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# CAN SOCIAL SCIENCE THEORY AID THE COMPARATIVE LAWYER IN UNDERSTANDING LEGAL KNOWLEDGE?

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GEOFFREY SAMUEL\*

Kent Law School

What is it to have knowledge of law? And what kind of knowledge is legal knowledge? These may seem rather extraordinary questions given that law has existed as a university discipline for a millennium and there has been a distinct legal profession for nearly as long.<sup>1</sup> Indeed if one includes Ancient Rome one is doubling the time period.<sup>2</sup> In addition there exists now a vast theory literature on the nature, concept and philosophy of law which, one might think, would have exhaustively supplied answers to the knowledge questions. Yet for the comparative lawyer the law school syllabi and the plurality of theories are not always that helpful because the question of what actually amounts to legal knowledge can be elusive. Now, in saying this, one is not suggesting that there has been an absence of reflection on the part of lawyers and jurists of what it is to have legal knowledge.<sup>3</sup> But there have,

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\*Professor Emeritus, Kent Law School. This article was first presented as a paper to the Private International Law as Global Governance (PILAGG) seminar at Sciences Po Paris in November 2017. The author would like to thank the participants of this seminar for their helpful comments, observations and criticisms, with a special thanks to Catalina Avasilencei (discussant) and Horatia Muir Watt. Thanks also to several anonymous referees whose comments and criticisms were particularly helpful with regard to the formulation of the final draft of the manuscript.

<sup>1</sup> See Brundage, J (2008) *The Medieval Origins of the Legal Profession* University of Chicago Press.

<sup>2</sup> On which see Schiavone, A (2017) *Ius. L'invenzione del diritto in Occidente* [The Invention of Law in the West] (2<sup>nd</sup> ed) Einaudi.

<sup>3</sup> Some notable more recent UK publications are Siems, M (2011) 'A World Without Law Professors' in Van Hoecke, M (ed) (2011) *Methodologies of Legal Research: Which Kind of Method for Which Kind of Discipline?* Hart Publishing 71 (plus references therein); Bix, B (2003) 'Law As An Autonomous Discipline' in Cane, P and Tushnet, M (eds) (2003) *The Oxford Handbook of Legal Studies* Oxford University Press 975; Bell, J (2003) 'Legal Education' in Cane, P and Tushnet, M (eds) (2003) *The Oxford Handbook of Legal Studies*

perhaps, been theories or notions of legal knowledge that have so dominated legal thinking and discourse that more reflective thinking about legal knowledge—indeed about knowledge in general—has been side-lined from legal discourse in academic institutions. Outside the legal discipline, social scientists have been asking questions about the nature of disciplines,<sup>4</sup> about whether social science knowledge is cumulative,<sup>5</sup> about the differences between academic and non-academic knowledge,<sup>6</sup> about the role of paradigms and the existence (or not) of scientific revolutions, about the validation of assertions and about other fundamental issues that seem of vital relevance to subjects such as sociology, anthropology, psychology and history.<sup>7</sup> Yet jurists seem on the whole absent from these debates. This absence is unhelpful for comparative lawyers because all pervading legal theories, together with long-established syllabi often having their sources directly or indirectly in Roman law,<sup>8</sup> can result in generating negative attitudes towards other cultural traditions whose notion of 'law' may be different.<sup>9</sup> So can one get beyond the established theories and syllabi in order to find some deeper identifiers of legal knowledge?

## INTRODUCTION: PROBLEMS AND PROMISES

So, what is it to have legal knowledge? One way of answering this question is of course to look at the syllabi of university law faculties and professional

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Oxford University Press 901.

<sup>4</sup> Boutier, J ; Passeron, J-C and Revel, J (eds) (2006) *Qu'est-ce qu'une discipline?* [What is a Discipline?]] Éditions de l'École des Hautes Études en Sciences Sociales.

<sup>5</sup> Walliser, B (ed) (2009) *La cumulativité du savoir en sciences sociales* [Cumulativity in the Social Sciences] Éditions de l'École des Hautes Études en Sciences Sociales.

<sup>6</sup> Walliser, B (ed) (2015) *La distinction des savoirs* [The Distinction Between Knowledges] Éditions de l'École des Hautes Études en Sciences Sociales.

<sup>7</sup> For many of the topics mentioned see generally Mesure, S and Savidan, P (eds) (2006) *Le dictionnaire des sciences humaines* [Dictionary of the Human Sciences] Presses Universitaires de France. See also Berthelot, J-M (ed) (2001) *Épistémologie des sciences sociales* [Epistemology of the Social Sciences] Presses Universitaires de France.

<sup>8</sup> See generally Gordley, J (2013) *The Jurists: A Critical History* Oxford University Press.

<sup>9</sup> Note in particular the work of Teemu Ruskola: Ruskola, T (2002) 'Legal Orientalism' (101) *Michigan Law Review* 179. Ruskola has adapted Edward Said's critique of Western attitudes towards the East and argues that some Western comparative lawyers are guilty of orientalism: Said, E (1978) *Orientalism* Routledge & Keegan Paul. Sir Christopher Frayling has described an aspect of orientalism as 'the colonial, white, public school view of Chinese people': Frayling, C (2014) *The Yellow Peril* Thames and Hudson at 13.

