COMPARATIVE LAW AND JURISPRUDENCE

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THIS article will propose that comparative law as a discipline should now consolidate itself as an independent subject with its own internal structure. This is not to say that its teachers and professors should abandon, or at least fully abandon, their "gift of freedom".[1] Nor is it to confuse comparative law with other more specific law subjects which may be taught in a comparative way.[2] What this article will propose is that comparative law be envisaged as a subject basically operating at two levels (or consisting of two parts). At one level it consists of the now considerable literature on the subject, including of course the work which envisages the subject in terms of legal families. At another level, however, comparative law should be envisaged as being concerned with the theoretical underpinning of the terms "comparative" and "law". This part, in other words, would deal with these terms as instruments of knowledge. What is it to have knowledge of "law"? And what contribution does "comparison" make to this epistemological question?

However, before examining in more depth these two questions, it may be valuable to look more generally, by way of introduction, at the relationship between comparative law and jurisprudence (Part I) and, in particular, at some of the weaknesses of comparative law when it comes to theories of legal knowledge (Part II). Alternatives will then be considered and it will be argued that the approach which ought to be adopted is that of the scientific model (Part III). Knowledge is about structures rather than the isolation and interpretation of the language of rules. Accordingly it will be proposed that comparative law should take as its object the internal structures of legal knowledge—structures capable of being isolated through a history of categories, institutions and ideas rather than events—and that it is these structures which, in turn, constitute, "social realities" (Part IV). By way of conclusion some observations will be made on how these structural aspects of legal knowledge can determine the form of legal mentalities (Part V).

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1. Cf. O. Kahn-Freund, "Comparative Law as an Academic Subject" (1966) 82 L.Q.R. 40, 41.

2. Cf. B. Markesinis, "Comparative Law—A Subject in Search of an Audience" (1990) 53 M.L.R. 1, 21.

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I. INTRODUCTION

THE current debate about whether or not European legal systems are converging, a debate which embraces and underpins the practical question concerning the desirability of a European Civil Code, is remarkable in that it is being conducted, if conducted is a suitable term, largely outside any direct input by Anglo-American legal theorists.[3] Yet if there was ever a contemporary practical project in need of an input by jurisprudents, then EU harmonisation of private law is one such a project. As Pierre Legrand, a comparatist, is arguably demonstrating, the whole question is being debated, if not within a theoretical vacuum, then within a context which is lacking any theoretical underpinning. According to this author, "a commitment to theory is paramount if comparative legal studies is to take place in any credible form".[4] This lack of interest on the part of Anglo-American theorists to engage with the EU harmonisation issue is, in some ways, surprising given that one of the main "jobs" of jurisprudence as a subject is to provide an epistemology of law.[5] For it is just this epistemological dimension that is missing from comparative law and the EU harmonisation debate itself.[6] Accordingly, the purpose of this article is, first of all, to investigate in a little more depth the relationship, or perhaps lack of relationship, between comparative law and jurisprudence. A second purpose is to suggest, if only briefly and obliquely, a programme of comparative law founded upon an epistemological orientation. The aim here is to bring together comparative legal studies, legal theory, legal reasoning and aspects of European legal history so as to produce a comparative law core which might act as both a module in jurisprudence on legal epistemology and a module in comparative law on theory.

The study of comparative law in the context of a course on jurisprudence is, if the contemporary textbooks in English are any guide, a rare phenomenon. This, perhaps, is both surprising and unsurprising. It is surprising in that theories about the nature and purpose of law, if they are to claim any universal validity, must encompass all systems of law and, in turn, this suggests that a detailed study of at least a range of systems would appear a prerequisite. Certainly courses on jurisprudence encompass a range of theorists from a number of different systems, but the study of such theorists does not in itself amount to a study of the relevant legal system. Chapters on Hans Kelsen are not prefaced by any historical analysis of the German and Austrian models of law, just as chapters on Ronald

3. For details of the debate see B. De Witte, "The Convergence Debate" (1996) 3 M.J. 105. See in particular P. Legrand, "European Legal Systems are Not Converging" (1996) 45 I.C.L.Q. 52, "Against a European Civil Code" (1997) 60 M.L.R. 44.

4. P. Legrand, "How to Compare Now" (1996) 16 L.S. 232, 238. See also "Comparative Legal Studies and a Commitment to Theory" (1995) 58 M.L.R. 262.

5. M. D. A. Freeman, *Lloyd's Introduction to Jurisprudence* (6th edn, 1994), p.6.

6. Legrand, all articles cited, *supra* nn.3 and 4.

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Dworkin are not preceded by a discussion of the common law tradition. Yet it is at least arguable that neither the work of Kelsen nor that of Dworkin can properly be understood without a sophisticated appreciation of the respective systems in which these jurists were raised. Dworkin's chain novel analysis,[7] to give just one example, could well appear unscientific to some jurists, particularly to those from the tradition still marked by the *mos geometricus*, within the civil law world.[8] Equally it has to be asked whether the norm theory of Kelsen can properly be appreciated by any Anglo-American lawyer without a knowledge of the German habit of distinguishing between rules and norms.[9]

The absence of any comparative study of law in jurisprudence courses is, in other ways, unsurprising. Leaving aside the constraints of timetable and subject matter, it could well be argued that theory ought to transcend both history and particularity; the object of a course on jurisprudence is not any particular legal system, but a selection of theories. The analysis of legal systems and particular aspects of any given system is for other courses. Indeed, the aim of a law degree programme is that the programme itself will add up to more than the sum of its parts; and so in an ideal programme the underpinning of legal theory with a requisite knowledge of legal systems will be achieved by a properly balanced curriculum. Moreover, the study of theory in isolation will benefit all other parts of this curriculum and thus to argue that jurisprudence ought to be rooted in whole or in part in comparative legal studies is to misunderstand the nature of legal education as expressed in a degree programme.

