanding legal reasoning in general. This aspect has not, admittedly, been examined in great depth within this present contribution.¹⁶⁵ Yet one need think only of the methods associated with statutory interpretation, in relation to those used in the analysis of caselaw problems, to appreciate how hermeneutics and, say, a causal analysis are different epistemological models. Again the methods of the Glossators in relation to those of the Humanists or the Pandectists can be categorised and analysed through the Berthelot schemes. Social science epistemology is more than just useful to the comparatist; it is essential to any serious comparative law research.

None of this is to assert, however, that Berthelot's schemes are to be accepted uncritically. There is a range of problems, some of which the author himself is only too aware.¹⁶⁶ Nevertheless they can, for the jurist, and in particular the comparatist, act as a starting point for a deeper

¹⁶⁵ But see Samuel, *Epistemology and Method in Law*, above r. 13, pp 295-334.

¹⁶⁶ See generally Berthelot, 'Programmes, paradigmes etc.' in Berthelot, *Épistémologie*, pp 457-519.

reflection on method and on knowledge in social science. Indeed, once such deeper reflection is embarked upon it may well be that the jurist will in turn be able to make a critical contribution to social science epistemology. The jurist might well be able to show, for example, how the methods of the Glossators interweaved the various schemes of intelligibility in ways not fully appreciated by the sociological theorist. Berthelot's work might, in other words, encourage participation by the comparatist in intellectual projects that transcend law.

Secondly, epistemology of science has been useful in understanding the 'object' of legal 'science'. This is the old problem, again alluded to by Legrand, of *adaequatio rei et intellectus*;¹⁶⁷ the idea that legal science is a discourse that has as its object actual factual situations is to misunderstand, fundamentally, legal thought. The importance of the Gaian institutional system is that it functions as much within the world of fact as within the world of law and it is this dual role that endows it with its capacity to create virtual facts. Lawyers, like scientists, do not work directly on reality but construct rationalised models of this reality; and it is these models that become the 'objects' of legal discourse. Such models might seem absent in the common law given its apparent obsession with the specific rather than the generic. Yet such a conclusion is arguably wrong; the models of fact upon which the common lawyers work are as 'virtual' as those constructed by the civilian, although it might, as this contribution has suggested, be possible to talk in terms of degrees of 'virtuality'. Legal method might appear to be a matter of categorising facts, identifying appropriate legal source materials and applying these appropriate laws to facts; in truth, epistemologically, the methodology is very much more complex. When viewed from the position of comparative law, one might well say that the real, and most difficult, work of the comparatist is not to compare laws as such; it is to compare 'facts'. More specifically it is to compare how different virtual fact models are constructed and deconstructed within different systems. To the extent that the functional approach encourages a focus on fact, it can be said that the method has much to commend it. The danger, however, is that functionalism can so easily make wrong assumptions about the nature of facts themselves.

A third epistemological contribution from outside law that might prove useful to law is the contribution that emphasises the importance of the history of a science. If one wants to understand the *mentalité* of a legal system in the Legrand sense of the term (deep cognitive structures), then history offers a good means of access since it can identify the elements which have contributed to the formation of any science. However care must be taken here because one is not talking of a history of events as such; the emphasis is on the history of ideas. This means that the objects of this epistemological

¹⁶⁷ Legrand, *droit compare*, above n 5, p 87.

approach to history are not concrete discoveries but the 'genealogy of "categories"' which have successively made up the objects of [the] science'.¹⁶⁸ One is looking at 'an *internal movement of concepts*'.¹⁶⁹ The scheme of Robert Blanché is an important contribution to law in as much as it provides a model which charts the progress of mentalities in the various legal traditions. Teasingly, perhaps, it leaves the present state of this history in an ambiguous situation. With the failure of the *mos geometricus*, is there a retreat into some former stage or is there a progression towards some new, fifth stage? This progression point has, to an extent, been mirrored in the social sciences in general; with the decline of the grand theories associated with modernism, theorists have talked of a 'post-modern' era. Whatever the label—post-modern or post-axiomatic—the point that emerges is that comparative lawyers cannot now be so certain as to what constitutes legal knowledge. There is, in other words, a real and genuine ambiguity as to what constitutes 'law' and this is something that ought to be of concern to those comparatists seeking ever greater harmonisation between different legal traditions. Can this be achieved by a device—codes—whose origins are rooted in epistemological stages where the main characteristic was a certainty as to what constituted legal knowledge?