law schools.<sup>10</sup> What do students taking academic and professional exams (or other forms of assessment) need to study in order to be able to call themselves lawyers?<sup>11</sup> Another possibility is to adopt a diachronic approach. What has legal knowledge traditionally been? Both of these approaches are fundamental to an understanding of what constitutes legal knowledge in terms of material to be learned and certain methods to be adopted, but they do not necessarily give expression to some underlying epistemological issues that often seem to emerge obliquely. For example they may emerge in debates about the nature and goals of ‘private law’ or in arguments about legal theory or legal education or, again, in disputes about legal taxonomy.<sup>12</sup> Indeed the scope and perimeters of legal knowledge are not just for the academics; fundamental questions can be provoked by developments in the world of practice and commerce.<sup>13</sup> What kind of knowledge does the mediator or negotiator need in order to be good at what he or she does? And is such knowledge legal knowledge? In fact does one actually have to know much ‘law’ in order to be a good ‘lawyer’?<sup>14</sup> If one sees dispute resolution as central to law as a notion or discipline, is all knowledge about dispute resolution legal knowledge? Cultural issues also raise acute questions about the nature of legal knowledge. Are norms and customs arising out of indigenous cultures just issues of ‘fact’ or are they a legitimate aspect of legal knowledge?<sup>15</sup> In addition to these questions there are a range of others raising issues about the methods, focal points (institutional and conceptual), theories and role of law as a discipline or form knowledge.<sup>16</sup>

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<sup>10</sup> On which see Birks, P (ed) (1992) *Examining the Law Syllabus: The Core* Oxford University Press; Birks, P (ed) (1993) *Examining the Law Syllabus: Beyond the Core* Oxford University Press; Birks, P (ed) (1994) *Reviewing Legal Education* Oxford University Press; Birks, P (ed) (1996) *Pressing Problems in the Law: Volume 2: What Are Law Schools For?* Oxford University Press.

<sup>11</sup> See further Bell ‘Legal Education’ supra note 3 and Siems ‘A World Without Law Professors’ supra note 3.

<sup>12</sup> See eg Samuel, G (2000) ‘Can Gaius Really be Compared to Darwin?’ (49) *International & Comparative Law Quarterly* 297.

<sup>13</sup> Bell (2003) ‘Legal Education’ supra note 3 at 908–909.

<sup>14</sup> See eg <<https://www.youtube.com/watch?v=uMR1NIEifWM>>.

<sup>15</sup> See eg Provost, R (ed) (2017) *Culture in the Domains of Law* Cambridge University Press.

<sup>16</sup> See further Bix ‘Law As An Autonomous Discipline’ supra note 3.

Following on from these questions, there is little doubt that any attempt to assert in some kind of definitive way what legal knowledge is will face a number of 'legal knowledge paradoxes'. These paradoxes will in turn often tempt the legal scholar to fall back on the traditional notions and concepts (most of which have come directly or indirectly from Roman law: the 'Roman' conception) that form the institutional knowledge basis of much of what lawyers learn in the classroom and of what judges usually use for their reasoning and justification.<sup>17</sup> Yet if the comparative law scholar does fall back on these notions and concepts is he or she in danger of indulging in what might be described as epistemological imperialism (or colonialism)? Indeed, it could equally amount to a form of actual geopolitical imperialism if, for instance, Western commercial laws are forced upon emerging trading nations. And, paradoxically, such imperialism in turn will mask the highly important methodological and theory connections that law, even the 'Roman' conception of law as a discipline, enjoys with other disciplines within social science. In other words in over-emphasising traditional legal models more general forms of social science knowledge can so easily be eclipsed.<sup>18</sup>

One aspect, therefore, of legal epistemology is its fundamental interdisciplinary orientation.<sup>19</sup> If it is to be a serious subject for the comparatist it must form part of the discipline of epistemology in general which in turn will require that the legal epistemologist be familiar with the issues and debates in the epistemology of the natural and social sciences. Moreover legal epistemology must not just be informed by work in other areas but, if it is to be intellectually dynamic, itself must inform work

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<sup>17</sup> See generally Gordley *The Jurists: A Critical History* supra note 8.

<sup>18</sup> A good illustration is statutory interpretation which in the common law tradition has been reduced to three rules, namely the literal, golden and mischief rules. These formal rules mask the complex epistemological schemes of intelligibility and paradigm orientations that come into play when interpreting and applying texts.

<sup>19</sup> This is very evident in the work of Christian Atias: see eg Atias, C (2002) *Épistémologie juridique* [Legal Epistemology] Dalloz. Note also Ian Maclean's comment: 'The Corpus Juris Civilis itself [...] is not methodologically self-sufficient: a solid grounding in grammar, logic and legal argument is presupposed': Maclean, I (1992) *Interpretation and Meaning in the Renaissance* Cambridge University Press at 68.

outside of law.<sup>20</sup> It follows from this that in order to investigate the nature of legal knowledge one cannot operate uniquely from within law so to speak; there is a need to stand outside the discipline in order to bring to bear on the object of investigation notions, schemes, theories and methods that make up the discipline of epistemology itself. One must, as will be seen, stand outside the authority paradigm.<sup>21</sup> However such a stance finds itself in conflict with those legal theorists who approach legal theory from what might be described as an internal point of view.<sup>22</sup>

## EPISTEMOLOGICAL APPROACHES

Armed with an interdisciplinary outlook the epistemologist keen to discover what it is to have knowledge of law can adopt one (or more) of several approaches. There is, as Blanché has said, the dichotomy between a philosophic and a scientific approach.<sup>23</sup> Another approach is one that attempts to grasp a science as it is, divorced so to speak from any temporal dimension.<sup>24</sup> This is the synchronic viewpoint. What are the models used by scientists today? How do they relate to the objects that they are designed to represent? What is the present state of a particular science and what is its relationship with the empirical world? Here the emphasis is often on the preciseness of the scientific language employed in relation to the empirical phenomenon which is the object of the language. ‘Scientific knowledge of the kind concerned with experience of the real world’, wrote Gilles-Gaston Granger, ‘always consists of *constructing abstract schemes or models of this*

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<sup>20</sup> See on this issue Siems ‘academic dinner party test’: Siems ‘A World Without Law Professors’ supra note 3 at 82.

<sup>21</sup> On the authority paradigm see: Samuel, G (2009) ‘Interdisciplinarity and the Authority Paradigm: Should Law Be Taken Seriously by Scientists and Social Scientists?’ (36) *Journal of Law and Society* 431.