The idea that legal theories should be the main, if not unique, object of a course in jurisprudence is, therefore, a defensible position. However, there are a number of specific difficulties in relation to such a course. First, the notion of jurisprudence itself is vague and this means that a quite wide range of material is capable of acting as the object of such a course.[10] Here comparison with civil law thinking is helpful in that there is no real equivalent as such to "jurisprudence" (indeed in French *jurisprudence* means case law).[11] Instead there are several separate, although admittedly interrelating, areas of legal philosophy, general theory of law (*théorie générale du droit*), sociology of law and legal epistemology.[12] In addition, the idea of legal science (*scientia juris*), sometimes seen as a jurisprudential issue,

7. R. Dworkin, *Law's Empire* (1986), pp.228–238.

8. Although Dworkin's law as interpretation would be viewed sympathetically within the context of what is now being called "new legal hermeneutics": Manuel Calvo García, *Los fundamentos del método jurídico: una revisión crítica* (1994), pp.167–215.

9. See e.g. F. Müller, *Juristische Methodik* (1993).

10. On the definition of "jurisprudence", in its Anglo-American sense, see Freeman *op. cit. supra* n.5, at pp.1–20.

11. J. Bell, "Introduction: Legal Theory and the Anglo-Saxon World", in M. Van Hoecke, *What is Legal Theory?* (1985), pp.11–25.

12. J.-L. Bergel, *Théorie générale du droit* (2nd edn, 1989), pp.3–5.

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conveys a quite different idea from the English word "jurisprudence". Legal science is a notion that encompasses positive law organised in such a way that it rationalises, scientifically, not just an empirical object but also itself.[13] To study the civil codes is, then, to indulge in what many believe to be a scientific exercise.[14] In the common law tradition subjects such as criminology and sociology of law are indeed often seen as separate topics from jurisprudence in as much as they are frequently given their own place in the university curriculum. However, little time is ever spent distinguishing legal philosophy, which the Continental jurist sees as being preoccupied with values, from *théorie générale*, a subject encompassing the basic concepts, methods, classification schemes and instruments of law. "General theory of law starts out from the observation of legal systems, from the research into their permanent elements, from their intellectual articulations", writes Jean-Louis Bergel, "so as to extract concepts, techniques, main intellectual constructions and so on." Legal philosophy, for its part, "is more concerned with philosophy than law" in that it "tends to strip law of its technical covering under the pretext of better reaching the essence so as to discover the metalegal signification, the values that it has to pursue, the sense in relation to a total vision of man and the world".[15]

II. COMPARATIVE LAW AND THEORIES OF LEGAL KNOWLEDGE

EQUALLY, the contribution that comparative law, to date, has made directly to legal philosophy is relatively limited for a number of reasons. First, because comparative lawyers have on the whole been more interested in the details of positive law than in the abstract questions of philosophy and this has meant that most comparatists have all started from similar assumptions about the nature of law itself. Microcomparison, according to Zweigert and Kötz, "has to do ... with the *rules* used to solve actual problems or particular conflicts of interests".[16] Even Watson, who raises a number of interesting and sceptical questions about comparative law, arrives at the conclusion that "the nature of Comparative Law is obvious, it can only be the investigation of legal *rules* and procedures not of one system in isolation but in harness with the examination of the equivalent rules and procedures in at least one other system".[17] Comparative law has, in other words, rarely challenged the legal theorists. Second, because comparative law as a subject in itself has made little headway over

13. P. Orianne, *Apprendre le droit: Eléments pour une pédagogie juridique* (1990), pp.73–76.
14. *Ibid.*
15. Bergel, *op. cit. supra* n.12, at p.4.
16. K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (2nd revd. edn, 1992), p.5 (emphasis added).
17. A. Watson, *Legal Transplants* (1974), p.2 (emphasis added). But see now P. Legrand, "The Impossibility of 'Legal Transplants' " (1997) 4 M.J. 111.

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the past century; it has often distinguished itself only rarely from courses devoted either to the study of foreign legal systems or to overviews of the major legal families of the world.[18] And even when it has focused on a particular area such as product liability, contract, administrative law or labour law, theoretical questions about comparative law have often tended to become lost in the details of the subject matter of the investigation. One might add, of course, that some comparatists have, in their turn, found legal theorists of little help to comparative law.[19] Nevertheless it could be argued that the fault lies just as much with the comparatist as with the legal theorist. Why have comparatists never developed comparative legal theory as a central area of their concern?

A third reason comparative law has made only a limited contribution to legal philosophy is because comparative law has found itself, when not bound to the details of positive legal subjects, closely associated with the history of legal systems.[20] And historical jurisprudence has been a school of legal theory that has not been at the cutting edge of jurisprudence in recent years.[21] Indeed some legal philosophers have manifested a profound distrust of legal history's ability to contribute directly to legal theory.[22] One can ask, however, why this lack of interest in the history of legal thought has not been challenged by comparatists. At the very least what the history of legal thought can illustrate is that notions such as a "right" are located in epistemological constructions that are both historically determined and structurally significant. For example, the relationship between the notions of a "right" and a "duty", united in the work of Hohfeld,[23] can be seen as much more complex when viewed from the position of a comparatist aware of the historical and legal relationship difference between *dominium* and *obligatio*.[24] Indeed even the ideological aspects of a "right"—its ability to act as the foundation of a political theory of individualism—can be better appreciated once it is realised that the whole institutional model of Roman law is as intimately involved with the old debate between nominalism and universalism as is, say, mathematics.[25] A comparative history of legal models can be a prelude to a history of the sub-structures of Western social thought in general.[26]

18. Watson, *idem*, p.4.
19. R. David, "Sources of Law", *International Encyclopedia of Comparative Law*, Vol.II, chap.3, para.391.
20. See e.g. Zweigert and Kötz, *op. cit. supra* n.16, at pp.76–122, 138–211.
21. P. Stein, "The Tasks of Historical Jurisprudence", in N. MacCormick and P. Birks (Eds), *The Legal Mind: Essays for Tony Honoré* (1986), pp.293 *et seq.*
22. See e.g. Dworkin, *op. cit. supra* n.7, at p.14.
23. W. N. Hohfeld, *Fundamental Legal Conceptions* (1919).
24. See e.g. R. Tuck, *Natural Rights Theories* (1979), pp.5–31.
25. See e.g. A. Laurent, *Histoire de l'individualisme* (1993), pp.21–24.
26. D. R. Kelley, "*Gaius Noster*: Substructures of Western Social Thought" (1979) 84 American Historical Rev. 619.

