A Conversation on Comparative Law

The British Association of Comparative Law (BACL) commissioned this exchange, which unfolded via e-mail from May to July 2020. Geoffrey Samuel is Professor of Law Emeritus at Kent Law School and Pierre Legrand teaches comparative law at the Sorbonne.

Geoffrey Samuel (GS): Pierre, you may well remember when we were colleagues at Lancaster in the early 1990s that we were attempting to construct a full comparative law advanced module for returning Erasmus students. We reflected on the difficulty of doing this because of the paucity of academic literature. There was, at that time, just Zweigert & Kötz plus a few articles. Many existing courses on comparative law in other universities were often introductions to another system or, worse, a kind of legal tourism; or they consisted of an examination of some positive area of law such as contract and looked for 'better solutions', etc. Clearly, the position has changed since then and there is an abundance of more theory-orientated literature (thanks in part to your own contributions). Or at least there is enough of such literature to support a sophisticated advanced course. And there is even a dedicated journal. But do you think there still remain important gaps in the literature? Are there still areas in comparative legal studies that remain under-researched or ignored?

Pierre Legrand (PL): If I may, I will address your questions obliquely. Indeed, when Lancaster University afforded me the possibility to leave Canada for good and the huge opportunity to work in a most enriching academic environment — the three years that I spent at Lancaster in fact permanently changed my intellectual life — at that time, then, the field of comparative law was in thrall to Zweigert & Kötz's textbook. To frame the matter in familiar language — more accurately, in familiar North-American language — Zweigert & Kötz's textbook was the only game in town. I am talking about the situation that prevailed in 1992 or 1993. Zweigert & Kötz's second English edition had been released a few years earlier in 1987 — the book was then newly in the hands of a major academic publisher — while the third English edition was in preparation and would appear a few years later in 1998. So, if we focus on 1992 or 1993 — the two full calendar years that we spent as colleagues at Lancaster — it is fair to say, I think, that Zweigert & Kötz's book was then exercising unchallenged epistemic supremacy in comparative law, at least in most European countries. (I would leave to one side a country like the United States, where there obtains a 'cases & materials' ethos and where textbooks hold limited sway, certainly in the law-school environment, and I would also except a country like France, where comparatists either did not know or did not want to know of Zweigert & Kötz's existence — to this day, Zweigert & Kötz's German textbook, although it has appeared in English, Italian, Japanese, and Russian, to name these four languages only, has never been translated into French, an excellent example of academic chauvinism of the worst kind because the idea, of course, was to confer a sort of intellectual immunity to René David's *Grands systèmes* model, one of the better known instances of the deeply objectionable 'legal tourism' that you indicate in your question.)

Although I do not want to digress, I have long argued that Zweigert & Kötz's epistemology is excruciatingly indigent to the point, really, of profound embarrassment. Perhaps I can produce an anecdote to make my case concretely. In 2000, Roderick Munday and I

convened a conference in Cambridge to address the full gammut of theoretical issues in comparative law. We invited Lawrence Rosen, the distinguished Princeton anthropologist and Islamicist, to close the five-day event with a keynote presentation. Rosen, who also taught law at Columbia, proved to be a conference organizer's dream keynote speaker. Throughout the sessions, he was consistently assiduous, relentlessly engaged, and robustly committed to the discussion of the theoretical issues that were being debated. As it happens, Rosen did not know about Zweigert & Kötz when he arrived in Cambridge. Since their book kept being mentioned by the various speakers, however, he promptly took an interest. Whether he borrowed someone's copy or made his way to Heffer's (as it then was) to purchase his own, I cannot recall. But he somehow came into contact with the book during the conference. In the published version of his keynote, Rosen proceeded to quote a passage from Zweigert & Kötz's that he had come across. It went like this (I am reading from the proceedings, which I happen to have at hand on my laptop) — so this is Zweigert & Kötz: 'Convinced, perhaps from living by the sea, that life will controvert the best-laid plans, the Englishman is more at home with case-law proceeding cautiously step-by-step than with legislation that purports to lay down rules for the solution of all future cases'. So, there: Zweigert & Kötz on the common law tradition! And then, Rosen produced his retort: 'I had thought if comparative studies had demonstrated anything it was that the perverse attachment by the British to the common law was, in fact, due to a surfeit of marmite at a formative stage of youth, combined with the restricted blood flow to the brain that comes from wearing rubber wellies and fingerless gloves!'. Embarrassment indeed: there was the leading textbook in my field, in the field in which I toiled, being ridiculed by a leading US anthropologist. Evidently, Rosen saw Zweigert & Kötz as intellectual midgets. No doubt exaggeratedly, and perhaps without any good reason whatsoever, I felt tainted by association. Was I not a player in the field of comparative law — was I not one of those comparatists having effectively allowed Zweigert & Kötz's book to be entrusted with epistemic authority? Did I not bear part of the blame for the fact that this inadequate book was effectively exercising epistemic governance over comparative law? Was I not somehow complicit? Could I not have been more critical? Should I not have offered more resistance? Hence, my earlier remark about embarrassment. Be that as it may, such was the state of play within comparative law in the early 1990s.

Now, what of the theoretical developments over the last three decades or so, in effect your question's main focus? In this respect, I am moved to make three observations, which I will try to keep as brief as I can. First, in a paper that he published in Austria towards the end of 2016, Günter Frankenberg writes that Zweigert & Kötz's text, 'even though in dire need of revision, still sets the standard' within comparative law. I agree with this appreciation, which I claim is empirically demonstrable. Secondly, there is, at this juncture, one work, and one work only, that can challenge Zweigert & Kötz's 'textbook supremacy' within comparative law and that is Uwe Kischel's *Comparative Law* (I refer specifically to the English edition that was published in early 2019). It is not that I think Kischel's argument warrants the status of challenger or that it deserves to assume epistemic governance within comparative law, not for a moment. Still, on account of all manner of epistemic reasons that I do not want to investigate here, Kischel's is the only book that can aspire to displace Zweigert & Kötz's text. Crucially, I think, Kischel heaps massive praise on Zweigert & Kötz and indeed endorses the corner-stone of their theoretical edifice 'without reservation' (I insist that these are Kischel's own words). Thirdly, comparative constitutional law, whose

recent emergence is nothing short of spectacular, certainly in quantitative terms (hardly a month seems to pass without a new monograph or two fresh collections of essays being advertised), comparative constitutional law, then, has been said — insightfully, in my opinion — largely to consist in variations on Zweigert & Kötz's theoretical model. As you know well, Zweigert & Kötz extol the virtues of functional analysis, and comparative constitutional law has been styled 'neo-functionalist'. Again, this interpretation, I hold, can be empirically supported.

Against the background of these three remarks, I am moved to paraphrase Marx: 'A spectre is haunting comparative law...'. Otherwise said, comparative law, envisaged as a field, has not managed to relinquish its epistemic yoke and has not broken the bonds of its epistemic subservience to *Rechtsvergleichung als Rechtswissenschaft*. And, of course, this is a massive problem, a gigantic epistemic predicament. Recall Rosen! Having said all of this, it remains, to be sure, that I can identify publications released in the course of the past quarter-of-a-century or so that do comparative law proud. Teemu Ruskola's *Legal Orientalism* leaps to mind, a sophisticated and brave comparative legal study. I mentioned Lawrence Rosen: his *Law As Culture* stands as comparative legal research of the first order.

GS: This point about Zweigert & Kötz is interesting, and in a sense has caught me off guard. I suppose my thoughts were that progressive comparative lawyers (so to speak) had abandoned the textbook approach and had turned to the various edited books of papers (like the one you edited with Roderick Munday and the one you published in France) and journal articles, plus of course books like Ruskola's. However, on using the new edition of the *Oxford Handbook on Comparative Law* (there were some references that I needed to update), I was astonished to read this from Reinhard Zimmermann: 'Nothing, so far, has fundamentally challenged the conventional "method" of comparative law, as set out in the standard works such as Zweigert and Kötz' (p. 594). I find this astonishing because Zimmermann is supposedly one of the editors of this book and thus, presumably, had read all the contributions, including a new one for the second edition on 'New Directions in Comparative Law' by Mathias Siems. Now, whatever one may think of this new chapter, Siems makes a number of statements such as 'Today, comparatists who go beyond traditional methods use a variety of alternative approaches' (p. 857) and 'this chapter has shown that the field of comparative law has become more diverse' (p. 873). As a Professor at the EUI, one would have thought that Siems' view might have warranted some attention by the editors. Ugo Mattei also says, in his chapter in the *Handbook*, 'Traditional comparative law can no longer be considered unambiguously functionalist' (p. 815). Zimmermann may well detest these new developments but completely to ignore them endorses, I suppose, your point. Moreover, the chapter in the *Handbook* on the 'Development of Comparative Law in Germany, Switzerland and Austria' — in particular its section on 'Methodological Foundations' (pp. 72-73) — needs to be read to be believed. One might add that Professor Fauvarque-Cosson's extraordinary remarks that 'it is impossible to be both a comparatist and a good French lawyer' and that it is 'counterproductive to insist that French comparatists become interdisciplinary specialists or social scientists' (p. 50) remains in the second edition. I find this equally astonishing as it is patently not true now, even if it was at the time of the first edition. If these are the best that serious (or supposedly serious) jurists can write on methodology, then thank heavens Professor Rosen never read the *Handbook* (or maybe he has?).

