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## SG on GS

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Samuel, Geoffrey. *An Introduction to Comparative Law Theory and Method*. Oxford, Hart, 2014. xvii, 226 p. ISBN 978-1-84946643-1.

Mirroring French specialists in French family law or German experts in the German law of obligations or English authorities on the English law of wills, comparatists have tended to orient their legal research towards rules and the interpretation of rules, whether judicial or doctrinal. Not only are theoretical reflections on the practice of comparative law a recent occurrence,<sup>1</sup> but they continue to be of interest to a relatively small number of comparatists only.<sup>2</sup> Inevitably, crucial issues like the relationship between law and culture or the translatability of law, the extent to which an understanding of another law is possible or the objectivity of legal interpretation therefore remain under-theorized within comparative law. In this regard, Geoffrey Samuel's book, *An Introduction to Comparative Law Theory and Method*, contributes timely insights to the necessary theoreticization of comparative law.<sup>3</sup> Although Samuel's monograph has been 'designed primarily for postgraduate research students whose work involves comparison between legal systems' (at vii), it must be welcomed by any comparatist who takes comparative legal research seriously.<sup>4</sup> But such earnest comparatist will want to engage with Samuel's determinations.

A threshold question concerns the monograph's title. Why did Samuel opt for the formulation 'theory and method', an arrangement suggesting that method would not pertain to theory, that it would be located beyond theory or at any rate elsewhere than within theory? Now, is it not the case that a method is always already grounded in certain theoretical choices of which it becomes the conduit or vehicle, to which it proceeds to give expression, which it implements? Indeed, as Samuel readily admits, 'the choice of a certain method implies the choice of a certain theoretical approach' (at 2). Thus, it can be said that '[m]ethod and methodology [...] embrace [...] theory' (ibid). I agree, but it follows that I must find the title problematic in as much as it operates an awkward categorization (even though the monograph itself appears rapidly to jettison the distinction — which, of course, creates other difficulties). But there is more to say as regards method.

While comparatists have traditionally eschewed theoretical investigations, it is fair to say that within such discussions as have taken place method has featured prominently. Already in 1900, at the Paris international conference on comparative law, Frederick Pollock expressed the view that 'comparative law [...] is but the introduction of the comparative

<sup>1</sup> In this respect, Günter Frankenberg's in-depth critique of comparatism remains something of a touchstone. See Frankenberg, G (1985) 'Critical Comparisons: Re-thinking Comparative Law' (26) *Harvard International Law Journal* 411.

<sup>2</sup> Eg: Legrand, P and Munday, R (eds) (2003) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press; Adams, M and Bomhoff, J (eds) (2014) *Practice and Theory in Comparative Law* Cambridge University Press; Legrand, P (2014) *Pour la relevance des droits étrangers* IRJS Editions; Frankenberg, G (2016) *Comparative Law As Critique* Elgar.

<sup>3</sup> For a review, see Vanderlinden, J (2015) 'Book Review: Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing, Oxford and Portland, Oregon 2014)' (8) *Journal of Civil Law Studies* 355.

<sup>4</sup> I indicate all references to the book under review in the body of the text.

method into law'.<sup>5</sup> Later, Erich-Hans Kaden, nowadays a largely forgotten name within comparative law, expressed the mainstream view that 'the concept of comparative law [...] denotes nothing other than a method'.<sup>6</sup> Over the years, comparatists have continued to emphasize the significance of method. While some scholars have released collections of essays addressing the location of method in comparative law,<sup>7</sup> others have devoted monographs, book chapters or articles to an analysis of method generally or to the examination of a specific methodological issue.<sup>8</sup> In the words of a US scholar, '[t]he comparatist *must* choose a methodology'.<sup>9</sup> I feel safe in saying that Samuel would endorse this view and that for him, too, method constitutes a *sine qua non* requirement for plausible comparative legal research. Indeed, Samuel, a seasoned comparatist drawing on a uniquely rich first-hand experience of foreign law (as an English professor of law he has taught at an extraordinarily large number of French law faculties on countless occasions over decades), has long been '[t]aking [m]ethods seriously'.<sup>10</sup> In the significance that he ascribes to method both in the title of the monograph under review and within it, Samuel thus marks his distance from a minority of contemporary comparatists who either challenge the fashioning of comparative law as method or fail to discuss method altogether in their scholarship.<sup>11</sup>