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The weaknesses with respect to comparative law are not as such the result of an absence of literature since there have been some significant and influential contributions to legal knowledge by comparativists. Indeed some of these contributions have ranked among the most elegant and insightful of legal writing, and this tradition remains one of the striking features of the *International Encyclopedia of Comparative Law*. The sheer scholarship to be found in, say, Professor Treitel's comparative account of contract remedies[27] is breathtaking and is matched only in its elegance by Zweigert's and Kötz's introductory work to comparative law and to the comparative law of obligations (translation by Tony Weir).[28] If *elegantia jurisprudentia* is a philosophical issue in itself, comparative law is truly the legal philosopher's stone.

Yet alongside the elegance there are some enduring weaknesses that have given rise to a parallel tradition in comparative legal writing that can at best be described as theoretically weak and at worst startlingly trivial. The weaknesses result from a number of factors of which, perhaps, the subject's search for legitimacy is one of the most problematic. The need to justify comparison in law by an appeal to its practical use can, as Rodolfo Sacco has noted, verge on the ridiculous. Is it really serious philosophy to imply that courses on comparative law would have had a civilising influence on Napoleon or those who took Europe into the two world wars?[29] And even when the practical thesis is not ridiculous, it can, as Legrand has so devastatingly shown,[30] often be just vacuous. No doubt the confusion between epistemological and social goals is a weakness that is inherent in the comparatist rather than in comparison, but appeals to theory, rather than to practice, have fared little better. The idea of an international *Rechtswissenschaft* as a legitimating goal for comparative law can so easily betray, not so much a wish for a knowledge of difference, but a desire for intellectual imperialism.[31] Other comparatists have tried to escape from this theoretical wasteland by turning their attention to the empirical or cultural underpinnings of legal systems in the hope of gaining insights into the functions of law or the values that they communicate. These approaches have proved more sophisticated in that they have at least escaped from legitimating theories focusing on legal formalism or upon trite humanitarian goals. But in terms of philosophy the logical difficulties of using empirical research as the basis for deriving philosophically normative ideas remain an obstacle. Just as historical jurisprudence seems today

27. G. Treitel, *Remedies for Breach of Contract* (1988).
28. Zweigert and Kötz, *op. cit. supra* n.16.
29. R. Sacco, "Legal Formants: A Dynamic Approach to Comparative Law" (1991) 39 A.J.C.L. 1, 2.
30. Legrand (1995), *op. cit. supra* n.4.
31. P. Legrand, *Comparatists-at-Law and the Contrarian Challenge* (Inaugural Lecture, University of Tilburg, 1995), p.4.

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incapable of providing a philosophy of law,[32] so comparative legal studies appears trapped within the confines either of legal history or of elegant exposition of positive laws.

Of course these limitations in outlook should surprise few since comparative lawyers often tend to be actively involved not just in the pursuit of knowledge of other legal systems, together with the linguistic demands that such pursuits require from the diligent researcher, but in the activities of mainstream national law as well. Indeed the good comparatist may even find the call of practice tempting on occasions.[33] A more compelling, if somewhat more modest, justification for comparative legal studies might, therefore, be found in the perspective it brings to problem-solving in case law and in legal translation. In turn it might be possible to move outward from these more focused positions towards a theory of comparative law that encompasses the details of practical reasoning and conceptual analysis within a broader perspective that sees law, for example, in terms of general theory[34]—yet a general theory that emphasises difference within, say, a "tradition as a process" framework.[35] Thus, while legal theory is concerned with the general definition of law in terms of a principal function, comparative law looks at the function of law within specific legal traditions and the way these functions are performed.[36] "Within such a view of law", writes Bell, "the central interplay between a community and its norms of conduct can be appreciated."[37]

One danger with this kind of bottom-up approach is that, in scientific terms, it tends to make use of concepts which fail to address legal knowledge itself. Professor Bell, for example, assumes that law is a question of "community" and "norms" with the result that his "tradition-as-function" notion runs the risk of failing to connect with more comprehensive paradigms about legal knowledge itself. As far as John Bell is concerned, the "activity of reading and interpreting ... texts is central to the activity of law, since they are the sources of applicable rules".[38] There is of course much truth in this observation about reading texts and it would be idle to ignore the importance of cultural tradition in legal comparison. However, in placing the emphasis on the axis between tradition and text the approach fails to connect with the construction of legal reality at the level

32. G. Samuel, "Science, Law and History: Historical Jurisprudence and Modern Legal Theory" (1990) 41 N.I.L.Q. 1.

33. See e.g. *White* v. *Jones* [1995] A.C. 207 where counsel for both parties included an eminent comparatist.

34. See e.g. Bergel, *op. cit. supra* n.12.

35. J. Bell, "Comparative Law and Legal Theory", in W. Krawietz, N. MacCormick and G. Henrik von Wright (Eds), *Prescriptive Formality and Normative Rationality in Modern Legal Systems: Festschrift for Robert Summers* (1995), pp.23–31.

36. *Idem*, p.31.

37. *Idem*, p.20.

38. *Idem*, p.26.