<sup>22</sup> This can be serious, in terms of an academic career, in France: see Jamin, C (2006) ‘La construction de la pensée juridique française: interrogation s sur un modèle original à l’aune de son anti-modèle’ in De Béchillon, D; Champeil-Desplats, V; Brunet, P and Millard, E (eds) (2006) *L’architecture du droit – Mélanges en l’honneur du Professeur Michel Troper* [The Architecture of the law - Essays in Honour of Michel Troper] *Economica* 501 at 507.

<sup>23</sup> Blanché, R (1983) *L’épistémologie* [Epistemology ] (3<sup>rd</sup> ed) Presses Universitaires de France at 29–33.

<sup>24</sup> *Ibid* at 33–36.

*experience*, and to exploit, by means of logic and mathematics, the relations between the abstract elements of these models, so as to infer in the end properties corresponding with sufficient precision to the empirical properties directly observable.<sup>25</sup> It is these models that act as the object of scientific knowledge and thus provide a synchronic vision of what it is to have such knowledge. One area of controversy with respect to these models is their epistemological status. Do they reflect the physical world as it is? Do they, in other words, have a ‘truth’ value? Or are they simply intellectual constructions to be judged in terms of their usefulness? Are they, in short, to be treated only ‘as if’ they represent truth?<sup>26</sup>

In contrast to this synchronic approach there is the diachronic which has been described by Blanché as an *analyse historico-critique*.<sup>27</sup> The importance of the historical approach, as Blanché said, is that it ‘offers a good means of analysis in separating, by the date and by the circumstances of their appearance, the various elements which have contributed to form little by little the notions and principles of... science.’<sup>28</sup> It is not, as this author equally stresses, just a matter of setting out a history of science; a diachronic epistemological approach is not an end but a means to understanding the elements which have come together to form the scientific ideal.<sup>29</sup> Nevertheless a separation between the two disciplines is not always easy. However while history largely concerns itself with the linking of events by cause, the epistemologist is more concerned with the development of ideas which are not determined in the same way by causal factors. Their history cannot be described but only seized in a manner that is more of a

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<sup>25</sup> Granger, G-G (1995), *La science et les sciences* [Science and the Sciences] (2<sup>nd</sup> ed) Presses Universitaires de France at 70.

<sup>26</sup> See Bouriau, C (2013) *Le ‘comme si’: Kant, Vaihinger et le fictionalisme* [The ‘As If’: Kant, Vaihinger and Fictionalism] Les Éditions du Cerf. And see of course Kuhn, T (1970) *The Structure of Scientific Revolutions* (2<sup>nd</sup> ed) University of Chicago Press.

<sup>27</sup> Blanché *L’épistémologie* supra note 23 at 33–39. This ‘as if’ approach to law is investigated further in Samuel, G (2015) ‘Is Law a Fiction?’ in Del Mar, M and Twining, W (eds) (2015) *Legal Fiction in Theory and Practice* Springer 31.

<sup>28</sup> *Ibid* at 36.

<sup>29</sup> *Ibid* at 37.

philosophical than historical exercise.<sup>30</sup> The danger here is that a diachronic approach can oscillate between an anecdotal listing of great names (a little like a history of great kings and queens) or it can simply coalesce into a more general philosophical approach.<sup>31</sup>

However, this said, the twentieth century saw a major resurgence of the diachronic approach with, first, the work of Gaston Bachelard and, secondly, with the publication of Thomas Kuhn's *The Structure of Scientific Revolutions*.<sup>32</sup> Both of these scientific writers offered an historical view of science that was in contrast to the image of science as one of linear progress. Gaston Bachelard (1884-1962) presented a vision of scientific development as a matter of overcoming epistemological obstacles,<sup>33</sup> while Thomas Kuhn (1922-1996) saw science in terms of periodic revolutions resulting in what he called changes of paradigm. Kuhn's book has had an enormous impact not just within and around the disciplines of the natural sciences but also on epistemological thinking in general. The three notions that form the foundation of Kuhn's thesis—namely normal science, paradigm and revolution—have entered the vocabulary of the social sciences and humanities and, indeed, the word paradigm has become something of a popular term.<sup>34</sup> One writer, listing Kuhn's book in his hundred best nonfiction books of all time, has stated recently that the expression, “paradigm shift” has become a cliché [sic] of social and political change.<sup>35</sup>

This diachronic viewpoint can in turn be contrasted with what might be described as a methodological approach to epistemology. Here the emphasis is rooted less in grand dichotomies such as the one between

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<sup>30</sup> Ibid at 38.

<sup>31</sup> Ibid.

<sup>32</sup> Kuhn *The Structure of Scientific Revolutions* University supra note 26.

<sup>33</sup> Bachelard, G (1938) *La formation de l'esprit scientifique* [The Formation of the Scientific Mind] J Vrin.

<sup>34</sup> See eg Pheby, J (1988) *Methodology and Economics: A Critical Introduction* Macmillan at 37-53.

<sup>35</sup> McCrum, R (2016) *The New Review (The Observer)*, 19 June 2016 at 37. McCrum lists Kuhn's book as number 21 in the column '100 Best Nonfiction Books of All Time'. It has sold, it is stated, more than 1.4 million copies. By way of contrast, McCrum lists Thomas Hobbes' *Leviathan* (1651) at number 94: *The New Review (The Observer)*, 19 November 2017 at 37.



synchronic and diachronic approaches and more in the actual methods employed by scientists. In the past a distinction was made between epistemology and methodology, but, as Blanché noted, it is difficult today to distinguish between the two.<sup>36</sup> Or, put another way, there is no science without method.<sup>37</sup> This is particularly true with respect to the work of Karl Popper (1902–1994) who refurbished the dialectical method in order to deal with the problem of uncertainty with regard to induction. Popper argued that a statement could be considered scientific only if it was open to falsification and that one role of a scientist was, accordingly, to attempt to falsify assertions and hypotheses advanced by others.<sup>38</sup> Statements that were incapable of being tested in this way would not form part of scientific knowledge and it is only by the denunciation of errors, and not by confirmation of seemingly acquired knowledge, that science progresses.<sup>39</sup> Critical method, in other words, is a fundamental aspect of epistemology.