So, to sum up on this point, I guess that I am being very naive to think that comparative legal studies is going through something of a 'revolution' or evolution. I was of the view that courses were becoming more like the ones offered by my colleague Dr Simone Glanert at Kent or Professor Jacco Bomhoff's at the LSE. And I know that Professor Maurice Adams offers much more than Zweigert & Kötz at Tilburg. I imagine that, for example, Catherine Valcke, Annelise Riles and Mitch Lasser are equally doing something beyond the Zweigert & Kötz approach.

But be that as it may, I actually think the problem is wider than the state of the Zweigert & Kötz-influenced comparative law literature. It is a problem with the juristic literature as a whole. Now, it must be said at once that there is much excellent stuff coming out of law faculties, especially over the last 20 or 30 years (encouraged, in the UK, by the research assessment exercises which discouraged black-letter doctrinal writing). Much of this good stuff is, as one might expect, interdisciplinary. And there is some challenging theory material with regard to, say, legal pluralism, although much still needs to be done in this area.

Yet there is equally much writing, especially coming out of the Oxford faculty and out of other common law faculties (especially in Australia, Hong Kong and Singapore) influenced by Oxford, that is highly reactionary. Take these recent critical observations from Dan Priel: 'doctrinal scholars …. see themselves as "practical" scholars who aim to help the courts reach better decisions, and they do that by a careful reading of the cases seeking to derive from them a coherent set of rules and principles already found in them, a task for which there is no need for any serious knowledge of history, economics, psychology or philosophy' ('Two Forms of Formalism', in Robertson & Goudkamp (eds), *Form and Substance in the Law of Obligations*, 2019, p. 165). Given this situation in many traditional Western law schools, I do not see how any serious comparative legal studies can be pursued. Traditional doctrinal law provides no epistemological frameworks, save a Zweigert & Kötz-type functionalism, through which new knowledge can be elicited from comparison. And even the Zweigert & Kötz functional approach is far too simplistic and insensitive to the importance of paradigm/programme orientations, to do much more than provide imaginary 'better solutions' (uninformed, of course, by any knowledge of the social sciences).

Indeed, it is not just an indifference to the social sciences. There is real hostility on occasions. Take this example from the professor of comparative law (!!) at Oxford. She describes American Realism as the 'jurisprudence of despair' leading to 'hopeless nihilism' and quotes Peter Birks' utter dismissal of Jerome Frank and his successors. She even blames the origin of this Realism on Von Jhering and his *Interressenjurisprudenz* (see 'Substance Over Form', in Robertson & Goudkamp, *supra*, pp. 60-61). Well, I have to ask if either of these jurists has ever read Frank? I'm sure his book is not above criticism, but I can find little in it that would drive a social scientist to despair. It seems to me that he made fairly obvious sociological observations and simply encouraged jurists to stop being so childish about their discipline. Given such hostility towards American Realism — a highly important movement in the history of legal thought even if it displayed flaws — I do not see how comparative law can truly flourish in many law schools. As Professor Fauvarque-Cosson indicates in the *Oxford Handbook*, it is just too difficult. Yet, there are real challenges out there for jurists. The *Doing Business* reports are arguably dangerous nonsense in terms of the

methodological and epistemological assumptions — can causation really be so simple? — and so France in particular has need of some sophisticated comparatists capable of taking on such reports. But if they come to the issue trained only in the way Priel and Fauvarque-Cosson describe, it will be World Bank 1, France 0.

I guess, then, that what is needed is a complete rethinking of legal education. So, here is the question. If comparatists were to participate in such a rethinking, what would or should they suggest? (In reflecting on this question it is worth keeping in mind that a law qualifying degree in England and Wales is much more flexible now than it ever was and so the excuse that there is 'not room' for much innovation is no longer valid.)

PL: I think it is one of comparative law's most unfortunate and damaging predicaments that comparatists will have initially trained as national jurists. No doubt an impolitic position to behold, it has long been clear to me that most jurists, certainly in continental Europe, where I am based, will quite simply never be in a position to engage in what I shall style, economically, 'good' comparative law on account of the epistemic impediments that they embody by way of their socialization and their institutionalization into their local law. The verb 'embody' is key: one interiorizes one's socialization and one's institutionalization, one makes these processes and their outcomes a constitutive part of one's body, a part of one. You can reach the same conclusion by playing with the verb 'incorporate' (I have in mind 'in-corporate'). And I think the more dogmatic, the more rigid one's socialization and institutionalization into law, the least likely it is that one can ever meaningfully surmount these epistemic strictures to 'good' scholarly effect — hence my earlier point about continental Europe, where socialization and institutionalization processes into law tend to be very dogmatic and very rigid indeed. Pierre Legendre talks about 'dressage', and he could not have been more perspicuous. (I know: I live in France.) Take the German reaction to Jerome Frank's book that you quote. If I may say so, there is my point exactly! You can see being displayed, so to speak, a basic inability to liberate oneself from the epistemic framework within which one has been framed into law. The German jurist you mention may have moved to another country, work in another language, whatever: in primordial ways, this individual remains the German jurist that local socialization and institutionalization processes have made her. She is what she has been. Incidentally, the fact of this epistemic persistence completely mocks Zweigert & Kötz's calls for comparisons to be disinterested, to be objective, to feature neutral concepts — and whatever other epistemic nonsense they peddle along these lines. If you are going to assess, say, a US monograph such as Frank's, it matters — it matters hugely — whether you became a jurist in Berlin or in Melbourne. Literally — and it is no exaggeration to couch the matter in these terms — Frank's monograph will be one book for the Berlin-educated jurist and it will be a different book for the Melbourne-educated jurist. There is more than one monograph, if you will (although there is obviously less than two).

Again, I am based in France (where, I am moved to add, I came strictly for personal reasons and where I remain strictly for personal reasons also), and, with the exception of my undergraduate course at the Sorbonne's Cairo branch, my Sorbonne teaching takes place exclusively at the postgraduate level in four different programmes. Now, in the twenty years or so that I have been at the Sorbonne, I can count on my fingers the number of students I have taught who were able and willing to realize that the formalist/positivist approach to

law along the lines of Kelsen's 'pure theory' that they were effectively upholding was the outcome of a dressage, to which they had subjected themselves through intransigent socialization and institutionalization processes in the course of their undergraduate law years. And then, there is a further problem. Assuming the ability and the willingness that I mention — once more, a very rare occurrence in my teaching experience — the question arises as to whether there even exists the 'space' to produce alternative scholarship. In France, for example, at least if one is aspiring to a French academic career, there is simply no institutional opportunity to write the kind of dissertation that I personally think could qualify as 'good' comparative law. How many times have I had to tell a postgraduate student contemplating an academic career in France that, if he or she were to work on the sort of topic that had piqued his or her attention in the context of my postgraduate teaching, and if he or she were to approach that topic in the kind of critical and indisciplined manner that I was advocating, he or she would never be able to teach in France? On occasion, some of my very, very best students have refused to allow themselves to be discouraged and have maintained their commitment to their preferred theme, which is all to their credit. But I had not been wrong: despite holding a Sorbonne PhD, having won a major academic prize, and having had their dissertation released by a major law publisher, they teach abroad.

Take another example. A recent EUI graduate sent me her PhD dissertation on so-called 'legal transplants' with specific reference to proportionality (in effect, a critique of the kind of facile assumptions that the partisans of 'legal transplants' reflexively make), which won her a major award at the EUI for the best annual dissertation in comparative law (as it happens, her supervisor was Bruno de Witte, a name that takes us straight back to our Lancaster years and someone whom you will no doubt remember as fondly as I do). So, there is this prize-winning PhD out of the EUI with a most distinguished supervisor. Well, even after the student had translated her work into French (because, of course, in France, if something is not in French, it does not exist), even after what must have been a massive and massively frustrating translation endeavour, the French institutional powers that be refused her bid to be accredited as a *maître de conférences* — not exactly a high-ranking institutional grade, in fact a position that carries far less institutional status and authority than, say, that of Assistant Professor or Lecturer in the common-law world. So, the EUI prize-winning PhD dissertation did not 'fit': there was no institutional room for it at all in France, and its author could not even be entrusted with a position at the very bottom of the permanent academic ladder. Incidentally — and not uninterestingly — the student later appealed the French decision and was successful.