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of concept and fact. As the epistemologist Granger has emphasised, a better understanding of science "can be obtained only by the invention and organisation of new *concepts*, and not by recourse to images, subjective impressions or universalising myths".[39] For a theory dealing with human facts "is constantly menaced, if one is not careful, with becoming an ideology, substituting myths for concepts and prescriptions for descriptions".[40] Now in order to avoid impressions and myths the scientist must at all times construct models of fact and integrate these models into the construction of social reality itself. This is a different exercise from interpretation, which is largely ideological rather than epistemological.[41] Of course one can argue that law is not a science. But in abandoning the scientific method the legal theorist is in danger of concluding that all legal thought is ideological and such a conclusion would, arguably, be quite misleading.

If ideology becomes completely identified with epistemology, it will no longer be possible to make structural comparisons between legal systems. It will be impossible to show, for example, how differences of structural symmetry can lead French and English jurists to arrive at quite different conclusions with respect to the facts of cases such as *Read* v. *J. Lyons & Co.*[42] and *Dunne* v. *North Western Gas Board*.[43] Both these cases involved actions for personal injuries against organisations acting in a public interest capacity; in France it would have been unnecessary to prove fault, but in English law it was fatal. Of course the differences of result in each country can be explained, descriptively, in terms of rules. Or, put another way, the cases can all be reduced to symbolic knowledge, to rules or norms. Yet rules simply fail to show how the relationships between legal subject (*persona*) and the community are being construed quite differently in each country.[44] In France the emphasis is on the community as a *persona* with its own *intérêt général*; each time an individual citizen is damaged as a result of some activity in the public interest it is unjust, given the constitutional principle of equality, that it should be the individual who bears the cost of the activity.[45] In England, in contrast, a government body is seen simply as an ordinary *persona* with its own individual interest to protect; those who wish to protect themselves against the risks of activities should thus obtain private insurance cover and seek to shift the burden on to an actor only when the latter has behaved wrongfully.[46] Evidently there

39. G.-G. Granger, *La science et les sciences* (2nd edn, 1995), p.111.
40. *Idem*, p.99.
41. G.-G. Granger, *Essai d'une philosophie du style* (2nd edn, 1988), pp.276–277.
42. [1947] A.C. 156.
43. [1964] 2 Q.B. 806.
44. G. Samuel, *The Foundations of Legal Reasoning* (1994), pp.76–79.
45. L. Neville Brown and J. Bell, *French Administrative Law* (4th edn, 1993), p.184.
46. Samuel, *Foundations*, *supra* n.44, pp.78–79.

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is here a difference of ideology. But the ideology is being expressed through the symmetries and patterns of institutional constructions which use exactly the same elements and relations—legal *persona*, *res*, interest, *dominium*, *imperium*, and so on—in each legal system. As Kelley has stated, the fundamental division of law into *personae*, *res* and *actiones*—and the associated relations and concepts—"entailed not only moral priorities and a means of ordering reality but also a characteristic mode of perceiving, of construing, and potentially of controlling the social field".[47]

III. THE SCIENTIFIC MODEL

WORKING with cases would seem, then, to be one major object of attention. Yet however valuable the attraction of case law might prove to be to the dedicated comparatist, the fact is that comparative law remains plagued by the absence of any sustained theoretical reflection on the notion of comparison. What are the scientific goals of comparison in law? What is to be achieved, epistemologically, from comparing different courts, different cases, different legislative provisions, or whatever? What is the theoretical basis of comparative law as a discipline? What is actually being compared when lawyers engage in comparison?

Answers—and not always trite answers—to some of these questions are, it must be said, to be found. Thus one response is to stress the conceptual underpinning of a legal system which comes into play when one is attempting to translate a legal term from one system into another. It is these conceptual structures that need to be understood and compared before the term can successfully be translated at the level of language. Rayar, accordingly, stresses the vital role of comparative law in legal translation:[48]

> Without comparing legal systems, we would have no idea of the conceptual differences between systems and could not assess the usefulness of foreign terms as translations. The possible existence of a common ground (a "common sense") between the source language term and legal terms available in the target language needs to be established. I think of it as applied comparative law. It should be conducted at a systematic and conceptual level, as well as at the word level. Systematic comparison involves the structure and organization of a particular legal area. At the conceptual level, the difference in legal concepts, institutions and solutions is studied. It is not sufficient to study a system merely at the level of its terminology. Kisch has said it much more elegantly in French: "*La connaissance des termes, ou plutôt de leurs définitions, vous laisse dans l'ignorance par rapport au système, à la structure, à l'économie de la science*", adding: "*le droit étranger ne s'apprend*

47. D. R. Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (1990), p.49.

48. L. Rayar, "Translating Legal Texts: A Methodology" (Conference Paper, Euroforum, Apr. 1993).

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pas par l'étude d'un vocabulaire juridique." Or: one does not learn about foreign law by studying its legal vocabulary.

Another focal point for the comparatist is the actual solutions reached within any particular case. Thus Markesinis,[49] and others, for example Weir,[50] have demonstrated the insights that a comparative approach can elicit from the facts, reasoning and solutions of actual cases. Looking at case law problems in another system "can bring a deeper understanding of problems they face—perhaps even unexpected ideas for solving them".[51] Yet this type of observation, as valuable as it might be, rarely connects with any major theoretical issue either within law itself or with respect to legal education or philosophy in general. Comparative law rarely seems a necessary part of any methodological, historical or philosophical training in law, as indeed Markesinis himself recognises. He has called upon comparative lawyers to rethink their subject or to face an exodus of students to options like property, tax and human rights. "Of course," he adds, "many of these options can and do have a comparative dimension" and thus "in a strange sort of way the comparative method may have more of a future by penetrating other subjects than by trying to assert its own continued independence under the unconvincing title of comparative law".[52] Weir seems to have gone even further. In an otherwise perceptive piece on comparative contract law he specifically states that he has no theory to propound since it "is possible for us, like Hamlet, to tell a hawk from a handsaw, and to do so without a complete theory of aerial predators or an exhaustive inventory of the carpenter's toolbox".[53]