Of course, given the wealth of literature in the field the reader may wonder whether there is any need for yet another discussion of comparative law's methodology. After all, one may harbour the legitimate impression that all of significance that could possibly be said about the use of method in comparative law has been said, and that nothing meaningfully new can be added to the debate. But Samuel shows himself to be deeply dissatisfied with available scholarly writings. He argues that 'on closer inspection [books that claim to

<sup>5</sup> Pollock, F (1905) in Congrès international de droit comparé *Procès-verbaux des séances* vol I LGDJ at 60.

<sup>6</sup> Kaden, E-H (1938) 'Rechtsvergleichung' in *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes* vol VI: *Rechtsmissbrauch und Schikane — Unsittliche Rechtsgeschäfte* Franz Vahlen at 11.

<sup>7</sup> Eg: Rotondi, M (ed) (1973) *Inchieste di diritto comparato* vol II: *Buts et méthodes du droit comparé* Cedam; Monateri, PG (ed) (2012) *Methods of Comparative Law* Elgar; Van Hoecke, M (ed) (2004) *Epistemology and Methodology of Comparative Law* Hart; Adams, M and Heirbaut, D (eds) (2014) *The Method and Culture of Comparative Law* Hart.

<sup>8</sup> Eg: Constantinesco, L-J (1972) *Rechtsvergleichung* vol II Heymans; Markesinis, BS (1997) *Foreign Law and Comparative Methodology: A Subject and a Thesis* Hart; Graziadei, M (2003) 'The Functionalist Heritage' in Legrand, P and Munday, R (eds) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press; Husa, J (2003) 'Farewell to Functionalism or Methodological Tolerance?' *RabelsZ* 419; Michaels, R (2006) 'The Functional Method of Comparative Law' in Reimann, M and Zimmermann, R (eds) *The Oxford Handbook of Comparative Law* Oxford University Press; Örcüü, E (2006) 'Methodological Aspects of Comparative Law' (8) *European Journal of Law Reform* 29; Brand, O (2007) 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' (32) *Brooklyn Journal of International Law* 405.

<sup>9</sup> Lasser, M (2003) 'The Question of Understanding' in Legrand, P and Munday, R (eds) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press at 234 (my emphasis).

<sup>10</sup> Samuel, G (2007) 'Taking Methods Seriously (Part One)' (2) *Journal of Comparative Law* 94; Samuel, G (2007) 'Taking Methods Seriously: (Part Two)' (2) *Journal of Comparative Law* 210. See also Samuel, G (2003) *Epistemology and Method in Law* Ashgate; Samuel, G (2004) 'Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences' in Van Hoecke, M (ed) *Epistemology and Methodology of Comparative Law* Hart; Samuel, G (2011) 'Does One Need an Understanding of Methodology in Law Before One Can Understand Methodology in Comparative Law?' in Van Hoecke, M (ed) *Methodologies of Legal Research* Hart; Samuel, G (2013) 'Comparative Law and Its Methodology' in Watkins, D and Burton, M (eds) *Research Methods in Law* Routledge.

<sup>11</sup> Legrand, P (1988) 'Beyond Method: Comparative Law As Perspective' [Book Review] (36) *American Journal of Comparative Law* 788; Legrand, P (2009) 'Au lieu de soi' in Legrand, P (ed) *Comparer les droits, résoluement* Presses Universitaires de France at 35; Watson, A (1993) *Legal Transplants: An Approach to Comparative Law* (2nd ed) University of Georgia Press at 9; Glanert, S (2012) 'Method?' in Monateri, PG (ed) *Methods of Comparative Law* Elgar.

be about comparative legal methodology] are certainly not systematic in their coverage of method, and some are even rather unsophisticated, if not trite' (at 3). Regrettably, '[c]omparative law [...] finds itself plagued by a mass of methodological notions and concepts' (at 14). If Samuel has his way, his book will 'act as a stimulant for a new wave of literature that will begin to lay down a more systematic basis for methodology not just in comparative law but for law in general' (at 3). According to the author, 'there is a need for a comparative law which will provide insights into the methodological models used by researchers, including jurists, in their attempt to make sense of objects of knowledge' (at 20). In the face of such ambitious goals, it behoves the comparatist to ask whether Samuel's monograph keeps its promise. On the whole, I have formed the confident view that *An Introduction to Comparative Law Theory and Method* does indeed make an outstanding contribution to the field. In the following, I focus on a critical assessment of some aspects of the text that I find deserve further consideration.