Allow me one final illustration from a couple of years back — I have, in fact, gathered a whole slew of these instances over the past two decades! So, here is this postgraduate out of the advanced programme in comparative law at the Sorbonne. First in his class! A gifted, thoughtful, well-read individual, someone who happens to have a writing talent also, this student produced his thesis under my supervision having chosen to research from a comparative standpoint the matter of States asking for forgiveness (the 'Truth and Reconciliation' Commission in South Africa, of course, but also the various official apologies to minorities that a number of States have been issuing in recent years). For obvious reasons — well, for reasons that strike me as obvious, at least — my student brought to bear insights from anthropology, philosophy, religious studies, and sociology, while also

sustaining his work with apposite literary quotations. Incidentally, this topic was the student's own idea which, to my mind, is a good indication of his intellectual sophistication (we can agree that it certainly beats mistake or pure economic loss). Personally, I thought the thesis was excellent, and I marked it accordingly. Now, the student sought to convert his thesis into a dissertation and enrolled in the Sorbonne's doctoral programme. Since he must support himself financially, he applied for a doctoral scholarship. I wrote a glowing letter of recommendation — whereupon my student was denied the scholarship not once, not twice, but three times, by three different Sorbonne academic committees. His biggest sin: 'forgiveness' was deemed not to qualify as a legal concept. As I say: no institutional space!

I am, in effect, circling back to your premiss: until legal education changes, until the institutional powers that be are prepared to change what they regard as worthy legal scholarship, comparative law will remain largely epistemically indigent. And, of course, given the hegemonic character of the governing models, especially in so-called 'civil-law' jurisdictions, to await a revolution in terms of legal education or legal scholarship would be, I think, far more optimistic than waiting for the elusive Godot. Meanwhile, we are having to contend with a further twist in terms of the quandary that we are addressing, which is that very many comparatists think of themselves as having escaped the epistemic throes of local formalism and positivism. They regard themselves as critical jurists because they see themselves as operating in non-standard ways vis-à-vis their colleagues who, for the most part, remain mired in the technicalities of national law only. All over continental Europe, I come across this delusion repeatedly: the Belgian or Dutch or Italian or German colleague who thinks that, on account of his pursuit of an interest in foreign law, he has managed to escape the epistemic strictures within which he initially allowed himself to be ordered into ideological/legal obedience. Again, Zweigert & Kötz offer a caricatural version of the fallacy that I discuss. Even as they enjoin comparatists to emancipate themselves from their cultural strictures and liberate themselves from their doctrinal background, they manage to produce a theoretical statement that is all about law as science, about comparative law as 'pure science', and what not.

Now, lest I should prove as dogmatic as the dogmaticians, I do not want to paint with too broad a brush. To be sure, there are exceptions — and it is relatively easy for me to think of an Italian comparatist (P.G. Monateri) or of a German comparatist (Günter Frankenberg), who have indeed managed a significant form of epistemic liberation. Ultimately, however, I hold that such exceptions are, well, exceptional. The very large bulk of comparatists apply to the comparison of laws the extraordinarily narrow Kelsenian or Kelsenian-like model that they had drilled into them during their initial and national law-school years — and they do so, whether they realize it or not. They may think they have unfettered themselves through the taking of an interest in foreign law, while they are in effect carrying their mindset in their epistemic luggage and transposing it willy-nilly to the study of foreign law. The late French philosopher Jacques Derrida coined the expression 'false exits' to refer to such circumstances, and I think these two words aptly capture the point that I am making.

GS: Yes, the situation in France is particularly grim. I'm also aware of a number of people who have suffered as a result of having done their doctorate in Florence or some other equally prestigious foreign institution. The sad thing about the French situation is that is has had two particularly unfortunate effects on a wider level. The first is that French law

faculties have contributed very little (at least since Gény and Duguit) to legal thinking beyond the borders of France itself. How many law works have been translated into English (important for the world market)? How many French jurists are there with an international reputation? There have been some works on legal history rightly translated and there are some good French legal historians who contribute to edited works published outside France. And, of course, in the field of Private International Law France has some major world players. I would also want to say that I think Mathieu-Izorche's *Les Représentations dans la pensée des juristes* (2014) is a genuinely original work which I hope will someday find a translator. This said, when one compares French law faculties with philosophy or some other social and human science faculties — or indeed with the natural science faculties — there is a glaring gap with regard to the world stage. Where is the French law equivalent of Foucault?

The second unfortunate effect is the internal reputation that law academics enjoy vis-à-vis their colleagues in other faculties. One thinks of Jean-Michel Berthelot's preface to his edited work on the *Épistémologie des sciences sociales*, which is now in the prestigious 'Quadrige' collection. Explaining why there is no chapter from law, his reasoning, reading between the lines, is that lawyers have nothing original to contribute to epistemological thinking. Since his unfortunate death, many of his colleagues and protégés have gone on to produce some most interesting edited works on social science epistemology under such headings as *Qu'est-ce qu'une discipline?* and *La Cumulativité du savoir en sciences sociales*. None of these works have contributions from jurists. This is really unfortunate not just because there are plenty of Francophone jurists (and of course non-Francophone ones) outside France who could have made valuable contributions to these works. It is also unfortunate from a financial point of view because applications for research grants from granting bodies will be judged by social and humanities scientists from other disciplines. As Rob van Gestel and Andreas Lienhard have recently pointed out in their evaluation of legal research in Europe, many lawyers 'have difficulties explaining their scholarly methods and theory to colleagues in other social sciences'. Mathias Siems, in his text on a world without law professors, is equally dismayed by the standard of scholarly thinking emerging from German law faculties. He quotes one early 20th-century German academic who thought that a law school had as much to contribute to scholarly thought as a school of dancing.

Actually, I think this might be a little unfair on schools of dancing — well at least on art schools if not schools of dancing. As you know, one of my sons studied at Chelsea Art School. Within a couple of weeks of starting his course, he was presented with this essay question: 'Imagine there is a new book on Modernism. It is radical. Write a book review'. If I remember rightly, they were given no reading list (thus I got a panic phone call from William). And most of the students, good as they were, would have had at that moment little or no knowledge of Modernism. Can you imagine such a challenging question being set in any law school (in the first term of the first year!!)? I should point out that for the next three years my son was faced with other, equally challenging, essay and assessment questions — and this was in the context of a graphic design degree! I can quite understand why there are senior members of the Bar, and senior English judges, who think that a degree in almost anything other than law is preferable for the aspiring barrister.

What can be done about this situation? It is tempting to think that law schools should be moved out of academia to become independent professional teaching institutions. But one wonders if the kind of stuff that they teach — the typical doctrinal legal subjects — is actually of much use to students when they go into practice. Plenty of ex-students have told me that their law degree proved of little or no value in the solicitors' office or in Chambers. And I recall one of your students, when I taught on your Masters course in Paris, telling me that his Paris four-year law programme was of no use whatsoever when he entered the world of practice in Paris for a year or two before enrolling for a 'Master 2' degree. I was once informed by a colleague at Kent, a specialist in Alternative Dispute Resolution, that firms specialising in ADR preferred to have people with a theology degree; law trained people were often quite unsuitable. Listening to the radio this morning, I heard someone pose the question: what is the point of wasps? It made me think: what is the point of law schools?

But I am of course being unduly negative. First, because I think France will come to see that a change of outlook with regard to legal academia is necessary. I think that there are people in the *Agence Nationale de Recherche* who are fully aware of the 'quality' of legal research emerging from law faculties. They are certainly aware of the standard of research grant applications submitted by even some of the most prestigious law faculties. Secondly, because law schools are not, for economic reasons, ever going to be moved out of academia — especially in continental Europe where law and universities have almost one and the same history — and so the issue is one of reform. I argued in my inaugural lecture at Kent that comparative law ought to be a core subject in every year of the law degree and I still think that this would be a valuable way of looking at some positive law (of different countries) through epistemological schemes that would encourage students to be more aware of the importance of interdisciplinarity. One could, for example, look at orientalism not just in legal thought but more widely, embracing cinema and literature (and, of course, Edward Said's book itself). This would not be enough, and I am sceptical about reform elsewhere in the curriculum. Indeed, the rise of neo-formalism in common law faculties suggests regression rather than reform. There is one positive note, and that is the effect of the comparative law literature in the domain of legal theory. Sterile debate about positivism cannot surely survive much longer in the face of cultural theory and legal pluralism.