## EPISTEMOLOGY AND THE HUMAN SCIENCES

There is no reason in principle why some of these approaches and methods common to the natural sciences should not be applicable to the social, if not human, sciences.<sup>40</sup> What are these different and conflicting methods? The most comprehensive epistemological response to this question has been provided by the late Jean-Michel Berthelot (1945–2006) who proposed a series of six schemes on intelligibility.<sup>41</sup> These schemes have been extensively discussed elsewhere,<sup>42</sup> and so for present purposes it might be useful (at least for the moment) to identify only two since these two have, to

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<sup>36</sup> Blanché *L'épistémologie* supra note 23 at 20–22.

<sup>37</sup> Barreau (1998) *L'épistémologie* [Epistemology] (4<sup>th</sup> ed) Presses Universitaires de France at 51.

<sup>38</sup> See generally Popper, K (1959) *The Logic of Scientific Discovery* Hutchinson and Co (reprint Routledge 2002).

<sup>39</sup> Barreau *L'épistémologie* supra note 37 at 57.

<sup>40</sup> Berthelot, J-M (2006) 'Épistémologie des sciences humaines' [Epistemology of the Human Sciences] in Mesure and Savidan *Le dictionnaire des sciences* supra note 7 at 378.

<sup>41</sup> See in particular Berthelot, J-M (1990) *L'intelligence du social* [Understanding Social Society] Presses Universitaires de France.

<sup>42</sup> Samuel, G (2014) *An Introduction to Comparative Law Theory and Method* Hart Publishing, at 79–95.

some extent, come to represent the fundamental epistemological and methodological difference between the natural and social sciences. This difference is expressed in the opposition between explanation and understanding.<sup>43</sup> The first is founded on a causal scheme whereby one seeks to explain a phenomenon through the mechanics of causation inherent in the physical facts while the second is about sense and intentionality which cannot be explained as such but only understood.<sup>44</sup> The ‘facts’ are a sign and their signification is a matter of hermeneutical interpretation. One is seeking their sense. The problem, of course, with this distinction, and which results in what can be seen as an epistemological weakness, is that assertions founded upon interpretation are not open to falsification in the Popper sense and thus may not even be considered scientific. They are, however, open to a dialectical scheme of intelligibility in which differing interpretative assertions are continually confronting each other in terms of dialectical oppositions which in turn engenders a critical approach perhaps seen as essential in the social sciences. ‘Explanations produce relations at a clearly defined level’, concludes Rudolf Makkreel, ‘whereas understanding uncovers interrelations which intervene at multiple levels.’<sup>45</sup>

In addition to these methodological issues there is also the problem of what might be termed paradigm or programme orientation. By this is meant that a researcher functions within what Thomas Kuhn has described as the paradigm of normal science; this is a period when scientists largely share the same methodological and epistemological outlook.<sup>46</sup> They adhere largely

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<sup>43</sup> Makkreel, R (2006) ‘Expliquer et comprendre’ [Explanation and Understanding] in Mesure and Savidan *Le dictionnaire des sciences* supra note 7 at 441; Berthelot ‘Épistémologie des sciences humaines’ supra note 40 at 380.

<sup>44</sup> Berthelot ‘Épistémologie des sciences humaines’ supra note 40 at 380.

<sup>45</sup> Makkreel ‘Expliquer et comprendre’ supra note 43 at 443.

<sup>46</sup> See generally Kuhn (1970), supra. In fact this reference to Kuhn is both helpful and misleading. It is helpful if one takes a quite wide definition of ‘paradigm’ so as to mean what might be described as a general world view. But it is misleading in the present context in that Kuhn himself used the term in relation to the natural sciences and to changes of paradigm that were drastic in their revolutionary effect; scientists working in the paradigm before the revolution would not be able to communicate with scientists working after the revolution. Given that such drastic revolutions are possibly not applicable in the world of social science, applying Kuhn’s paradigm notion to the social sciences must therefore be

to the same set of models and theories. When applied to the social sciences this idea of a generally shared ‘normal science’ is much more difficult to discern because of the plurality of methods and schemes of intelligibility. Consequently one finds that at any given moment different social scientists may well adhere to different ‘paradigm’ orientations.<sup>47</sup> Some may think that there is such an entity as ‘society’ while others see only a mass of individuals.<sup>48</sup> Some may think that social phenomena can be the subject of reductionist theories and (or) that there is an essential order (or system) that is inherent in such phenomena; others may see only complexity and chaos.<sup>49</sup> Some may think that social science knowledge is no different, in the end, to natural science knowledge and thus transcends cultures; others may be of the view that all such knowledge is uniquely cultural and only cultural.<sup>50</sup> Some may think that social science knowledge is grounded in an objective ontology while others are of the view that all such knowledge is entirely textual.<sup>51</sup> These different paradigm or programme orientations often translate into particular schemes of intelligibility and so, for example, cultural and textual approaches usually operate within a hermeneutic scheme while a scientific outlook focuses on causality.<sup>52</sup> An individualist paradigm usually translates into an actional scheme of intelligibility where the focus is on individual agents and their actions; a holistic outlook is often

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treated with caution and that is why, perhaps, programme would be a better expression.

<sup>47</sup> Again it must be stressed that paradigm is being used here in a weaker sense than in Kuhn.

<sup>48</sup> See further Valade, B (2006) ‘Individualisme et holisme méthodologiques’ [Methodological Individualism and Holism] in Mesure and Savidan *Le dictionnaire des sciences* supra note 7 at 620.