There are of course a number of difficulties with the anti-theory or commonsense view, the most obvious of which is that, despite the anti-theoretical stance, such a view is no less a statement of theory. Comparative law becomes law by intuition. It is, as Dworkin elegantly put it, to "say that judging is an art not a science, that the good judge blends analogy, craft, political wisdom, and a sense of his role into an intuitive decision, that he 'sees' law better than he can explain it".[54] Such a view is to reject serious legal theory as a fundamental aspect of comparative law. And such a rejection has, arguably, the effect of reducing comparative law to an enfeebled intellectual subject; for it will be deprived of any vehicle by which it can search for the epistemological relevance not just of "comparison" but equally of "law" itself. No doubt there are many happy with the intuition

49. Markesinis, *op. cit. supra* n.2.
50. T. Weir, "Contracts in Rome and England" (1992) 66 Tulane L.R. 1615.
51. Markesinis, *op. cit. supra* n.2, at p.21.
52. *Ibid.*
53. Weir, *op. cit. supra* n.50, at p.1616.
54. Dworkin, *op. cit. supra* n.7, at p.10.

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that enables them to tell a hawk from a handsaw. But there are serious academics, dare one say scientists, who do wish to know how and why the mind creates its symmetries and how patterns develop that allow for such instant recognition of objects. Furthermore, the rejection of theory can lead to the view that comparative law is nothing more or less than a methodology. As Legrand points out, to espouse such a view is simply to deny any substantive content to any comparative work on law; it is to deplete it of any potential instrumental function and to reduce it to being an adjunct of contract, property, public law, or whatever.[55]

IV. THE INTERNAL STRUCTURES OF LEGAL KNOWLEDGE

INSTEAD of comparative law as methodology, there is a need for comparative law as epistemology. Comparative law as a subject should have as its primary object knowledge of law. Such knowledge can be gained neither by an examination of a single legal system, since law transcends national systems, nor without comparison, for, as Rodolfo Sacco has stated, comparison begins at home. Comparison starts with making comparisons within one's own legal system:[56]

> It is one interpretation against another interpretation, either the interpretation of the professor against that of the court, or the interpretation of one professor against the interpretation of another professor, thus the approach of Maleville against that of Carbonnier, the perspective of von Tuhr against that of Larenz.

One is searching for "the structure of law".[57] This structure is not, however, a structure of rules. It is the structures that one uses to make sense of the world in which law applies. It is a matter of structuring the facts. What comparative law should have as its primary object are the models which can be used for constructing facts. This is why, from the position of legal science, the idea of "comparative-law-as-method" is untenable since the dichotomy between science and method is epistemologically dangerous. There is no science without method.[58] And what links the two is the model whose purpose is to relate the experience of the real world to an abstract scheme of elements and relations. Thus deduction (for example) as a method becomes explicable only when it relates to a structure whose transformations allow the discovery at one and the same time of general and particular propositions, together with solutions resulting from the transformations, within a framework where the direct study of all phenomena is impossible.[59] To paraphrase Granger, and others, the plan

55. Legrand (1995), *op. cit. supra* n.4, at p.264.
56. R. Sacco in P. Legrand, "Questions à Rodolfo Sacco" [4–1995] R.I.D.C. 943, 952.
57. *Idem*, p.944.
58. H. Barreau, *L'épistémologie* (3rd edn, 1995), p.51.
59. J. Piaget, *L'épistémologie génétique* (4th edn, 1988), p.103.

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that such scientific thought sets for itself is knowledge and the taking possession of an object of knowledge.[60] Such an object is not, as has been indicated already, the actual facts of the social world—for such facts cannot exist separately and they have sense only in relation to a pre-existing model. Nor is it simply the scheme of thought or structure, since that would make the science exclusively and hermetically the object of its own discourse (which, like mathematics, to an extent it is). The object of legal science is the model, and where comparative law has its role is in relation to such models.

In other words comparative law is part of legal science, using "science" to reflect a discourse that functions at one and the same time within "facts" and within the conceptual elements that make up the "science". And the goal of legal comparison as a science is "to know the differences existing between legal models, and to contribute to knowledge of these models".[61] No doubt legal models are different from scientific models—although of course the great codes were attempts to axiomatise legal knowledge in the manner of the *mos geometricus*, thus tying legal science not just to its own history but also to the history of science in general.[62] Yet what is undeniable is that from a methodological point of view legal knowledge can be characterised only by reference to a model—typically according to most legal philosophers a model of norms—which describes objects (norms, rules, relations, or whatever) which cannot be directly observed.[63] Law can exist, then, only as a scheme of knowledge that is a genealogy of categories and concepts which act as its object. Nevertheless, this scheme is not abstracted from fact. It functions both outside and inside the facts of litigation and it is this internal role that has arguably been neglected by both theorists and comparatists. What comparative law can do, through research into different models at different stages of development, is to help in the formation of a legal epistemology—that is to say, the distinguishing of a distinct science of law to act as the object of this epistemology—from all the neighbouring activities that have, to date, hindered such a development.[64] This, however, is not to resurrect the positivist paradigm; for this science of law is one that works within the facts. It is a science that organises and explains. It is a science integrated into the world of social facts in the same way as meteorology is integrated into the physical reality of weather.

Take, for example, the family. One can talk of the legal rules governing the construction of a family, the relationships of contract, cohabitation

60. G.-G. Granger, *La raison* (10th edn, 1993), p.58.
61. R. Sacco, *La comparaison juridique au service de la connaissance du droit* (1991), p.8.
62. R. Blanché, *L'épistémologie* (3rd edn, 1983), p.65.
63. V. Villa, *La science du droit* (1990), p.84.
64. C. Atias, *Épistémologie juridique* (1985), p.40.