But be that as it may, let us return to comparative legal studies itself. My fear here is that if care is not taken debate and discussion in the area could end up, as in jurisprudence, with rather fossilized debates between different 'schools', for example, between those adhering to a cultural paradigm versus those functioning within a transnational 'scientific' paradigm. Do you think this is a real danger? (I am not in any way suggesting that the debate is becoming stale or unimportant.) If there is a danger of fossilization, how might it be avoided? Are there other paradigms or programmes that could take comparatists into new debates?

PL: Your observations and your questions are rich, and I must choose to address one aspect of the matter only. Even though I do not think this is in fact the view that you defend, your articulation of the issues could be taken to mean that the two paradigms you mention are presenting comparative law with two equally respectable ways of engaging foreign-law research. It would then turn on each comparatist, I suppose, to follow the 'cultural' or the

'scientific' route. And, in the absence of any interface between the two models, there would be no possibility of meaningful cross-paradigm communication — that is, no way for one paradigm to be held accountable to the other — a situation that would lead to 'culturalists' and 'scientists' each going their merry way without having to show much concern for the other camp, hence the risk of the 'fossilized' debates that you indicate. Again, I do not think that you yourself hold both models to be on an epistemic par with comparatists being free to choose what they happen to fancy. In my experience, however, there are many comparatists who do think along these lines — who do maintain that one can opt for a 'cultural' or a 'scientific' approach not unlike the way in which one can prefer coffee over tea or whatever. This is the specific theme that I would like to address, if I may.

As impolitic as my claim may appear to some, one of the two paradigms you identify is ascertainably, verifiably, inapplicable to law, while the other is, just as ascertainably or verifiably, able to produce deep or thick knowledge about foreign law, much deeper or thicker knowledge at any rate than what its inapposite rival can ever hope to achieve. In other words, one paradigm harbours the potential to yield a far more sophisticated understanding of foreignness, which is why comparatists-at-law ought emphatically to prioritize it. I have in mind, of course, the cultural model. Moreover, I want to defend the view that there is an overlap between the two paradigms inasmuch as the 'scientific' framework, despite what the label wants to suggest, is itself thoroughly cultural. (How could it not be? How could any intellectual construction escape culture?) I hold that comparatists are therefore effectively faced with two cultural models. Before I turn to the gist of my argument, I want to observe that I am using 'law-as-science' as an umbrella designation bringing together positivisms of all hues although I fully accept that one can be a positivist, say, in Dublin or Chicago, in Melbourne or Nottingham, without adhering to the full range of epistemic tenets that typically pertain to law-as-science. To my mind, law-as-science refers to the extreme end of the positivist spectrum. However, it makes sense to track this particularly exalted brand of positivism since within comparative law, certainly over the last fifty years or so, this mindset has been at once very present and very influential on account of the predominant role of German legal scholarship in the field. And, as is well known, the idea of law-as-science is a hallmark of German legal scholarship.

At the outset, it strikes me that the most crucial distinction to be made between the two paradigms you mention is that one pertains to fiction, because law is obviously not a science, while the other concerns what is the case, since law is evidently cultural. Even as Zweigert & Kötz expressly juxtapose comparative law with physics, molecular biology, and geology, the fact remains that such amalgams are thoroughly implausible. Indeed, law, in the way in which it exists as an interpretive activity having very largely to do with ascription of meaning to texts consisting of words, is infinitely closer to literature or to philosophy than it will ever be to biochemistry. To be sure, when Hans Krebs, the biochemist, generated a model purporting to account for 'cellular respiration', he was engaged in interpretation. What Krebs did, specifically, was to use machinery (manometers, microscopes, and other laboratory instruments such as beakers, flasks, test-tubes, and what not) in order to test his model, to check if his model could discern and explain the metabolic reactions in living cells — the electron transport chain and all that. As he pursued his exploration of material agency, Krebs was effectively monitoring the performance of his equipment within a dialectics of resistance and accommodation, that is, he was engaged in 'tuning' his

equipment — his model or his machine or his manipulations — in response to his failures to achieve the results he was seeking. And this 'tuning' continued until Krebs was satisfied with his results, a process that had to contend, however, with the 'machinic' limits that existed in the 1930s. It is, indeed, precisely because of the ever-increasing sophistication of machinery — without any seeming limit at this juncture — that Krebs's explanation might one day be surpassed on the occasion of a further scientific revolution. Now, when a US comparatist comes to the French statute on religious attire in public schools, the situation is at once analogous and significantly different. Consider this simple question: does the French statute conceal traces of Islamophobia — or, if you will, is the French statute Islamophobic? In order to address this question, the US comparatist, like Krebs, must engage in interpretation. Like Krebs, too, the US comparatist is coming to an entity that exists before him and that would exist without him — in Krebs's case, the cell, in the US comparatist's case, the French statute. And like Krebs also, the US comparatist is pursuing ascription of meaning (Krebs imputes meaning to biochemical processes while the US comparatist assigns meaning to French legislative words). Just as biochemical processes need Krebs in order to operate meaningfully (citric acid does not mean on its own), the French statute needs the US comparatist in order to operate meaningfully (paper and ink molecules do not mean on their own). Like Krebs, who has carbon dioxide molecules attesting to citric acid's generative work, the US comparatist has young Muslim women's sartorial derogations from the dictates of their faith attesting to the condition 'legislative Islamophobia'. Both Krebs's and the US comparatist's are therefore strongly performative idioms. But there is an important difference between the two situations — and it is a difference that changes everything.

There is a 'machinic' dimension to Krebs's interpretive work that is completely missing from the US comparatist's intervention. Ultimately, Krebs's re-presentational chain ends with a machinic terminus, which is why if, later, the machinic grip on the world of cells changes — machinic powers keep expanding in extraordinary fashion — Krebs's explanation might be overcome. (Indeed, in the twenty years that followed Krebs's work on the citric-acid cycle, new discoveries allowed by improved machinery meant that Krebs's conclusions had to be supplemented.) Meanwhile, the US comparatist's deployment of human agency does not feature such a machinic dimension. One key implication is intrinsic boundedness: interpreters nowadays are, in effect, displaying the interpretive strategies that Montaigne was using more than four hundred years ago. A further key implication concerns replicability. Another biochemist than Krebs using Krebs's machinery may also reasonably be expected to 'register' citric acid's production of carbon dioxide molecules. Now, can another comparatist-at-law be reasonably expected also to 'register' Islamophobia as regards the French statute? The best answer seems to be 'perhaps'. In fact, it is as likely as not that another comparatist will hold that the French statute is *not* Islamophobic. (To marshall another illustration that I derive from US constitutional law, even as a US Supreme Court Justice makes the Second Amendment of the US Constitution state an individual right to firearms, it is as likely as not that another US Supreme Court Justice will make the Second Amendment of the US Constitution *not* state an individual right to firearms — which is precisely the situation that holds in the famous *Heller* case.) Right there and then, in terms of the 'machinic' and 'replicability' issues, there is a primordial difference between science and law that points to a textbook case of incommensurability, which must entail that the positioning of law under the auspices of science can only be illicit, that it must pertain to intellectual imposture. The fact of the matter is that electron transport chains and

Islamophobia disclose two different modes of existence demanding two different interpretive strategies that are incommensurable *inter se*.

Consider another example pointing to the incommensurability that I indicate, which I lift from a *Critical Inquiry* contribution by Robert Post that was released ten years ago or so. Imagine a physics student being taught differential equations. It seems fair to say that the rules governing the resolution of differential equations impose themselves on the student somewhat dogmatically. Here, the student's interpretive lee-way is severely limited. Now, consider a literature student being taught Paul Valéry's poem, 'Le Cimetière marin' (Post, in fact, mentions another literary text). It seems fair to say that the teacher's reading of Valéry's work does not dogmatically impose itself on the student and that the student is indeed in a position legitimately to supply an alternative interpretation to his teacher's. Now, the idea of law-as-science is precisely about denying an interpreter the interpretive power, the interpretive lee-way that I have identified in my three examples (the French statute, the US Constitution, and Valéry). Law-as-science is uncomfortable with the contingency that accompanies interpretive lee-way. Law-as-science is unhappy with the idea that the French statute (or the US Constitution for that matter) could mean this or that depending on who is interpreting it. Law-as-science does not accept that as a consequence of the way in which the interpretation of law-texts operates, the texture of the statute, the very fabric of the law-text, would be liable to change as the interpreter changes, because a different interpreter might hold the statute or any law-text to mean something different. Indeed, this interpretive lee-way significantly empowers the interpreter — say, the comparatist-at-law. For example, the US interpreter can *make* the French statute Islamophobic. I am using the verb 'make' deliberately. Concretely, the US comparatist lecturing his students in California has the power to make sense of the French statute as an Islamophobic law-text, to re-present it as such. Note what the interpreter is effectively doing: he is *making sense* of the statute, that is, he is fabricating the sense or the meaning of the statute (hence, my reference to re-presentation — note the hyphen). And it is to deny this interpretive latitude that there are comparatists who want to attribute a scientific character to law, the abiding idea being that if law is a science and if law's interpreter is a scientist, then interpretation cannot manifest itself so contingently. But to call law a science in order to avoid certain contingent outcomes that one dislikes does not *ipso facto* make law into a science. One can call a certain individual an 'honest US President' all one likes in order, say, to avoid the defeat of conservative ideas at the forthcoming presidential election. But no such designation, no matter how earnestly pursued, has the power actually to make the relevant individual into an 'honest US president'.