<sup>49</sup> See further Dupuy, J-P (2006) ‘Complexité sociale’ [Social Complexity] in Mesure and Savidan *Le dictionnaire des sciences* supra note 7 at 174.

<sup>50</sup> See further Muchielli, A (2006) ‘Scientisme’ [Scientism] in Mesure and Savidan *Le dictionnaire des sciences* supra note 7 at 1059; cf Abélès, M (2006) ‘Culturalisme’ [Culturalism] in Mesure and Savidan *Le dictionnaire des sciences* supra note 7 at 230.

<sup>51</sup> See further Ogien, R (2006) ‘Réalisme et sciences sociales’ [Realism and Social Science] in Mesure and Savidan *Le dictionnaire des sciences* supra note 7 at 963; cf Affergan, F (2006) ‘Écriture et sciences humaines’ [Writing and the Human Sciences] in Mesure and Savidan *Le dictionnaire des sciences* supra note 7 at 354.

<sup>52</sup> These schemes are discussed in more detail in Samuel *An Introduction to Comparative Law Theory and Method* supra note 42 at 81-92.

behind structural and functional methods.<sup>53</sup> The point that needs to be stressed, therefore, is that methods and orientations tend to be connected, even if the combination between reasoning techniques, schemes of intelligibility and orientations can vary amongst different social scientist researchers, whole groups of which are operating of course within different disciplines and sub-disciplines.

This reference to disciplines and sub-disciplines possibly renders the idea of different schematic levels—reasoning techniques, schemes of intelligibility and paradigm orientations—too schematic so to speak. Berthelot was sometimes more fluid in his description of currents and theories and subsequently talked in terms of functionalism, systemisation, structuralism, symbolic interactionism, ethnomethodology, pragmatism, methodological individualism and so on.<sup>54</sup> His main point, of course, was that all of these currents are partial and that in sociology no single theory has been able to impose itself. The result is that sociology has continually cultivated an epistemological reflection on its foundations.<sup>55</sup> This reflection in turn has given rise to a kind of dialectical attitude—the critical approach mentioned earlier—in which the epistemology of the social and human sciences is a matter of grand oppositions. Explanation verses understanding, causes versus sense, and natural sciences verses sciences of the mind, said Berthelot, structure much of the epistemological debate today.<sup>56</sup>

## EPISTEMOLOGY AND LAW

Given that law, in many universities in the common law world, is part of the social science faculty, does this discipline exhibit the same kind of dialectical tensions as those just outlined?<sup>57</sup> The answer may well be that

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<sup>53</sup> Ibid.

<sup>54</sup> Berthelot (2006a) 'Sociologie' [Sociology] in Mesure and Savidan *Le dictionnaire des sciences* supra note 7 1106 at 1108.

<sup>55</sup> Ibid.

<sup>56</sup> Berthelot 'Épistémologie des sciences humaines' supra note 7 at 380.

<sup>57</sup> This is not to assert that law is a social science: cf Samuel, G (2008) 'Is Law Really a

there are a number of dialectical tensions within the discipline but perhaps these cannot really be appreciated until some wider questions about legal knowledge are broached. One should start therefore by asking a general question. Where does the discipline of law fit into the general vision of epistemology? Three approaches have been outlined. A synchronic viewpoint can focus upon what law is today within a timeless context. What constitutes the material that is 'law' and how is it differentiated from material that is not 'law'?<sup>58</sup> Is there, for example, a science of law and if so what are the postulates and principle that make up this science? A rather different question, of course, is whether law itself is a science and, if so, what exactly forms its object. A philosophical approach might examine the values and theories that motivate or act as foundations for the discipline. Is an unjust law a law? Does law have as its role the pursuit of justice and, if so, what is meant by justice? A diachronic approach should ask what law has been. How has legal knowledge been perceived in the past? How have the constituent elements of this knowledge been constructed, put together and developed over the centuries? How have theories and methods changed or evolved over time?<sup>59</sup> These general epistemological approaches—and they are perhaps not exclusive—have, as we have seen, been fashioned within the context of the natural sciences but there is no reason why they cannot be relevant for law.

However these approaches and the questions that they generate cannot properly be pursued until legal knowledge itself has been more or less identified as an object (*res*). One should perhaps focus first on legal education.<sup>60</sup> What do students in law schools learn? What approaches are in evidence in the typical law school?<sup>61</sup> What is a first-year student entering

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Social Science? A View from Comparative Law' (2008) *Cambridge Law Journal* 288. The point being made here is whether law shares the same kind of epistemological tensions as the ones found in say sociology.

<sup>58</sup> Cf Bix 'Law As An Autonomous Discipline' supra note 3.

<sup>59</sup> See eg Schiavone *Ius. L'invenzione del diritto in* supra note 2.

<sup>60</sup> Bell 'Legal Education' supra note 3 (and references therein).

<sup>61</sup> For a recent historical and comparative analysis of legal education in the civil law and in the common law see: Freda, D (2019) 'Legal Education in England and Continental Europe

her legal studies faced with in terms of the kind of knowledge she will be expected to handle and absorb over the period of her studies? These questions will in turn lead the inquiry towards the texts used in law schools with the result that the apparent answer to the legal education question is this. Legal knowledge is, at least in part, the knowledge to be found in the law books.<sup>62</sup> A major research work on legal epistemology would, then, probably need to undertake an exhaustive coverage of the world's law textbooks, monographs and articles. What would such research likely to produce in terms of law as identifiable object?

Arguably the first-year student would become aware of three fundamental anchor points with regard to the knowledge she is about to tackle. First, the importance of classification and categories; the law degree will be divided up into a range of legal subjects and, as the studies proceed, it will become evident that these subject categories are based on various classification schemes, some conceptual and some empirical.<sup>63</sup> Secondly, within each category there will be several fundamental concepts and (or) notions.<sup>64</sup> In the law of property for example there are concepts such as ownership and possession; in the law of obligations (or alternatively contract and tort) there will be for instance the notions of consent and fault. Other concepts and notions such as right, duty, interest and so on will subsequently emerge from the different areas of law. Thirdly, and perhaps most controversially from an epistemological point of view, there will be

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Between the Middle Ages and the Early Modern Period: A Comparison' in Moréteau, O; Masferrer, A and Modéer, K (eds) (2019) *Comparative Legal History* Edward Elgar 242.