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and filiation, and the regimes, or otherwise, of family property. But none of these rules is capable of constructing the family as a legal institution. This can be done only in terms of a structure between the individual parts and the whole. Families exist—and even Margaret Thatcher was forced to admit that although there is "no such thing as society", there "are individual men and women and there are families"[65]—because two or more people are living in relation to a fund of property which, even if (as in English law) nominally owned by individuals within the family unit, exists as family property. It is the structural relationship between *personae* and *res*—between the individuals and the family property—which creates the unit of the family. Once this unit is established other areas of the law are forced to confront it even although the family itself has no legal personality. Damages claims, for example, might attach only to the human person but the judges cannot escape the family.[66] Indeed even relationships which fall outside the traditional Christian rule-defined marriage, if they exhibit the same structure, force themselves upon the courts as a "family" (which the court may or may not confirm as a legal rule).[67] This structural key is what makes Roman law so important.[68] The Romans took legal thinking to new conceptual heights, not because they were good at formulating rules, but because they appreciated the nuances of structuring facts. They appreciated the dichotomy between "the 'one' in relation to the 'many' " and the whole in relation to its parts.[69]

Having shifted on to the structure of facts, the question thus becomes one of determining exactly what makes up the various models of legal knowledge and here one comes up against, not just the weaknesses of comparative law, but the weaknesses of legal theory.[70] Is knowledge of law knowledge of rules or, more metaphysically, norms? In other words, is legal knowledge propositional knowledge? Certainly if one believes the doctrine and the jurisprudence legal knowledge is almost exclusively a matter of rules and principles, written or unwritten. French jurists, for the most part, conceive of case law only in terms of the abstract rule.[71] It is not difficult to see why this assumption has become so persuasive since the notion of a legal rule can transcend all legal systems; the rule can act as the object of a general legal science which, in turn, is capable of acting as an

65. *Woman's Own*, 31 Oct. 1987.

66. See e.g. *Jackson* v. *Horizon Holidays Ltd* [1975] 1 W.L.R. 1468; Cass.civ. 19.2.1997, J.C.P. 28.5.97.22848 note Viney (see in particular the opinion of the Advocate General).

67. See recently *Fitzpatrick* v. *Sterling Housing Association Ltd* [1997] 4 All E.R. 991.

68. On which see Samuel, *op. cit. supra* n.44, at pp.35–37; G. Samuel and J. Rinkes, *Law of Obligations and Legal Remedies* (1996), pp.4–6.

69. H. F. Jolowicz, *Roman Foundations of Modern Law* (1957), p.134.

70. Samuel, *op. cit. supra* n.44, at pp.89–133.

71. See e.g. J.-L. Bergel, "Le processus de transformation des décisions de justice en normes juridiques" (1993) 18 Revue de la Recherche Juridique 1055. But cf. T. Ivainer, *L'interprétation des faits en droit* (1988).

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epistemological device for explaining the various sources of legal knowledge. Another, equally important, reason for the dominance of the rule model is to be found in the fact that both the science and the object of legal science can seemingly be reduced to propositional knowledge. Thus the symmetry of the civil codes, a symmetry inherited from Justinian's *Institutes*, is capable of being expressed, if only imperfectly, through a number of propositions which in turn act as the pillars of private law.

Take the fundamental relationship between subject (*persona*) and object (*res*). Ownership, although it seems not defined by the Romans themselves, is elegantly expressed as a proposition in Article 544 of the *Code civil*: "La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, ... " And even the Romans attempted to reduce the other key relationship, that is, the bond between two legal subjects, to a proposition; accordingly in Justinian's *Institutes* an obligation is defined as "iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura".[72] These statements can, evidently, be seen as rules.[73] And in addition they can be seen as organising propositions since they orientate legal thinking around two fundamental and symmetrical relationships. That is to say, they orientate thinking around the relationship between legal subject and legal object, relationships *in rem*, and the relationship between legal subject and legal subject, relationships *in personam*. Yet neither statement can in itself act as a complete form of legal knowledge since not only do these propositions depend, with respect to the information they are supposed to contain, upon each other—indeed upon other propositions within the legal system as well—but their very brevity as symbols means that they suffer from an acute loss of information. Thus Article 544 cannot function within a knowledge system that has no appreciation of the notion of "*un droit*" (*subjectif*) and the definition of an obligation is dependent upon the metaphor of a *iuris vinculum*. Moreover, the notion of an obligation, that is to say, a relationship *in personam*, has no meaning whatsoever outside the system of relations which also contains relations *in rem*. The idea of a *jus in rem* or a *jus in personam* is dependent, then, not just on the symbolic representation in terms of a linguistic proposition, but also on the notion of a system and on the idea of relationships between elements.[74] Does not the notion of a system transcend language?

Now a rule theorist might well argue that the notions of a right and of a system and its symmetry are contained, if not in the rule of ownership or

72. J.3.13pr.

73. Indeed the Romans themselves collected together legal maxims (*regulae juris*), although the first of such maxims denies that knowledge of law is to be found in the maxims: D.50.17.1. See generally P. Stein, *Regulae Iuris* (1966).

74. G. Samuel, "Classification of Obligations and the Impact of Constructivist Epistemologies" (1997) 17 L.S. 448.

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obligation itself, in other linguistic propositions that interrelate with this rule. Legal knowledge is thus a question of knowing the propositions and of developing the skill of interpretation, that is to say, of teasing out of the symbolic knowledge representation structure, which acts as the object of legal knowledge, all the hidden propositional knowledge. It is a matter of *scientia juris* and *ars hermeneutica*. The problem with this supposition is that it does not accord with the evidence. Certainly judges and jurists claim that legal solutions can be inferred from premises and such inferences are undoubtedly possible where the rule is founded on mathematics. Thus rules about speed limits can be applied to facts more or less by formal logic provided the means of evidence are reliable. If D was doing more than 50 miles per hour when a legal rule specifies such behaviour as an offence all that is required is reliable evidence that the minor premise, driving over 50 miles per hour, was true. However, only a limited amount of legal reasoning is of this nature. Most rules are not based upon mathematics but upon terms that are more or less vague, and when it comes to the application of these kinds of rules a quite different mental process is required. As Bergel has observed, "the reduction of law to equations is a myth" since it "comes up against insurmountable difficulties of method and against the objectives of every legal system"; for the "law is full of departures from logical solutions deduced from an axiom".[75] Legal reasoning is a matter of "philosophical, moral and technical choices" which are "the fruit of the constant arbitration between opposing interests".[76]