In effect, my claim is that lawyers cannot transfer on their say-so a machinic/replicable epistemic regime to a non-machinic/non-replicable epistemic regime on account of whatever goals they are pursuing or because of whatever fears or concerns they happen to have — or because of whatever envy drives them. (I mention 'envy' since there is arguably a measure of repressed science envy at work on the part of lawyers, that is, there is lawyer envy at the machinic and replicable features of science.) Ultimately, then, I hold that law-as-science is a construction purporting, without any epistemic warrant, to ignore the tenets of incommensurability. To my mind, therefore, the paradigmatic tussle you mention is not at all between two equally worthy contenders. And there is a further twist, which I heralded earlier. In assuming that the model they defend is somehow immune to interpretive

vagaries, the partisans of law-as-science, and of comparative-law-as-science, are effectively claiming an immunity from culture. One could say that such is the sub-text on display. In effect, it is the text, too. Zweigert & Kötz, for instance, expressly argue in favour of comparative law beyond culture on a number of occasions in their textbook. The good comparatist — from their standpoint, the comparatist who approaches comparative law as a '*science pure*' (their words, in French) — would be cultureless. But the idea that law-as-science can somehow exist *sans* culture is risible. Law-as-science is as much a cultural edifice as surrealism or jazz. It is, in fact, very much, demonstrably so, a German cultural edifice. Accordingly, the young comparatist — say, the postgraduate — is effectively faced with two cultural constructions, one of the two being in the nature of a fable or a fairy tale mocking incommensurability, which leaves the other. I style it 'culturalism', but anyone can call it by any other name. Even as I appreciate that I am offering a longer answer than you might have wanted, let me explain, briefly, why culturalism ought to be attractive to the young comparatist, and certainly more so than law-as-science, despite the uncontested supremacy of German scholarship within comparative law (and without a clear sign that this situation is about to change, quite to the contrary). In order to make my explanation concrete, let me return, briefly — I promise! — to the French statute on religious attire in public schools.

Imagine a US comparatist researching this statute in the Sorbonne law library. The first part of the endeavour must be to examine the wording of the statute itself, perhaps consider the legislative debates, and certainly investigate the regulations, judicial decisions, and doctrinal writings purporting to delineate the meaning of the statute in places such as the French parliament, the French courts, and French law schools. But there has to be a second dimension to the research, which is one of the most important respects whereby culturalism resolutely parts ways with law-as-science. When a French court interprets the word 'schools' — the statute is about 'schools' — it does not ask itself why the statute does not concern hospitals, airports, or parks. This is not the French court's task. But I hold that it is emphatically the US comparatist's remit to be asking this question. Indeed, the US comparatist needs to understand what there is about schools that have made them the focus of French legislative intervention. In other words, the US comparatist needs to trace the statute to the institutional role that French schools have played as vectors of republican values — a role that sets them apart from hospitals, airports, or parks. Of course, in order to assemble information regarding the institutional role of schools — which, according to the way in which academic disciplines have come to be structured, stands as a sociological matter — the US comparatist may well have to leave the law library. But there we are: a statute is worldly, it issues from the world — in this instance, it has to do with the social, political, historical role of schools as regards the dissemination of French republican values (which, in a number of ways, France deems to be running contrary to Islamic values, hence the exclusion of visible acts of Islamic allegiance at school).

I have no doubt that the proponents of law-as-science would take the view that the US comparatist researching French schools as disseminators of republican values has resolutely left the law-box, that he is no longer preoccupying himself with the law as it is, that he is busily doing something else such as sociology. For my part, I disagree. Not only has the comparatist not left the law-box, but he is effectively engaging in something like archaeological or genealogical work within the law-box. Applying another metaphor, he is

submitting the law-text to his spectrograph in order to see what traces are lurking between the lines, to ascertain what haunts the text. But these spectres, these ghosts — say, these traces of the philosophical-political-social-historical role of schools, of the republican role of schools — are very much within the law-box. Indeed, they are the very architectonics of the law-text. If French schools did not carry the institutional role they do, there would have been no French statute on religious attire in public schools. Note that culturalism, to marshall this label once more, does not do away with judicial decisions and doctrinal writings, not in the least. Instead, it integrates this information into its model except that it does not stop at this data. In fact, it uses, say, judicial decisions and doctrinal writings as starting-points for further investigation, as springboards for supplementary probing.

All the while, culturalism very much remains an endeavour in comparative *law*. Paradoxically, even as the US comparatist may be involved in what law-as-science would obviously regard as a sociological exercise, his investigation is genuinely taking place within the law-box. The fact that he is probing law sociologically does not detract from the fact that he is probing *law*. He may not be doing law-work in the way in which a votary of law-as-science would do, but he is doing *law-work*, very much so. Culturalism's signal contribution to comparative law, if you will, is to reclaim the worldliness of law — the way in which, for instance, the French statute partakes of the world of French republican values, philosophically, politically, socially, historically. Now, the acknowledgment that the French statute on religious attire in public schools is worldly — that its worldliness is one of the defining features of the statute, that the statute's worldliness pertains to its very being — such acknowledgment, then, purports to change comparative law's generative grammar, no less. In sum, culturalism can explain why the statute is about schools, which is an explanation that law-as-science is simply unable to produce given the way in which it restricts itself to an identification of the legally authoritative meaning of 'school'. This is my earlier point about culturalism's more sophisticated yield. Perhaps I can mobilize and transpose an insight from your own published work: think of law-as-science as an authoritative endeavour, as being focused on the identification of authoritative meaning, while culturalism stands as an inquiring enterprise, as an endeavour asking the question 'why?' (as in 'why schools rather than airports?').

Again, I realize that I have certainly produced a longer answer than you were expecting. I apologize. Perhaps you should set a strict word limit!

GS: Not at all (no word limit)! I think that the questions being discussed are so fundamental to comparative legal studies that they require space. As for the substance of your response, I would not want to defend law-as-science in the sense that law should be classed with the natural sciences rather than with the social and human 'sciences'. The problem here is the word 'science'. How should one describe the paradigm (held I would argue by many) that law is a transnational phenomenon? Perhaps 'naturalist' paradigm might be better. This said, I am not at all sure that I would want to defend such a paradigm exactly for the reasons that you state (but I will be provocative later). Despite what some in the hermeneutical tradition have asserted, I still think that the old distinction between explanation (based on a causal scheme) and understanding (based on a hermeneutical scheme) remains valid in this natural science versus social and human 'sciences' debate. I

also personally agree with your example of how the comparatist should approach the French text on the wearing of veils in public schools.

Where perhaps we might differ — but I am not over-confident of my view on this — is that whatever its epistemological weakness the so-called 'scientific', 'naturalist' or, perhaps we should just say, 'transnational' paradigm does have to be fully taught to comparative law students. Indeed, just as the concept of God needs to exist in order to be an atheist, so the transnational paradigm — in fact the German-inspired law-as-science paradigm — needs to be understood before one can fully appreciate why the culturalist paradigm is more convincing from an epistemological point of view. If we ignore, or expel, this German-inspired school from the teaching of comparative law, we would, in my view, be expelling a significant body of opinion from the field of comparative law. Actually, this sounds as if I am suggesting that you would want to see these comparatists expelled. I am not sure that this is the case since you have spent much time and energy rightly engaging, critically of course, with the leading works emerging from Germany. So, I guess what I am saying is that comparative legal studies needs the German-inspired 'transnational' or 'scientific' paradigm (even if it is fictional nonsense) just as the atheist needs God. (However, as indicated, I am going to come back to this transnational question in a provocative way later.)

I do take on board what you say about fossilization. Having read your response, I think that the expression is perhaps too negative. However, I think that there is a danger that those adhering to the legal 'science' paradigm will not actually engage properly with the cultural paradigm; they will simply ignore it or at least marginalize it. One can see this in some of the chapters in the *Oxford Handbook*. Even Siems' use of the expression 'post-modern' as a category in which to discuss work by those operating within the cultural paradigm is rather negative since the expression carries with it, at least for traditional jurists, a certain implied marginalization. In other words, 'post-modern' is itself, for some, a negative term.