<sup>62</sup> Jamin, C (2014) 'Le droit des manuels de droit ou l'art de traiter la moitié du sujet' [The Law in Textbooks or The Art of Setting Out Half the Subject] in Chambost, A-S (ed) *Histoire des manuels de droit* [History of Legal Textbooks] LGDJ 9 at 11. See also Cabrillac, R (ed) (2017) *Qu'est-ce qu'une introduction au droit?* [What is an Introduction to Law?] Dalloz.

<sup>63</sup> See Birks *Examining the Law Syllabus: The Core* supra note 10, and Birks *Examining the Law Syllabus: Beyond the Core* supra note 10. In the civil law this classification, following Roman law, will extend to persons and to things: Ancel, P (2014) *Les manuels d'introduction au droit: de Capitant à la période contemporaine* [Introductory Textbooks in Law: From Capitant to Modern Times], in Chambost *Histoire des manuels de droit* supra note 62 133 at 137.

<sup>64</sup> Rochfeld, J (2011) *Les grandes notions du droit privé* [The Leading Notions of Private Law] Presses Universitaires de France.

rules and principles.<sup>65</sup> Indeed it is this latter notion that will probably be the most evident at any general legal knowledge level.<sup>66</sup> Studying law is, it would seem, about learning and applying rules and principles to sets of factual situations and this learning will be facilitated not just by studying the rules themselves (say in a statute) but equally their interpretation and application in cases.<sup>67</sup> When viewed from the position of texts, the student will probably see legal knowledge as being about reading statutes, cases and textbooks. This is where legal knowledge is to be sourced and found.

This of course is a somewhat simplified picture of legal knowledge.<sup>68</sup> But it arguably acts as a foundation for legal knowledge upon which a more sophisticated description of legal knowledge can be constructed.<sup>69</sup> Thus each category of law has generated not only definitional issues but also theory debates. What is the philosophy behind the law of tort? What constitutes property? How does private law differ from public law? The range of theory questions generated by each field of law are multiple and varied. The same is true of concepts. What is ownership? What amounts to consent? Indeed some concepts such as right and duty have risen above legal categories to become focal points for general theories. What is meant by a 'right'? Is there a notion of an abuse of a right? As for rules and principles, these have provided the basis for whole theories of law.<sup>70</sup> What is a legal rule as opposed to a non-legal rule? Is an unjust rule a legal rule? How do all the rules and principles relate to each other and are these relations fundamental to the definition of law? In short, the literature on these kinds of questions—and there are many of them—is huge and

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<sup>65</sup> Rules are controversial as the foundation of legal knowledge simply because they beg the question whether to have knowledge of law is to have knowledge of rules. However see Bix 'Law As An Autonomous Discipline' supra note 3 at 978.

<sup>66</sup> Bix 'Law As An Autonomous Discipline' supra note 3 at 978.

<sup>67</sup> See in particular Twining, W and Miers, D (2010) *How To Do Things With Rules* (5<sup>th</sup> ed) Cambridge University Press.

<sup>68</sup> See Bell 'Legal Education' supra note 3. But cf Siems 'A World Without Law Professors' supra note 3

<sup>69</sup> Siems 'A World Without Law Professors' supra note 3.

<sup>70</sup> See generally Duxbury, N (2003) 'A Century of Legal Studies' in Cane and Tushnet *The Oxford Handbook of Legal Studies* supra note 3 950.

constitutes not just legal knowledge but evidence of internal debates within the discipline of law. These debates in turn can be translated into tensions in that the various positions adopted within the debates often display different epistemological visions of law.<sup>71</sup> The claim being made in this present article is that it is these tensions that form the bedrock of a legal epistemology that might make sense to a social science theorist.

How might these tensions be articulated? Again one probably needs to embark upon an exhaustive coverage of the theory literature devoted to law or to aspects of law. But, again, one can ask what might such a research project reveal. Arguably it would reveal four principal areas of tension. The first is the general one to be found in epistemology, namely the opposition between a synchronic and a diachronic approach. This may at first sight seem a surprising debate given that very few of the graduates leaving law schools will have studied legal history in any depth.<sup>72</sup> However an exhaustive examination of all the legal literature will reveal that issues about law's past are often to be found under the surface so to speak. Moreover there is arguably a renewed interest in this present century in what might be called historical jurisprudence.<sup>73</sup> A second tension—and one of the most fundamental—is between formalism and realism (this latter term, it must be stressed at once, being understood in a wide sense). To what extent are the functions fulfilled by law part of legal knowledge itself? Are cases to be decided by reference only to some *a priori* formal legal model of say rights or legal axioms or are the social, economic or (and) political implications of any decision to be taken into account by the judges?<sup>74</sup>

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<sup>71</sup> For example Andrew Robertson has described the tension between formalism and instrumentalism (functionalism) as 'the great divide': Robertson, A (2009) 'Constraints on Policy-Based Reasoning in Private Law' in Robertson, A and Wu, TH (eds) (2009) *The Goals of Private Law* Hart Publishing 261 at 261. Indeed some argue that instrumentalist or functionalist reasoning in law is not law but politics or economics: see eg Weinrib, E (1995) *The Idea of Private Law* Harvard University Press. This suggests more than a debate between jurists; it suggests a real tension between two epistemological positions.

<sup>72</sup> Birks, Introduction, *Examining the Law Syllabus: The Core* supra note 10 at 7.

<sup>73</sup> See eg Del Mar, M and Lobban, M (eds) (2016) *Law in Theory and History* Hart Publishing.