To be sure, Samuel (thankfully!) sets high standards for credible comparative legal research. Because 'the comparatist enjoys the power to explicate',<sup>12</sup> an ability that as often as not the scholar ascribes to himself without any official warrant from the legal agents being the focus of her enquiry, Samuel warns how '[a]mateurism can be fatal to a serious research project and can result in work that is pretentious and ridiculous and (or) full of errors' (at 35). In order to circumvent these pitfalls, Samuel makes a strong argument in favor of an interdisciplinary approach. He thus writes in unequivocal terms that '[t]he researcher who wishes to stay squarely within a 'pure normative inquiry' approach probably ought not [...] to undertake comparative legal research' (at 3). Now, Samuel's call to interdisciplinary arms is bound to generate much perplexity within mainstream comparative law. Although some comparatists have increasingly been tapping into fields of knowledge other than law with a view to optimizing their interpretive yield,<sup>13</sup> most legal scholars resist interdisciplinarity. Various reasons account for such diffidence.

Typically, a lawyer will have developed an expertise in her own field but know little about other disciplines. Spanish philosopher José Ortega y Gasset famously referred to such an individual as a 'learned-ignoramus', that is, someone who 'will act in all areas in which he is ignorant, not like an ignorant man, but with all the airs of one who is learned in his own special line'.<sup>14</sup> Be that as it may, many comparatists find it difficult to come to terms with writings that are not deemed 'legal' in the traditional sense.<sup>15</sup> Further, there are comparatists who do not undertake interdisciplinary research for what they regard as practical reasons. The underlying idea informing this brand of comparative research is that it must provide concrete solutions to specific legal problems involving foreign law.<sup>16</sup>

<sup>12</sup> Legrand, P (1996) 'How to Compare Now' (16) *Legal Studies* 232 at 236.

<sup>13</sup> Eg: Foster, NHD, Moscati, MF and Palmer, M (eds) (2016) *Interdisciplinary Study and Comparative Law* Wildy's. See also Legrand, P (2011) 'Siting Foreign Law: How Derrida Can Help' (21) *Duke Journal of Comparative and International Law* 595; Glanert, S (ed) (2014) *Comparative Law – Engaging Translation* Routledge; Teubner, G (1998) 'Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (61) *Modern Law Review* 11; Ruskola, T (2013) *Legal Orientalism* Harvard University Press.

<sup>14</sup> Ortega y Gasset, J (1985 [1930]) *The Revolt of the Masses* Moore, K (ed) Kerrigan, A (trans) University of Notre Dame Press at 98.

<sup>15</sup> A French comparatist laments how 'complex cultural and interdisciplinary comparison [...] renders the discipline so complicated': Fauvarque-Cosson, B (2006) 'Comparative Law in France' in Reimann, M and Zimmermann, R (eds) *The Oxford Handbook of Comparative Law* Oxford University Press at 61.

<sup>16</sup> Eg: Basedow, J (2014) 'Comparative Law and Its Clients' (62) *American Journal of Comparative Law* 821. Revealing the utmost scepticism with respect to interdisciplinary approaches, another comparatist argues

Also, the ascendancy of law may explain some at least of the comparatist's unwillingness to take an interest in interdisciplinarity. Traditionally, law has been envisaged as more prestigious than other disciplines like anthropology, sociology or linguistics — which entails that interdisciplinary work, to the extent that it would be diluting the law or contaminating the law's alleged purity, would effectively prove scientifically demeaning.<sup>17</sup> Indeed, one should not forget that in civil-law countries, where statutes are considered to constitute the epistemological substance of the law and where most legal knowledge is articulated around the idea of 'law as science', there is but little epistemological room left for the interaction of law with other fields of knowledge.<sup>18</sup> Against the background of such scepticism, I rejoice that Samuel should be amenable to interdisciplinary research within comparative law and should be willing to emphasize the advantages pertaining to this approach to the construction of legal knowledge.