Another reason why I now think that fossilization is too negative is that it does suggest, as you rightly indicate, that somehow one should 'move on' from advising new researchers in comparative law about how to undertake their research within the cultural paradigm. The advice that you set out will always remain fundamental and nothing that I say should be taken as suggesting otherwise. Moreover, those researchers who insist on the law-as-science German approach ought to be forced to explain their methodology which, in my experience in teaching at doctoral workshops, they usually cannot do. Indeed, I can recall one encounter in a Danish law school that was almost comical. GS: 'Please explain your methodology in depth.' Student: 'I am going to use the dogmatic method.' GS: 'What is the dogmatic method?' Student: 'Well, it's obvious.' GS: 'Is it? Are we talking causality, functionalism, hermeneutics or what?' Student: 'If you don't know what the dogmatic method is, you cannot be a proper lawyer'.

So, yes, perhaps I should re-orientate the whole issue. One of the most convincing aspects of your argument that you set out above, and of course have asserted in many publications, is the way in which you employ the example of the French veil law. This is, surely, very convincing. The text cannot be properly understood without a full appreciation, *inter alia*, of the intense debate in 19th-century France about the secularization of education. Anyone who has lived in France for any period of time will know just how important this

secularization issue remains, even today, for a considerable number of people. Moreover, your point about interpretation is fundamental; an assertion about a legal text — just like the assertion about a literary text — is entirely different from a scientific assertion. Here, I still think, despite the criticism it has attracted over the years, that Karl Popper's falsification test is relevant. As I have made clear in my own publications, legal theory assertions cannot be falsified. Indeed, I was amazed, and most disheartened, when a referee claimed that Hart falsified Austin's theory. This, of course, is nonsense. Hart may have provided, at least for some, a more convincing theory and his criticisms of Austin may, for some, be spot on. But Hart in no way falsified Austin's theory. Indeed, I would not be at all surprised if one day Austin makes a comeback. (Of course, certain legal statements can be falsified. If I assert that there is no English legal text governing, say, the restitution situation after a contract has been frustrated, such a statement is clearly wrong.)

However, the problem with the French text is that it is too good an example and might distract attention from other legal texts that are more difficult and ambiguous. Take an example that I recently came across. I will not go into any detail since the example comes from an as yet unpublished chapter. I will simply describe the example as an abstract one. Imagine a country that has emerged from communism and wants to 'Westernize' its commercial law. Most of the legal community in this country has been educated under the influence of the civil law paradigm even during the communist era. So when it was proposed to import the common law trust, there was very heavy resistance both from the legal community and from certain politicians. The idea that a beneficiary could obtain a right *in rem* went against their civil law mentality. As a result, a law was passed importing the 'trust' but making it a contractual obligation only. Thus, for a common law lawyer, it was no longer a trust. However, over the years, the judges, being more practically orientated than the conservative members of the rest of legal community, gradually started to endow this 'trust' with more and more trust-like properties. Indeed, they may have done this somewhat unconsciously. Now, I don't know how accurate this transplant example might be but let us, for the sake of argument, say that it is seemingly true and that we are the two supervisors for a good research student who is going to write her thesis on this phenomenon.

She sees you first and you advise her in the way that you have set out above. There are, of course, many issues here ripe for a hermeneutical and deep cultural analysis and any researcher examining this whole trust law episode is most certainly going to have to look well beyond the law library. You would, no doubt, advise her to focus in particular on the word 'trust' and, following your well-known paper on legal transplants, she would start off from the premise that what is being transplanted is, in itself, a meaningless word. What must be researched is its deep meaning within the cultural contexts of the common law exporter state from which it is taken (note: does the US have a different notion of the trust from, say, Australia?) and the civil law influenced importer state. This cultural context research will take her into the realms of history, politics, economics and so on. I am, of course, simplifying your research advice and there are many issues that you would want to develop in much more depth.

The researcher then comes to me as her second supervisor. There is absolutely nothing that I would want to contest in respect of your advice and I would endorse every word of it. However, I would argue that there are some further epistemological issues that need to be

considered and pursued that will require approaches beyond hermeneutics. The first is this. Is there a structural issue in play here? That is to say, are there embedded in the mentality of all lawyers and jurists in any country common structural models consisting of Roman inherited concepts such as possession, ownership, contract and so on and jural relations such as *in rem* and *in personam* bonds? I would argue that this is a far more subtle epistemological issue than it might at first seem. I would suggest that some of these notions are so embedded that they have entered the *descriptive* discourse in every language of countries adhering to common law or civil law influence. Thus, in Germany, Finland, Russia, England, France, Italy, etc., notions such as 'sale', 'hire', 'possession', etc., have become embedded in the everyday factual thinking of the population. They have become in themselves 'facts'. Given this situation — and here is the controversial question — does it not mean that sale, hire, possession and the like have a transnational quality? Is there not a transnational epistemological structure? When Marion sells her car in Hitchcock's *Psycho* (1960), or when she transacts for a room in Bates' Hotel, these 'facts' will be understandable by audiences in any common law and civil law influenced culture. They have become transnational facts.

Let us now say that the research student is horrified by this suggestion and quotes from your *Droit comparé* the maxim (and your text surrounding it) *extra culturam nihil datur* (at p. 82). My response will be this. OK, so transnational law or legal models cannot exist. Law can, following Pierre, exist only within a particular language and culture. But does law 'exist' within any of these cultures? Surely what exists are only texts calling themselves legal and interpreters calling themselves lawyers or jurists? These people act 'as if' law exists rather as people in church — or theologians interpreting their religious texts — act 'as if' God exists. None of this proves the existence of God. Law, in other words, is a complete fiction. The key to its 'existence' is a group of people who act 'as if' (and possibly genuinely believe) that law exists. Just because there are many, many legal texts in existence, this in no way proves the existence of law. There are many texts about miracles, but the existence of these texts does not prove that miracles have existed. So, I would go on to argue, what if there are texts claiming to state transnational laws and there is a group of lawyers and jurists who act 'as if' there are transnational laws? Epistemologically speaking, and basing oneself on Hans Vaihinger's philosophy of 'as if', it must follow logically that transnational law has an equal claim to existence as national law.

This leads on to a second approach. One cannot ignore the function that this apparent 'trust' is playing within the system and culture that has imported it. What is it actually 'doing'? And why do the judges apparently think that its *in rem* aspect needs to be 'imported' (or developed) despite the legislation that dictates that it is purely contractual? This functional aspect follows on from Vaihinger's fiction theory. As you know, Vaihinger was not using fiction in a pejorative sense; he argued that we should not in fact be concerned as to whether the phenomenon being modelled by the 'fictional' epistemological discourse exists or not. We should ask only if it is useful. So, I would say to the research student that, of course, we need to get well beyond Zweigert & Kötz's notion of the functional method and certainly not indulge in any 'better solution' fantasies. However, the comparatist cannot always discard functionalism. Perhaps I would be deliberately provocative towards the research student. If law itself is a fiction — if it does not exist — one is left only with its function.

So, my question to you is whether or not you think that law exists. And, if it does not, does this not mean that if there exists a body of jurists who act 'as if' transnational law exists, then transnational law has an equal claim to existence as any national law?

PL: Despite your generosity, I am determined to keep my perissology in check. As regards your point that the German model must be addressed on account of its impact within comparative law, I entirely agree. In the course on comparative law that I currently teach in Paris (in French) and in the United States (in English) — and that I have taught in any number of countries over the years (mostly in English but also in French) — I devote a good three hours to a close reading of Zweigert & Kötz's book. All of my students for the past twenty years or so can attest to this fact. To be sure, I regard Zweigert & Kötz's theory as a contingent knowledge-pack, but it is a contingent knowledge-pack that has proved influential within the field of comparative law (for reasons, I might add, that do not all have to do with intrinsic merit — but, as the man said, that is another story). On account of this impact, Zweigert & Kötz's work deserves theoretical scrutiny. Moreover, I structure my own research as a reaction to Zweigert & Kötz's model. In other words, I introduce my own contingent knowledge-pack as a response to theirs, which is also a way of affording significant space (and eminence) to Zweigert & Kötz.

You mention the expression 'post-modern', and you refer to the manner in which the terms are deployed by certain comparatists. What these comparatists intend, I cannot tell. But the sarcastic and derogatory baggage that the expression carries in many circles, I can readily confirm. I must say that I would be surprised if the comparatists who marshall 'post-modern' were not aware of the expression's undertones, and I must therefore conclude, at least provisionally, that their choice of words is not innocent. Of course, academic strategies of peripherization are well known — indeed, age-old — naming-as-denigration being a favorite tactic. Although there would be much to say on point, I propose to turn instead to your structuralist argument.