<sup>74</sup> Bix 'Law As An Autonomous Discipline' supra note 3 at 978–980.



Should one take account of the psychology of judges or their social background? What is the relationship between law and facts? Indeed what constitutes fact for lawyers? A third tension is linked to this last one, but it deserves its own place so to speak because it can reach beyond the tension between the formal and the empirical. Is knowledge of law confined to some notion of 'law' or does it—should it?—embrace the law-makers themselves? Should a definition of law include a description of those who make the law? The fourth tension is one that has not been openly articulated in the literature but, as any diachronic approach will reveal, lies at the heart of law's validity and scope. This is the tension between what might be called the authority and the inquiry paradigms. Are lawyers little more than narrow interpreters of official legal texts using techniques, usually in a rather simplistic fashion, imported from other disciplines? Is the research domain in legal studies severely limited by what constitutes the discipline's texts and what are its acceptable methods? Should law as a discipline be compared to theology rather than to the social sciences?

## HISTORY AND ANTI-HISTORY

Having identified these four areas of tension in legal epistemology—although again it must be stated that they may not be exhaustive—the next obvious step is to examine each of them in more detail. However, if only for reasons of space, a more fluid discussion might be more useful. It might be more useful because the tensions themselves can flow one into another which, in turn, produce a number of cross-currents and under-currents so to speak. This said, there is one tension that no epistemological account can ignore; this is the tension between past and present.

In the preface to perhaps the only work ever published in English that comes close to being a work of pure legal epistemology, Walter Jones wrote that even 'to-day so many roads in the law lead us back to Rome by way of the Commentators on the Roman law'.<sup>75</sup> Not surprisingly, therefore, the two

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<sup>75</sup> Jones, JW (1940) *Historical Introduction to the Theory of Law* Oxford University Press at v

leading Post-Glossators, Bartolus (1313–1357) and Baldus (1327–1400), are given frequent references and quotation. Yet almost no civilian or common law graduate will ever have studied the works of these two jurists and, in contrast to the texts of Roman law, their major commentaries on Roman law have never been translated (save for some short pieces) into other European languages.<sup>76</sup> Indeed there are not even easily readable Latin texts.<sup>77</sup> This seems odd in many ways given that Bartolus provided one of the first, and most long-lasting, definitions of ownership;<sup>78</sup> and Baldus furnished the foundations of corporation theory, so vital to the development of constitutional and company law.<sup>79</sup> However one of the ironies of legal history is that it consists of a progression of jurists and legal theorists who have propounded ahistorical (synchronic) models of law.<sup>80</sup> This is not to say that there have not been historical schools of jurisprudence. But, as Jones pointed out, ‘the more widely the legal historian extends his field, the more convinced he will become of the impossibility and even absurdity of all attempts to formulate any concept of law’.<sup>81</sup> This problem was overcome by abandoning history in favour of metaphysical formalism.<sup>82</sup> One must rise above history, for the ‘very expressions “legal history”, “legal evolution”, have no meaning unless we distinguish law from its history or evolution.’<sup>83</sup> The concept of law is *a priori* and formal; and, moreover, it must be a consistent harmonious whole not just free of internal contradiction but capable of providing an answer to every case subject to it.<sup>84</sup>

This kind of thinking gave rise to monistic rule model theories of law

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(Preface).

<sup>76</sup> At least not to this present author’s knowledge.

<sup>77</sup> The original manuscripts are not just written in Latin but also contain endless abbreviations which only a specialist can follow with ease.

<sup>78</sup> See Bartolus *In primam Digesti Novi partem Commentaria* [Commentaries on the New Part of the Digest] D.42.2.17.1 no 4.

<sup>79</sup> Canning, J (1987) *The Political Thought of Baldus de Ubaldis* Cambridge University Press.

<sup>80</sup> See generally Gordley *The Jurists: A Critical History* supra note 8.

<sup>81</sup> Jones *Historical Introduction to the Theory of Law* supra note 75 at 204.

<sup>82</sup> *Ibid* at 204–206.

<sup>83</sup> *Ibid* at 211.

<sup>84</sup> Thus *Code civil* [French Civil Code] art 4.

many of which attracted the name positivism.<sup>85</sup> On the whole these theories tended to exclude the law-makers themselves, except as formal sources of legal rules. In other words the reasoning processes by which a judge came to a decision was either a matter of deductive or syllogistic logic or of interpretative discretion.<sup>86</sup> The focus is on the model of rules or norms—or a model of ‘rights’—and it is this model that should determine, either directly or indirectly, the outcome of litigation disputes.<sup>87</sup>

However a synchronic approach need not exclude the law-maker. Ronald Dworkin (1931–2013), for example, adopted something of an anti-historical approach in suggesting that just as one did need a knowledge of the history of mathematics in order to be a good mathematician, so one did not need a profound knowledge of legal history to be a good lawyer.<sup>88</sup> It was a question of ‘attitude’ in turn founded on the structure of legal arguments.<sup>89</sup> Whether this analogy is exact is another question. The structural and conceptual basis of mathematics and the mathematical reasoning associated with it is an ‘attitude’ that can certainly be divorced from any historical dimension, but is the same true of law? Is the legal ‘attitude’ one that has not been formed uniquely out of an historical intellectual process? Whatever the response to this question, it has to be admitted that a great majority of competent lawyers seem to have gained their competence without ever having had to study in any significant depth legal history. As Atias observed, there are a good many histories of law but law is passed off as having no history; it is studied and is formed outside of

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<sup>85</sup> On which see Maulin, É (2003) ‘Positivisme’ [Positivism] in Alland, D and Rials, S (eds) (2003) *Dictionnaire de la culture juridique* [Dictionary of Legal Culture] Presses Universitaires de France 1171.