The question, of course, is how comparative law might contribute to this non-propositional knowledge. Now different approaches to liability can be reduced to rules—rules about the difference between public and private law, *non-cumul*, equality, and so on. But it is the pattern that determines the solution and not the rule. This point has been demonstrated elsewhere, in relation to cases such as *Esso* v. *Southport Corporation*[77] and *Photo Production* v. *Securicor*,[78] and so suffice it to say that, with regard to *Photo Production*, the moment one moves from a model emphasising the *iuris vinculum* between factory owner and security company (*persona–persona*) to a pattern consisting of two insurance companies and the relationship between insurance and building (*persona–res*) the whole normative question changes. Instead of asking who was at fault or who was in breach of promise, the question becomes one of risk. Which fire insurance company should bear the risk of this factory? A similar structural analysis can be made, as we have already suggested, with respect to a case like

75. Bergel, *op. cit. supra* n.12, at p.269.

76. *Idem*, p.270.

77. [1953] 3 W.L.R. 773 (QBD); [1954] 2 Q.B. 182 (CA); [1956] A.C. 218. Discussed Samuel, *op. cit. supra* n.44, at pp.199–202; Samuel and Rinkes, *op. cit. supra* n.68, at pp.21–24.

78. [1980] A.C. 827. Discussed Samuel, *idem*, pp.205–207; Samuel and Rinkes, *idem*, pp.126–127.

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Dunne v. *NW Gas Board*. The point that needs to be made here is that comparative law is a vehicle through which one can construct out of different legal systems different, and alternative, models. These models of structural relations are, as some cognitive scientists are beginning to appreciate, at least as important in the reasoning process as the traditional methods associated with the epistemological thesis that knowledge is propositional. The models represent a form of reasoning consisting "non pas de symboles mais d'images, d'états affectifs, de schèmes, de prototypes souvent intraduisibles par une expression linguistique".[79] Yet when a translation into rules is possible, "elle s'accompagne d'une perte d'information, de dimension ... considérable".[80] Comparative law is a subject that should be looking beyond the rules and into the structures which make up the dimensions of legal problem-solving. How do systems construct their facts? What institutional elements come into play in car accident cases or disputes over the right to a valuable brooch found by a passer-by on land belonging to another? How do systems handle the problem of illegal recording of live musical performances? Of course one can study the rules. But these rules are two-dimensional; they fail to express the way facts are envisaged. For example, with respect to the illegal recording of a live performance, is this a law of persons problem or one within the law of things? Is it an infringement of a right of personality or a right of property? These structural and isomorphic problems can be rule-described, but they cannot in an *a priori* sense be rule-envisaged.[81] Legal theory has been largely silent on these issues and as a result has little to contribute to contemporary debates about harmonisation and integration of legal systems within the European Union.

These weaknesses need much more elaboration of course. But it might be worth emphasising once again that the weaknesses to be found in both legal theory and comparative law might well have a common source. Neither subject can answer, in a practical way, the question of how one gets from abstract rule to concrete solution.[82] Consequently, however depressing the present relationship between comparative law and legal theory, it might not be unrealistically optimistic to think that the two subjects have a necessary future together. Legal theory and comparative law can combine to take legal thinking beyond rules. This is not to downgrade rules; they may well remain one starting point. However, other focal points such as institutions (persons, things and actions), interests, legal relations (ownership and obligations, for example) and concepts (rights and duties) are

79. J. Delacour, *Le cerveau et l'esprit* (1995), p.35.
80. *Idem*, pp.35–36.
81. W. Bechtel and A. Abrahamsen, *Connectionism and the Mind* (1991), p.227.
82. C. Atias, *Épistémologie du droit* (1994), p.119.

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equally, perhaps more, important. What comparative law can do, on the one hand, is to compare the different symmetries between these non-rule focal points. And to compare them within the organisation and categorisation of the facts. What legal theory can do, on the other hand, is to provide an epistemological context such as systems thinking within which the institutional symmetries can be theorised.[83] Such an intermixing has the capacity not just of enriching the understanding of legal knowledge in ways that can take thinking beyond the two-dimensional world of symbolic propositional knowledge. It has, more importantly, the capacity of providing a context in which some of the current issues in comparative law—in particular of course the harmonisation debate—can be carried forward to a new level of sophistication.[84]

V. CONCLUSION—LEGAL MENTALITIES

COMPARATIVE law as a subject in itself ought, then, to operate at two levels. At the first level it should, evidently, provide the opportunity to study the literature specifically devoted to the history, aims, functions, methods, strengths and weaknesses of comparative law. This literature may vary in quality, as Legrand has indicated, but it is significant and deserves to be treated as an object of knowledge.[85] At a second level, however, comparative law should provide the opportunity to study the internal structures of legal knowledge. And it is here that jurisprudence, together with the history of legal theory, can make a major contribution. What are the elements that legal knowledge can employ in order to make sense of facts and how do the different patterns and symmetries—knowledge that can be described as non-symbolic—give rise ultimately to knowledge that can be described as symbolic (rules, principles and (or) norms)? This is the epistemological function of comparative law which will require not just a sophisticated appreciation of legal taxonomy and its relationship to the construction of knowledge systems,[86] but equally an appreciation of how the elements and relationships that make up the knowledge systems function within sets of facts. It is with respect to this internal structuralisation of "social realities" that comparative legal studies has its major contribution to make.