Samuel is rightly convinced that 'the jurist could learn much from subjects such as comparative literature, comparative linguistics, comparative religion, comparative politics and the like' (at 24). Interestingly, the author himself proves to be very open to intellectual influences coming from outside the law as traditionally understood. Thus, Samuel's monograph contains many refreshing references to film (at 82, 84-86, 88-89 and 135) and to sociology (at 93, 128, 154 and 159). It also features a section devoted to language and translation issues (at 144-47), long neglected by most comparatists.<sup>19</sup> While Samuel acknowledges that 'a commitment [to interdisciplinarity] is not necessarily going to be that easy for researchers trained uniquely in the discipline of positive law' (at 5), he neither explains the meaning of interdisciplinarity — as distinguished, say, from pluridisciplinarity or transdisciplinarity — nor does he provide any concrete guidelines on how to undertake interdisciplinary research.<sup>20</sup> Although undoubtedly well-intentioned, a general remark to the effect that '[i]t should be evident that a researcher who wishes to adopt an external standpoint ought to have sufficient expertise in the specialized field that will act as the intellectual model for the external framework' (at 35) can only offer limited assistance. The young comparatists to whom the book is specifically addressed would have

that 'this new material is not likely to be of use to applied research of the kind that judges, legislators, and practitioners would ever wish to consult': Markesinis, B (2006) 'Understanding American Law by Looking at It Through Foreign Eyes: Towards a Wider Theory for the Study and Use of Foreign Law' (81) *Tulane Law Review* 123 at 142.

<sup>17</sup> For example, in France, during their very first year of legal studies, students learn to distinguish categorically between 'the law' and 'the auxiliary sciences of the law': Aubert, J-L and Savaux, E (2016) *Introduction au droit et thèmes fondamentaux en droit civil* (16th ed) Sirey at 47-51.

<sup>18</sup> See Kiesow, RM (2010) 'Rechtswissenschaft — was ist das?' (12) *JuristenZeitung* 585.

<sup>19</sup> Many textbooks in the field refrain from addressing translation problems. Eg: Zweigert, K and Kötz, H (1998) *Introduction to Comparative Law* (3d ed) Weir, T (trans) Oxford University Press; Menski, W (2006) *Comparative Law in a Global Context* (2d ed) Cambridge University Press; Glenn, HP (2014) *Legal Traditions of the World* (5th ed) Oxford University Press. But see Weisflog, WE (1996) *Rechtsvergleichung und juristische Übersetzung* Schulthess; Pommer, S (2006) *Rechtsübersetzung und Rechtsvergleichung* Peter Lang; Legrand, P (2008) 'Word/World (Of Primordial Issues for Comparative Legal Studies)' in Petersen, H et al (eds) *Paradoxes of European Legal Integration* Ashgate; Glanert, S (ed) (2014) *Comparative Law — Engaging Translation* Routledge.

<sup>20</sup> Eg: Thompson Klein, J (1990) *Interdisciplinarity: History, Theory, and Practice* Wayne State University Press; Moran, J (2010) *Interdisciplinarity* (3rd ed) Routledge; Aldrich, JH (2014) *Interdisciplinarity: Its Role in a Discipline-Based Academy* Oxford University Press; Jacobs, JA (2014) *In Defense of Disciplines: Interdisciplinarity and Specialization in the Research University* University of Chicago Press; Graff, HJ (2015) *Undisciplining Knowledge: Interdisciplinarity in the Twentieth Century* Johns Hopkins University Press; Frodeman, R, Thompson Klein, J and Pacheco, RCS (eds) (2017) *The Oxford Handbook of Interdisciplinarity* (2d ed) Oxford University Press.

benefited from a more detailed discussion of interdisciplinary research in comparative law emphasizing Samuel's own extensive experience across disciplines.