One temptation might be to label this new fifth stage as 'hermeneutical'. Law is about, and only about, interpretation and thus linguistic propositions (rules and principles) act merely as signifiers. The question here, however, is one that focuses on the signified: what do rules and principles signify? For some legal theorists it is a question of 'rights' where the role of the judge is analogous to an author involved in a literary project;¹⁷⁰ for a comparatist like Legrand, however, it is a matter of going beyond legal concepts and into the deep structures of a cultural mentality. Hermeneutics thus becomes an ambiguous scheme of intelligibility in as much as its structure, signifier and signified, is a formal abstraction whose effectiveness in any given situation depends upon what is assumed as the signified. To this extent it cannot be assumed to be either superior or inferior as an epistemological device to other schemes such as the functional approach. Its main epistemological force is that it can act as an alternative knowledge scheme. However this idea of an 'alternative' is in itself epistemologically important. Knowledge in the social sciences is not absolute in the sense that one 'model' or 'paradigm' is superior to others; it is the possibility of the alternative that acts as the epistemological force and this is no less true of law than it is for sociology or economics. The problem, therefore, with the Zweigert and Kötz insistence on the functional method is that it fails to emphasise the importance of the methodological alternative in

¹⁶⁸ Granger, above n 16, p 114.

¹⁶⁹ *Ibid.*, p 115.

¹⁷⁰ R Dworkin, *Law's Empire* (London Fontana, 1986), pp 228–38.

comparative law. Or, put another way, the problem with comparatists who give primacy to a single scheme is that they are, ironically, denying to the comparative law student the one method that ought to characterise comparative law. They are suppressing, rather than emphasising, the importance of the alternative as a knowledge device in its own right.

12. CONCLUDING REMARK

Perhaps, then, the fifth stage ought not to be the era of the hermeneutical. What social science epistemology suggests is that social scientists have entered the stage where knowledge is a question of alternative models whose individual epistemological value is always contingent.¹⁷¹ This leads to two fundamental questions to be posed by all scientists, using 'science' here in both its restricted and wider meaning. Can this phenomenon be modelled or schematised? And, if the answer is positive, is there an alternative model or scheme that can be applied to the phenomenon? Care, of course, must be taken in the application of these questions since the dichotomy between model and phenomenon is at best a delicate one. Yet once one appreciates that it is the very existence of an alternative that is one of the essential epistemological factors, then the *intellectus et res* element itself becomes one of the objects of the alternative. The danger here, of course, is that knowledge can so easily be seen as relative; Darwin's theory is simply an alternative to those to be found in the Bible. Epistemology, it would seem, must abandon any normative claims. Berthelot's response is to argue for a third way to be found in the 'logic of confrontation'.¹⁷² This confrontation is not, however, just a recourse to the dialectical scheme since the object of the confrontation is not as such a process on the way towards a new and higher element or factor. It is, as Legrand rightly recognises, an epistemology of *difference*. For every 'virtual' fact situation created out of the institutional model there is always an alternative situation to be constructed out of a differently constructed institutional pattern. For every definition of law there is an alternative. For every thesis in favour of harmonisation there is an opposite alternative. And for every identified and asserted comparative law method there is always an alternative. The present epistemological stage cannot, therefore, be labelled hermeneutical since, thanks to social science theory, there is always an alternative scheme of intelligibility.

Where does this leave both epistemology and harmonisation of law in Europe? One answer, of course, is that epistemology can be used as a starting point for either camp in the harmonisation debate and this has two

¹⁷¹ Berthelot, 'Les sciences du social', in Berthelot, *Épistémologie*, pp 203–65.

¹⁷² *Ibid.*, p 260.

particular dangers. First, those comparatists who emphasise the possibility and value of harmonisation are in danger of simplifying legal knowledge, most notably when such harmonisation is advocated via codification. Secondly, however, those like Professor Legrand who are extremely sceptical about a European Civil Code¹⁷³ are in danger of slipping, via culturalism, from epistemology towards, if not ideology and myth (although this is a danger), psychological explanations that end up as incomparable with the institutional structures identified as being central to civilian rationality. English law, or say English morality, becomes difficult if not impossible to explain simply because it does not use rationalised and abstract structures. Too great a difference, in other words, courts the danger of undermining the very process of confrontation. Or, to put it another way, rationality versus irrationality can lead one into a zone where knowledge becomes stultified because the process of confrontation, of recourse to the alternative scheme of intelligibility, finds itself outside the very rationalities upon which the notion of epistemology itself is founded. Harmonisation, or non-harmonisation, will then take place as a result of arguments that owe more to ideology than epistemology.

¹⁷³P Legrand, 'Against a European Civil Code', (1997) 60 *Modern Law Review* 44.