You are advancing a very important claim. When James Gordley tells us that as regards liability for bodily harm or the sale of defective goods, the law is 'much the same' in Jakarta, Tel Aviv, Montpellier, and Tucson, I think he means something along the lines of what you are saying. For discussion's sake, let me concede your claim about the existence (or the reality) of structures in law. So, let me agree that there are indeed structures like 'possession' and others, and let me agree further that these structures are recognizably present in a wide range of contemporary laws. Now, my concession that there are the structures you mention does not compel me to the further concession that when we are considering a structure as it has established itself, say, in Slovenia and Portugal, we are then dealing in identity. There are a number of points of entry into my objection to the argument from identity, and I propose to emphasize one pathway only.

Back to Constantinople, briefly! The Byzantine conception of '*possessio*' as it existed in the sixth century was not some free-floating entity. In advance of empirical study, I hold that Byzantine possession would have very much been a grounded conceptual entity with all manner of characteristic or idiosyncratic features that would have been informed by whatever were the concerns of the jurisconsults of the day — whether these

preoccupations pertained to analytics, ideology, or what not. Now, irrespective of the so-called 'Roman' understanding of '*possessio*', it is inconceivable that that structure (I am upholding my concession!) would have moved by itself from Constantinople to northern Italy or wherever. Indeed, for that displacement to have happened, someone would have had to take hold of the Byzantine '*possessio*' and move it along. Concretely speaking, someone would have had to write about Byzantine '*possessio*' or teach it in northern Italy and have advocated its relevance there perhaps under another label derived from a local language. And that move to northern Italy would ultimately have been prompted by desire. In other words, the mover would have had his motives, his ambitions — there would have been the mover's striving informing the move. And then, at some later point in time, the structure would have moved from northern Italy to the south of France on account of someone doing that moving for his own reasons. That is, someone in the south of France would have written about northern Italian/Byzantine '*possessio*' or whatever and suggested its relevance to the south of France. And then the structure would have moved from the south of France to Strasbourg, where someone like Du Moulin would have advocated its virtues for the benefit of local law. *Ainsi de suite*...

My basic point is that, strictly speaking, although the structure is on the move and affixing itself in various locales along the merry way, it is, strictly speaking, never repeating itself. Despite what appearances may suggest, a transformation of the structure will have been taking place every time it 'landed' somewhere. This transformation could have been happening because in the local language the word for '*possessio*' carries a slightly different semantic extension than in the language whence it came. Or it could have been because the concept's local interpreters — say, judges or doctrinal writers — assign a slightly different meaning to the term. Be that as it may, there cannot not have been a transformation — or so I contend. To draw on Bruno Latour, the philosopher and sociologist of science, if there is transportation, there is transformation. Therefore, we can say that what we have, each and every time, is repetition with a transformation (which is, in effect, loose language, because if rigorous expression be upheld, *there is no repetition*). Again, every implementation of the structure carries with it a transformation. And that transformation, that change, is at once necessary and inevitable.

The claim regarding 'necessity' is more philosophical, and it goes back to Leibniz's argument from indiscernability (often referred to as 'Leibniz's Law'). In effect, Leibniz's insight holds that if there is more than one, there is difference (because there can no longer be identity). So, if there is more than one instance of '*possessio*' — say, the one in Constantinople, the further one in northern Italy, the other one in the south of France, and the additional one in Strasbourg — there is necessarily no identity across these various instantiations of the structure. Once more, the non-identity could have to do with local language, local interpretation, or local anything. The contention about 'inevitability' is more sociological. For the structure to be able to embed itself in a new legal/cultural environment, that is, for the structure to 'work' in its new locale, it must go 'local' in some way or other. It must adapt, at least minimally, to local circumstances. There must be a 'fit'. On account of the necessity and inevitability that I mention, no matter how structural a structure happens to be, there must be found within any structure an in-built mechanism allowing for its 'reproduction' outside of the framework of identity. (As it happens, there is a philosophical term for reproduction-without-identity, which is 'iteration'.) What I am saying is that a

structure must feature some in-built latitude, some in-built lee-way, allowing for its peripatetics and making it possible for it to acquire the required local colour that will allow it to 'match' locally — that is, allowing for its iteration. Again, I challenge the idea of fixity or immutability and, drawing on Leibniz (and on other philosophers also), I say that every time the structure replicates itself, it inevitably features a local hiatus, a hiatus that is irreducible — a hiatus that cannot not be there.

For me, the local hiatus is infinitely more attractive intellectually than the fact of the displacement itself. In my eyes, the fact of the displacement is somewhat trivial. Ideas have always travelled, and individuals who become acquainted with foreign ideas have always sought to take them along, to import them. (Having said this, I suppose it can be interesting to ask why ideas being imported somewhere come from a certain location rather than another.) Crucially, though, every single 'landing' of the structure features an original twist and therefore results in a singular arrangement. To understand this local inflexion — what prompts local judges or scholars to tweak the new conceptual arrival this way or that — offers the best opportunity to appreciate what makes a legal community 'tick', so to speak. I think of the situation as a clash of interpretations. There is, then, that structure, '*possessio*', making its way to Strasbourg from Constantinople and northern Italy via the south of France. Well, if I am a comparatist seeking to impart meaning to French law, I will be primarily interested in what Du Moulin made of the structure locally, how he impastoed it so that it would work locally once it had reached Strasbourg, so that it would achieve the goals he himself formulated for what he regarded as an optimal conception. I am interested in what the condition of being here rather than there entails for the structure's life in the law. To return to Gordley's 'much the same', I am interested in the 'muchness'. What is 'much'? How much is 'much'? After all, the idea of 'sameness' points to the existence of a difference, if a slight one. So, what local singularities does the word 'much' purport to downplay or to hide altogether? Consider an assertion that I borrow from Alan Watson's *Society and Legal Change* (and which, I think, well encapsulates Watson's views on legal dissemination): 'Visigothic Spain, parts of post-mediaeval Germany and nineteenth century California could accept for a variety of reasons what is basically the same régime of matrimonial property'. Note the words 'basically the same'. To me, the key word here is 'basically'. I am interested in that word, 'basically' — which effectively means that the regimes Watson discusses are all local, different, singular models — for whatever reasons. And it is precisely those reasons that, I think, warrant serious comparative investigation.

Allow me another illustration, very rapidly. I am not particularly interested in the fact that US class actions came to France since I find the fact that France would borrow a legal idea from the United States to be, if you will, par for the course. France would evidently do that, and it has done that more than once in recent years. What I am interested in is how class actions transformed themselves into '*actions de groupe*' and how local, different, singular, these French '*actions de groupe*' happen to be vis-à-vis US class actions. If you will, I am not so much interested by the displacement of US class actions to France as I am by the 'Frenchification' of US class actions. Note that a focus on the additional layers or coatings of local significance — this local supplementation of meaning — keeps the comparatist firmly within the law-box. For my part, I situate my comparative responsibilities precisely in the elicitation of this local meaning — a process of elucidation that will lead me to envisage '*actions de groupe*', for instance, very much as a cultural enunciation, as French culture

expressing itself legally. If I come to French law as a comparatist, my abiding concern lies in the local significance of '*actions de groupe*' (in France) vis-à-vis the local significance of class actions (in the United States), a pluralism that precludes the emergence of any single meaning. Without reaching for an unduly exalted view of the matter, for me this comparative exercise is about doing justice to what I am undertaking to re-present. If I take it upon myself to talk about '*actions de groupe*' in my comparative work, I have a duty — call it an ethical duty — to do '*actions de groupe*' interpretive justice. And this can only begin to happen if I will envisage '*actions de groupe*' as they stand locally by trying to saturate their local meaning with as many local accoutrements as I can possibly fathom as I canvass the law library and other libraries, too. (I mean, of course, both 'bricks-and-mortar' and electronic libraries.) Not to reclaim the periphrastic dimensions of '*actions de groupe*' and not to reclaim them as a constitutive part of the law-text (that is, to relegate them to some easily dismissible context) is to participate in a certain pedagogical and scholarly irresponsibility (my turn to be provocative!).