Still operating within the methodological realm (but very much addressing a matter pertaining to legal theory, too), Samuel urges the comparatist to ask 'the right question' (at 25). As I read Samuel, the idea is not to formulate a 'correct' research problem in the sense of a 'true' one, say, a problem that the field of comparative law would regard as 'truly' significant. Rather, Samuel means that 'the question must be correctly framed so as to define as precisely as possible the area to be researched' (at 25). For Samuel, the moment when a research question is formulated is of 'fundamental importance' since it 'is the stage at which the direction, sophistication and scope of the research project are to be determined; and it is the stage at which the researcher must begin to reflect on the methodological and epistemological implications of undertaking a comparative law project' (at 43). Since 'different methods result in different kinds of knowledge' (at 44), 'the researcher ought to justify why a particular methodology and orientation has been adopted' (ibid).

Helpfully emphasizing how the choice of a given method has an impact on the outcome of the research, that is, on the knowledge about foreign law that the comparatist will actually produce, the book under review devotes five chapters to the examination of a range of comparative approaches, including macro- and micro-comparison, genealogical and analogical approaches, universalist and differential comparison as well as inner and outer perspectives. In this regard, Samuel properly warns the comparatist that 'the development of a perfect epistemological single model capable of encapsulating at one and the same time all of the various knowledge aspects of a discourse and its object is, to say the least, an unrealistic enterprise' (at 45). Along the way, Samuel critically examines the functionalist method that Konrad Zweigert and Hein Kötz's *Introduction to Comparative Law* steadfastly and prominently advocates,<sup>21</sup> a model so influential that it has come to be described as 'comparative legal studies's *doxa*'.<sup>22</sup> In their treatise, Zweigert and Kötz defend the position that '[t]he basic methodological principle of all comparative law, from which stem all the other methodological principles — the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, etc. — is that of *functionality*'.<sup>23</sup> In the context of his analysis, Samuel deploys two examples, good faith and abuse of rights, with a view to highlighting the many problems arising from the use of the functionalist approach in comparative law to the exclusion of any other research strategy (at 69-71). Indeed, Samuel, who strongly believes that 'one must focus upon a variety of schemes methods and approaches' (at 45), finds that 'it is particularly dangerous to argue that there is just one method that is useful to comparative law' (at 95). As he undertakes to suggest methodological alternatives to functionalism,<sup>24</sup> Samuel, having ascertained that comparative-law research cannot be of any assistance to him, finds himself

<sup>21</sup> Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 19. See also Graziadei, M 'The Functionalist Heritage' supra note 8; Michaels, R 'The Functional Method of Comparative Law' supra note 8; Gordley, J (2012) 'The Functional Method' in Monateri, PG (ed) *Methods of Comparative Law* Elgar.

<sup>22</sup> Legrand, P (2005) 'Paradoxically, Derrida: For A Comparative Legal Studies' (27) *Cardozo Law Review* 631 at 632.

<sup>23</sup> Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 19 at 34 (emphasis original; translation modified).

<sup>24</sup> Along similar lines, another comparatist has argued that '[t]here is no exclusive method and much to be said about the virtues, and defects, of different methods': Glenn, HP *Legal Traditions of the World* supra note 19 at 7.

referring to social-science literature. In particular, he relies on the writings of the late French epistemologist Jean-Michel Berthelot who identified six methodological schemes of intelligibility — the causal, functional, structural, hermeneutical, actual and dialectical models — which, although not necessarily operating independently from one another, can be identified as separate epistemological approaches (at 83-95).