Such internal structures are vital to the harmonisation debate. The rigidity of the separation between relations *in rem* and *in personam* in German legal thinking needs to be matched with the fluidity and flexibility of real and personal relations in English law. The idea, for example, that the law of unjust enrichment in the common law might straddle the prop-

83. See e.g. M. Van de Kerchove and F. Ost, *Le droit ou les paradoxes du jeu* (1992).

84. See e.g. G. Samuel, "The Impact of European Integration on Private Law—A Comment" (1998) 18 LS 167.

85. For an overview see e.g. Zweigert and Kötz, *op. cit. supra* n.16, at pp.1–75.

86. Cf. Samuel, *op. cit. supra* n.74,.

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erty and obligations divide is something that appears incompatible with the civilian structures. Yet such incompatibility does not arise as such from a set of two incompatible internal structures; both common lawyers (partly perhaps as a result of the older analytical jurisprudence textbooks) and civil lawyers recognise the *in rem* and *in personam* relations. Rather, it is the dimensions in which the various relations function that gives rise to problems. In continuing to recognise the *actio* (remedy) as a structural element in the model that operates in the construction of legal facts, the common lawyers are able to work in, so to speak, an extra dimension. They can motivate an *in personam* remedy (debt) by reference to, in another dimension, a real relation (ownership).[87] It is not, then, the relationships or elements within the model functioning as a system that differ as between English and German law. It is the shape and structure of the model and its dimensional possibilities.

Analogous possibilities exist with respect, say, to the interaction of ECJ decisions with those of national courts. As Christian Joerges has suggested, such interactions and interrelations might take place on the basis of structural elements such as the *persona* and interest.[88] This is not to say that convergence and harmonisation will suddenly become a possibility as soon as this epistemological similarity between Western legal systems is recognised. The point to be made is that one has an ontological foundation upon which the legal theorists can work. Comparative law will have escaped from the epistemological sterility of the rule thesis to arrive at a new stage where complex systems can be used to model the differences of *mentalité* between national legal cultures. Highly complex patterns of damage, interests, legal objects, legal subjects, legal remedies, legal relations, and so on can be constructed within factual situations so as to produce abstract patterns, in the legal world, of ownership, obligations, rights and duties. Comparative law will have combined with legal theory to produce an institutional structure of legal knowledge that uses elements that model facts and patterns that model *mentalité*.

None of this is to suggest that comparative law can of itself help fashion a legal *philosophy*. That is an aspect of jurisprudence whose roots stretch well beyond the boundaries of law as a phenomenon. Yet, as Blanché has noted, theoretical reflection on a science does not necessarily have to be philosophic; such reflection can focus on what the science actually says in respect of the object upon which the science is based and upon the system of signs it employs to explain the object and to predict future movements and outcomes.[89] One might add, given that legal discourse creates both its

87. Samuel and Rinkes, *op. cit. supra* n.68, at pp.354–356.

88. C. Joerges, "The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective" [1997] E.L.J. 378.

89. Blanché, *op. cit. supra* n.62, at p.120.

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object (facts) and its own science (law),[90] that the reflection can focus upon the system of signs employed to construct and to deconstruct the factual situations which form the apparent "object" of legal science. Comparative law can, accordingly, make its contribution at the level of legal discourse. It can show how the language of rules need not be the sole means of access to legal knowledge or the unique means of expression. Put another way, comparative law might be restyled "comparative legal facts" so as to bring out the constructive nature of this discourse within "social reality". Instead of thinking in terms of the way the cultural context of law shapes the *mentalité* of the legal system, it might be better to try to perceive how the structures of law can help shape the very cultural and ideological context in which the law operates.

This is not to deny the importance of the cultural tradition with respect to any particular system of law. The point to be made is that legal structures are, in their symmetries and dimensions, more complex than the rule thesis implies. How one envisages a relationship between *persona* and *actio*, for example, cannot simply be envisaged via a single two-dimensional model since such a relation involves, if only indirectly, at one and the same time *in rem* and (or) *in personam* relations as well. The jurist constructs the factual model using the institutions and institutional relationships of law. French law thus utilises the *persona* and *res* symmetry where the common law thinks in terms of the *persona* and *actio* (causes of action); such a difference of emphasis helps explain why one system thinks in terms of strict liability while the other relies upon fault.[91]

In addition, such institutional models can connect with theory. An emphasis on *dominium* rather than *imperium* can obviously stress the individual rather than the group, just as the reduction of all relations to the paradigm of the *iuris vinculum* between two *personae* can suggest liberalism rather than egalitarianism. At a more sophisticated level the shift from the language of the rule to the symmetry of the fact construction can effect a shift from the process of justification to the process of discovery.[92] Legal reasoning can thus be expanded to include what cognitive psychologists call non-symbolic knowledge.[93] Such non-symbolic knowledge may not in itself act as a sufficient basis for a theory of legal justification or argumentation. But it can explain the ontological premises upon which such justification or argumentation is based. And it is here that comparative law can make its contribution to jurisprudence. It can help construct a range of

90. Atias, *op. cit. supra* n.64, at pp.31–36.

91. Samuel and Rinkes, *op. cit. supra* n.68, at pp.24–26.

92. Cf. B. Anderson, "The Case for Re-Investigating 'The Process of Discovery' " (1995) 8 Ratio Juris 330.

93. Delacour, *op. cit. supra* n.79, at pp.34–42.

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different "ontological" models through the institutional deconstruction, and reconstruction, of case law and doctrinal analysis from a range of different legal systems. Such deconstruction and reconstruction are of value to the rule theorist as well since "concepts are the units with which one constructs propositions: they are the conceptual atoms".[94] In natural science one can talk of a construction being "ontologically badly constituted" when a conceptual property is attributed to a physical object itself.[95] In law, however, the difficulty of distinguishing between science and object means that it is almost impossible for legal science to be in a constant state of comparison with its own object. What law can do, instead, is to compare itself with alternative legal *mentalités* which ought at least make it sensitive to the strength and weakness of its own constructs and conceptualisations. Comparative law, in other words, can go far in testing each system's constructions of its perceived social reality.

94. M. Bunge, *Épistémologie* (1983, trans. H. Donadieu), p.53.
95. *Idem*, p.57.

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