As regards your question on the existence of law arising from 'as if' philosophy, I would like to answer it by raising an interrogation of my own. Assume a comparatist. Does 'foreign law' exist for this comparatist? Indeed, *can* foreign law exist for this comparatist? The short version of my conundrum is as follows. For foreign law to be foreign, it has to be located beyond the comparatist's grasp. It has to be, literally, foreign to the comparatist. But if the comparatist is dealing in the beyond-one's-grasp, how can he convincingly talk about existence? By definition, so to speak, the comparatist cannot have any knowledge of what lies beyond his grasp. So, the comparatist cannot know that what lies beyond his grasp exists as 'law' elsewhere, as foreign law. Only when the comparatist 'connects' with the foreign law can he be satisfied that there is that entity, 'foreign law', there, in existence. But as a connection is being made, the entity 'foreign law' is no longer foreign to the comparatist. Perhaps, then, to follow your train of thought, one could say that comparatists are acting 'as if' foreign law exists. Now, the idea that because comparatists are acting 'as if' foreign law exists, foreign law's claim to existence would find itself warranted strikes me, at first blush, as an odd proposition. But I must confess that I have yet to read Vaihinger. I recall that you recommended the work to me a few years ago, and for my defence I will say that I now have Vaihinger's German text, the English translation and three books of commentary in English and French sitting neatly on one of the coffee tables in my *provençal* study. But I simply have not been able to make the time. And I would find it problematic now to be acting 'as if' I had read Vaihinger.

GS: What you say is most helpful. It sets out how you envisage the role of the comparatist and it is difficult to dissent from anything you say. Despite my puzzlement over structures, I certainly would never assert as Gordley and Watson do (although I find Watson not to be entirely consistent in all his writings) that something like possession is 'much the same' or 'basically the same' across laws. I might say that the definition of possession in the many of the modern civil law systems is similar to the definition to be found in the *Digest*, just as the definition of ownership in article 544 of the French *Code civil* is almost the same in terms of its words as Bartolus' definition in his comment attached to D.42.2.17.1. Indeed, the definition of a usufruct in the *Code civil* (art. 578) is almost word-for-word the same definition as to be found in the *Digest* (D.7.1.1). But, as you say, they cannot mean the same in these different cultural contexts. Bartolus' understanding of ownership in 14th-century

Italy must surely be of quite a different order from an understanding of '*propriété*' in France in 1804 and indeed in 2020. What is worse for the contemporary comparatist who is looking at these Roman notions in the past is that she is faced with two 'others'. There is the other of 14th-century Italy as a foreign culture and there is the other of history itself — that is, history itself is a 'foreign country' and culture. Structuralism is in this respect an easy escape route for the comparatist/historian, but, as you say, it cannot really stand up to historiographical scrutiny. However, I find myself tempted on occasions to ponder on this epistemological seductive possibility, rather as a mathematician must ponder on the transcultural possibility of the existence of numbers (if numbers do 'exist'). So, what I do, or did when I was still teaching, was to adopt an approach analogous to your own with regard to Zweigert & Kötz. There is a structuralist thesis, but whether it can be defended is another matter.

As for Vaihinger, I recommended it after hearing your talk some years ago at Sciences Po on the Gordley and Whitman debate. One or two of the students, if I remember rightly, got most agitated by your view that the idea that one could state objectively the law on some topic or other — 'what the law is' — was untenable. It made me think that lawyers act 'as if' the law can be stated objectively. Gordley no doubt thought that he was stating the law objectively, but, if you are right (and I think that you must be), the only thing that exists are the texts that Gordley is interpreting. The 'law' that somehow exists 'objectively' is a fiction. Anyway, you no doubt have Bouriau's book *Le 'Comme si'* which you might want to read first as he puts Vaihinger in context.

Well, I guess we have now travelled quite a distance and have ranged over a number of fundamental topics. What has been most helpful is how you have stated with clarity your own position and outlook as a comparatist. This, I think, will be invaluable to readers. My own position is less clear and this is because my interest in methodology and epistemology in general has led me into that awful domain where I think that there is no one 'truth'. Each scheme of intelligibility (causality, functionalism, hermeneutics, dialectics, etc.) brings its own knowledge of a phenomenon and these schemes in turn function within paradigm orientations — naturalist paradigm versus the cultural paradigm, holism versus individualism and so on. Different schemes, different paradigms, different knowledge. Some reviewers criticised my comparative law book for not taking a final position; they are right. Where we can agree is that the old positivistic approach to comparative law is useless, save perhaps if I want to buy a house in Germany. The culturalist paradigm, with its interdisciplinary orientation, has transformed the subject and made comparative law a domain of, I think, exciting debate. There is now more than enough material — your own, Nelken, Ruskola, Whitman, Gordley, Watson, Kennedy, etc. — to support an advanced comparative law course. This, in itself, is a revolution.

Perhaps you might like to add some final words?

PL: Since you are kind enough to offer, I will indeed seize this opportunity to enter a brief rejoinder to your point about truth. You say 'there is no one "truth"'. Not only do I agree, but I would actually hold that since 'there is no one truth', there is no truth at all (a claim with which you yourself might agree — or not). In my view, the idea of 'truth' — at least in terms of its conventional understanding — is incompatible with there being more than one.

Indeed, the very point of a 'true' meaning of a foreign law-text is to cancel the possibility that there could be, say, more than one valid or legitimate meaning of a foreign law-text. For example, there is no sense in talking about 'truth for me' since if one adds this codicil, the word 'truth' effectively finds itself devoid of meaningful semantic import. So, if there is a true reading of foreign law, this fact must exclude the possibility that there could be more than one valid or legitimate reading of foreign law. I must add that 'truth' strikes me as a very authoritarian motion, as the kind of move that aims to bring any ongoing conversation to an end. If a comparatist asserts that the 2004 French statute is Islamophobic as a matter of truth, this comparatist is effectively saying that any conversation regarding the meaning of the statute has become irrelevant. Indeed, if there is the truth of the matter, what point further discussion? Let me put it this way: when someone thinks he is hard-wired to truth, the rest of us are in deep trouble, which is why I would strongly advise — and I do strongly advise — any young comparatist not to go down that epistemic dead-end. Meanwhile, the comparatist who holds that the French statute is Islamophobic on account of his interpretation of the text — which, of course, the comparatist in question regards as the best interpretation going — is, in effect, making the case for a democratic comparative law. To recognize that one's 'take' can only be interpretive and therefore to recognize the validity and legitimacy of competing interpretations is indeed to uphold a democratic comparative law — a most meritorious stance to behold, if you ask me.

I think I can helpfully refer to Ronald Dworkin in order to illustrate the kind of thinking that comparative law must resist. In his *Justice for Hedgehogs*, Dworkin writes that 'a scholar who labors for years over a new reading of *Hamlet* cannot believe that his various interpretive conclusions are no more valid than the contradictory conclusions of other scholars'. Dworkin adds that this scholar can therefore think that 'there is objective truth in interpretation'. Now, assume that Dworkin's *Hamlet* scholar is acting seriously and is wishing to be taken seriously by his readership. Of course, one can expect this scholar to deem his interpretation of *Hamlet* to be offering a more compelling reading than, say, other extant interpretations of *Hamlet* to be found in various literary monographs or journals. But this sense of achievement does not mean, need not mean, and must not mean that this *Hamlet* scholar should hold his interpretation to be 'true'. What this scholar requires to believe, and what he needs to convince his readership to accept about his work, is that his interpretation carries a higher interpretive yield than all other interpretations. Those who suppose that there are no criteria for such judgment other than 'truth' merely expose their own epistemic incapacity. Be that as it may, the idea of 'truth' is superfluous as regards any expression of conviction in the supremacy of one interpretation over others. You will have noticed that Dworkin mentions 'objectivity'. Indeed, I can replicate my critique of 'truth' as regards 'objectivity', another highly authoritarian motion. For a comparatist to claim that he can proceed objectively is, in effect, to cancel any worthwhile possibility of challenge to his work. And such authoritarianism must be scrupulously avoided.

Perhaps I can close our exchange by encouraging comparatists — especially younger colleagues who, in my experience, are likely to come to the comparison of laws with a more open mind than their elders — to reflect on the kind of issues that we have been raising in the course of our conversation. At this writing, it is the easiest thing to point to the resurgence of nationalism and parochialism, of xenophobia and other forms of discrimination against foreigners, literally all over the world. Think of the United States and

the United Kingdom, of course, but also of Brazil, Hungary, and the Philippines, not to mention Poland and Australia. Now, without exaggerating in the least what can be achieved, the fact of the matter is that a practice like comparative law *can* play a role as an antidote to the intellectual forces of retrenchment and stigmatization — a small-scale role, to be sure, but a role all the same, for example, as regards the edification of respect for difference. However, if it is to get a hearing before the law-school curriculum committee and if it is to prove effective in the law-school classroom, comparative law has to feature a minimum of intellectual sophistication. It has to pass epistemic muster — hence the need on the part of comparatists for serious reflection on the matters that we have been canvassing (and on many others — a topic like translation rushes to mind!).

It remains to thank you for leading this conversation and for your important observations and questions. These range widely and invite deep and meaningful thought. I very much enjoyed our exchange.