In particular, I found Samuel's brief discussion of hermeneutics stimulating (at 83-84). The author explains that 'functionalism is now under attack as being too restrictive; over the past two decades the emphasis has shifted, at least to an extent, to hermeneutics' (at 41), often referred to as interpretation theory. According to Samuel, '[t]he comparatist is an interpreter, not a mathematician or logician' (ibid). For him, '[t]he legal text is simply a signifier and the job of the comparatist is to go beyond this signifier in order to discover the cultural and mentality significance that the text represents' (ibid). Samuel mentions that 'the essence [...] of the hermeneutical scheme is the art of interpretation; and the goal of such interpretation is to understand the interior through exterior signs' (at 86). Initially concerned with the exegesis of sacred texts where the governing interpretive idea was to discover the will of God, hermeneutics progressively developed into a more general method for any work that was complicated and difficult to understand. Samuel particularly mentions Wilhelm Dilthey, a 19th-century German social scientist, 'who shifted the methodological perspective from explanation (of society) to an understanding of it through the study of its exterior manifestations' (at 85). In a brief nod to history, Samuel emphasizes that 'thanks to [Dilthey] the hermeneutics scheme was to gain a relevance and visibility that it had never before had, and it was to inspire a range of twentieth-century philosophers' (ibid). Several pages later, Samuel returns to hermeneutics in a chapter that he entitles 'Hermeneutical Method' (at 108-20).

Along with structuralism, Samuel regards hermeneutics as one of the 'more important tools' in comparative legal research (at 95). In his cursory reflections on hermeneutics, Samuel relies on the third edition of Pierre Legrand's *Le Droit comparé*.<sup>25</sup> In the process, the reader learns that 'Legrand is referring to the work of Gadamer' — who asserts that interpretation is 'an exercise that goes beyond method' (at 108). Not only do I regret that Samuel does not supply any information about Gadamer, whose significance for hermeneutics deserves to be underlined, but I find that the approving reference to Legrand is confusing given that the book under review repeatedly casts hermeneutics as a methodological option for comparatists. Specifically, Samuel writes that '[hermeneutics] is a *method* that emphasizes the 'situated character' of the interpreter, on the one hand, and the 'situated character' of the text on the other' (at 109; my emphasis). Samuel also writes about the '*deep* hermeneutical method' (at 111; my emphasis). Indeed, for Samuel hermeneutics ranks as his preferred method. 'The methodology that the comparatist should be employing', he writes, 'is not functionalism or structuralism which tends to emphasize law-as-rules, but a deep hermeneutical approach, in which rules and concepts are merely the signifiers of a much deeper *mentalité*' (at 118; emphasis original; see also at 163). Still, as if edging his bets, Samuel observes that '[a] hermeneutical approach is not intrinsically 'better' than a functional approach; what the former can do is to highlight both the knowledge that the latter does not reveal and the shortcomings of functionalism' (at 95). In the end, I think Samuel's book would have been stronger if it had found itself able

<sup>25</sup> See Legrand, P (2009) *Le Droit comparé* (3d edn) Presses Universitaires de France.

to express sharper views on the status to be ascribed to hermeneutics within comparative law. Also, if hermeneutics stands to play an important role for comparatists, one would expect some key philosophical texts<sup>26</sup> and related literature,<sup>27</sup> to make an appearance in the notes. Another difficulty concerns Legrand's work. While this comparatist has for many years embraced a deconstructive approach to law,<sup>28</sup> thus moving beyond hermeneutics, Samuel's book does not indicate this development — nor indeed does he seek to probe the salient differences between 'hermeneutics' and 'deconstruction'.<sup>29</sup>

Curiously, given his apparent commitment to hermeneutics, Samuel seems to underestimate the active role played by the comparatist within comparative legal research. On several occasions, Samuel thus suggests that knowledge about foreign law can somehow be 'found'. For example, he writes that '[a] piece of research, including of course research in comparative legal studies, has as its objective the *discovery* of knowledge' (at 25; my emphasis). Further, he argues that 'the job of the comparatist is [...] to *discover* the cultural and mentality significance that the text represents' (at 41; my emphasis). *Pace* Samuel, I take the view that knowledge regarding foreign law does not simply await the interpreter, who would come along not unlike the archaeologist digging up an amphora long hidden under a stone slab. Rather — and this insight is arguably one of hermeneutics's signal contributions<sup>30</sup> — the comparatist is actively involved in the *production* of knowledge about

<sup>26</sup> Leading texts would presumably include Schleiermacher, FDE (1998 [1838]) *Hermeneutics and Criticism* Bowie, A (ed and trans) Cambridge University Press; Heidegger, M (1999 [1923]) *Ontology — The Hermeneutics of Facticity*, Van Buren, J (trans) Indiana University Press; Heidegger, M (1962 [1927]) *Being and Time* Macquarrie, J and Robinson, E (trans) Blackwell; Gadamer, H-G (2004 [1986]) *Truth and Method* (2d rev Eng ed) Weinsheimer, J and Marshall, DG (trans) Continuum; Gadamer, H-G (2001 [1993]) *Gadamer in Conversation [With Carsten Dutt]* Palmer, RE (ed and trans) Yale University Press; Gadamer, H-G (2007) *The Gadamer Reader: A Bouquet of the Later Writings* Palmer, RE (ed) Northwestern University Press.

<sup>27</sup> Eg: Palmer, RE (1969) *Hermeneutics: Interpretation Theory in Schleiermacher, Dilthey, Heidegger, Gadamer* Northwestern University Press; Warnke, G (1987) *Gadamer: Hermeneutics, Tradition, and Reason* Stanford University Press; Bruns, GL (1992) *Hermeneutics: Ancient and Modern* Yale University Press; Grondin, J (1993) *L'Universalité de l'herméneutique* Presses Universitaires de France; Grondin, J (1994 [1991]) *Introduction to Philosophical Hermeneutics* Weinsheimer, J (trans) Yale University Press; Dostal, RJ (ed) (2002) *The Cambridge Companion to Gadamer* Cambridge University Press; Krajewski, B (ed) (2004) *Gadamer's Repercussions* University of California Press; Davey, N (2006) *Unquiet Understanding: Gadamer's Philosophical Hermeneutics* SUNY Press; Grondin, J (2008) *L'Herméneutique* (2nd ed) Presses Universitaires de France; Malpas, J and Zabala, S (eds) (2010) *Consequences of Hermeneutics* Northwestern University Press; Malpas, J and Gander, H-H (eds) (2015) *The Routledge Companion to Hermeneutics* Routledge; Zimmermann, J (2015) *Hermeneutics* Oxford University Press; Warnke, G (ed) (2016) *Inheriting Gadamer: New Directions in Philosophical Hermeneutics* Edinburgh University Press. With specific reference to law, see, for example, Betti, E (1955) *Teoria generale della interpretazione* 2 vol Giuffrè; Leyh, G (ed) (1992) *Legal Hermeneutics: History, Theory, and Practice* University of California Press; Senn, M and Fritsch, B (eds) (2009) *Rechtswissenschaft und Hermeneutik* F Steiner; Kaspers, J (2014) *Philosophie — Hermeneutik — Jurisprudenz: Die Bedeutung der philosophischen Hermeneutik Hans-Georg Gadamer's für die Rechtswissenschaften* Duncker & Humblot; Omaggio, V and Carlizzi G (2010) *Ermeneutica e interpretazione giuridica* Giappichelli; Glanert, S and Girard, F (2016) *Law's Hermeneutics: Other Investigations* Routledge.

<sup>28</sup> See Legrand, P (2011) *Le Droit comparé* (4th ed) Presses Universitaires de France at 50-72. For a more recent version of the argument, see Legrand, P (2015) *Le Droit comparé* (5th ed) Presses Universitaires de France at 49-71.

<sup>29</sup> Eg: Silverman, HJ and Ihde, D (eds) (1985) *Hermeneutics and Deconstruction* SUNY Press; Caputo, JD (1988) *Radical Hermeneutics: Repetition, Deconstruction, and the Hermeneutic Project* Indiana University Press; Michelfelder, DP and Palmer, RE (eds) (1989) *Dialogue and Deconstruction: The Gadamer-Derrida Encounter* SUNY Press Champion; Silverman, HJ (2016) *Textualities: Between Hermeneutics and Deconstruction* Routledge; Legrand, P (2016) 'Derrida's Gadamer' in Glanert, S and Girard, F (eds) *Law's Hermeneutics: Other Investigations* Routledge.

<sup>30</sup> As Hans-Georg Gadamer writes, the interpreter's understanding of a text or situation is never objective, but always conditioned by the tradition that inhabits her and that forms the substance of her 'prejudgment[s]'. Gadamer, H-G *Truth and Method* supra note 26 at 273.



foreign law. Because any representation is generated by a situated observer, it is inevitably other than mere description. Indeed, language or discourse necessarily filters foreignness through the prism of its own assumptions, which means that any text purporting to account for foreign law is slanted. Would it be excessive to call it 'fictional'?<sup>31</sup> Think about the French comparatist's French words and French assumptions — say, concerning the fundamental character of binary distinctions in the organization of thought — which aim to convey English law. And consider the German comparatist's re-presentation as it makes use of German words and depends on German assumptions having to do, for example, with the scientific (or *wissenschaftlichen*) conception of law. Since any intelligibility of English law can only happen through schemes that interpreters impose upon it *a priori*, a French comparatist's representation will differ from a German comparatist's, so that each comparison will, in the end, generate a local version of English law which simply cannot reasonably pretend to being 'English law' (whatever that may mean) and which, to the extent that it will necessarily depart from 'English law', can properly be regarded as fashioning an 'English law' that is fictitious.

My French and German illustrations point to another tension within Samuel's book, which a deeper engagement with hermeneutics would have addressed more persuasively. Samuel thus writes that 'another methodological difficulty to be encountered in comparative legal studies is one that involves the perspective from which the comparatist should operate' (at 60). This difficulty, he argues, 'raises the question as to whether a comparatist from one tradition or system, in order to understand the law of another tradition or system, needs to become immersed in the mentality of the other. For instance, can a common lawyer understand French Law from the 'outside', so to speak, or must she become an 'insider' before she can properly comprehend this civilian system? Must one subjectively absorb the culture and mentality of the French lawyer?' (at 61). To be sure, Samuel recognizes that '[o]ne difficulty arising from th[e] [insider] thesis is the sheer effort that would be required for a jurist brought up in say England or the United States actually to become such an insider, for the Cartesian mentality that underpins French legal thought is not something that can be absorbed by doing a French law degree or spending a few years in the country' (at 61). But hermeneutics shows that irrespective of what an interpreter may *want* to accomplish, one simply *cannot* jettison the tradition into which she was thrown.<sup>32</sup>

In deference to Geoffrey Samuel's critical approach to comparative law, I have wanted to offer a critical response of my own to certain aspects of his treatment of theoretical or methodological issues arising within the comparison of laws. It remains that Samuel makes an important contribution to comparative law, which comparatists the world over must enthusiastically welcome (and which the book's sophisticated index will allow them

<sup>31</sup> Eg: Bercea, R (2009) 'Toute comparaison des droits est une fiction' in *Comparer les droits, résolument* Legrand, P (ed) Presses Universitaires de France at 41-68.

<sup>32</sup> 'Thrownness' (or *Geworfenheit*) is an important motif in Heideggerian philosophy. 'Thrownness is neither a 'fact that is finished' nor a Fact that is settled. Dasein's facticity is such as long as it is what it is, Dasein remains in the throw, and is sucked into the turbulence of 'they's' authenticity': Heidegger, M *Being and Time* supra note 26 at 223 (emphasis original). In this regard, it is important to observe that Heidegger is a decisive influence within philosophical hermeneutics. Eg: Palmer, RE *Hermeneutics: Interpretation Theory in Schleiermacher, Dilthey, Heidegger, Gadamer* supra note 27; Pöggeler, O (1983) *Heidegger und die hermeneutische Philosophie* K Alber; Grondin, J (2001) *Von Heidegger zu Gadamer: Unterauegs zur Hermeneutik* Wissenschaftliche Buchgesellschaft; Bowler, N and Farin, I (eds) (2016) *Hermeneutical Heidegger* Northwestern University Press.

to use optimally). A distinguished comparatist, Samuel has shown once again that he takes comparative legal research seriously. For my part, I very much look forward to pursuing our conversation within the context of our co-authored book, *Rethinking Comparative Law*.<sup>33</sup> I have no doubt that Geoffrey Samuel's longstanding experience as a comparatist will stand this project in very good stead indeed.

<sup>33</sup> Glanert, S and Samuel, G (2019) *Rethinking Comparative Law* Elgar.