<sup>86</sup> Again a diachronic approach reveals how some of these methods were fundamental to legal studies by the end of the Middle Ages: see eg Mattheo Gribaldi *De methodo ac ratione studendi libri tres* [Concerning Method and Reasoning For Students] first published in 1558. And see generally Maclean *Interpretation and Meaning in the Renaissance* supra note 19.

<sup>87</sup> Some models of what constitutes law do not concern themselves with legal reasoning as such; they are constructs of rules or norms within which the law-making judge might well have discretion in the hard case.

<sup>88</sup> Dworkin, R (1986) *Law's Empire* Fontana, at 14.

<sup>89</sup> *Ibid* at 413.

time.<sup>90</sup> Yet while Dworkin's view undoubtedly fuels the tension between the synchronic and diachronic, his theory unashamedly embraces the law-makers—the judges—within a theory of law. Law is interpretation.<sup>91</sup> It may be that the judge has to construct a formal model, out of the precedents and statutory texts, within which the hard case can be 'fitted', but this model is not divorced from the judge, even if Dworkin has to create a fictional and superhuman version of this law-maker.

Donald Kelley, in contrast, approaches legal knowledge as a specialist in the history of law and the human sciences. When faced with the 'what is history' question he responded by saying that one might start by asking what history has been.<sup>92</sup> This no doubt is one suitable starting point for legal knowledge as well. Indeed within the civil law tradition there have been many who have argued that a knowledge of the historical dimension of law is indispensable to an understanding of contemporary legal thought and practice.<sup>93</sup> The diachronic is essential to the synchronic. But what should be the focal point of this history? As with history itself, the answer is likely to be texts of one sort or another. Yet what is special about legal texts through the ages is that many of the most notable ones have been attempting to escape from the past; from Gaius to the modern textbook it is a matter of stating the law as it is, divorced from any historical account as such.<sup>94</sup> This divorce in turn was impossible to a certain extent because for many centuries legal scholarship in continental Europe was attached to Roman law.<sup>95</sup> But the jurists, especially from the sixteenth century onwards, provided in their commentaries and treatises what they considered to be a

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<sup>90</sup> Atias, C (2009) *Questions et réponses en droit* [Questions and Answers in Law] Presses Universitaires de France at 205.

<sup>91</sup> See generally Dworkin *Law's Empire* supra note 88.

<sup>92</sup> Kelley, D (1970) *Foundations of Modern Historical Scholarship* Columbia University Press at 2.

<sup>93</sup> See Cherfouh, F (2014) 'Les usages de l'histoire et du droit romain dans les ouvrages d'Introduction au droit' [The Use of History and Roman Law in Introductory Works in Law] in Chambost *Histoire des manuels de droit* supra note 62 at 100–104.

<sup>94</sup> Actually this is not strictly true of Gaius since there is quite a lot of historical information in his *Institutes*.

<sup>95</sup> Stein, P (1999) *Roman Law in European History* Cambridge University Press.

restatement of law as a conceptual and coherent body of rules and axioms.<sup>96</sup> The legislature took the final step in this divorce process. Thus Professor van Caenegem starts his celebrated history of private law in Europe with the great ‘restatement’ of this area of knowledge, namely the *Code civil* of 1804. Here was, so many jurists thought, a ‘new beginning’ which ‘attempted to make the traditional role of legal scholarship superfluous, by forbidding doctrinal commentary on the codes, in the belief that the new legislation was clear and self-sufficient.’<sup>97</sup> There is thus within history itself a tension between the diachronic and synchronic with the result that all attempts to restate legal knowledge in synchronic form soon become, themselves, part of the diachronic account of legal knowledge.<sup>98</sup>

Nevertheless a diachronic approach, as important as it is, cannot adequately account for the totality of legal knowledge, nor indeed can a synchronic ‘restatement’ of the law either in a code or in a textbook.<sup>99</sup> Certainly textbooks seem fundamental both to the learning process and to provision of legal information to practitioners and others, but common lawyers seemingly take the view that there is an important distinction between ‘law in books’ and ‘law in action’.<sup>100</sup> This distinction has its direct source in the American Realist movement,<sup>101</sup> although the division stretches further back and seems implicit in Maine’s comment that, during the sixteenth and seventeenth centuries, reform of the law meant reform of the law books.<sup>102</sup> Maine was no doubt thinking more of the civil law—for the English legal literature of this period was of little note<sup>103</sup>—and while the

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<sup>96</sup> See generally Gordley *The Jurists: A Critical History* supra note 8. The expression *axiomata iuris* is to be found in Gribaldi *De methodo ac ratione studendi libri tres* supra note 86 at (eg) 17.

<sup>97</sup> Van Caenegem, R (1992) *An Historical Introduction to Private Law* Cambridge University Press translated by Johnston, DEL at 1.

<sup>98</sup> See eg Duxbury ‘A Century of Legal Studies’ supra note 70.

<sup>99</sup> Bix ‘Law As An Autonomous Discipline’ supra note 3 at 981–983

<sup>100</sup> See generally Fernandez, A and Dubber, M (eds) (2012) *Law Books in Action - Essays on the Anglo-American Legal Treatise* Hart Publishing.

<sup>101</sup> Jamin, C ‘Le droit des manuels de droit ou l’art de traiter la moitié du sujet’ supra note 62 at 11.

<sup>102</sup> Maine, H (1890) *Early Law and Custom* John Murray at 363.

<sup>103</sup> Baker, J (2002) *An Introduction to English Legal History* (4<sup>th</sup> ed) Butterworths at 188–

textbooks, even today, are far more central to what constitutes legal knowledge in the civil law tradition there is a growing feeling that there is perhaps less legal knowledge in textbooks than one might think.<sup>104</sup> This said, both in the civil and common law traditions of today ‘text-books are important... as guides to the case-law with which they are concerned’. And ‘if they are good they are more than mere guides, for they seek not only to arrange the cases systematically but to extract from them the general principles of the law and to show how those principles may be developed.’<sup>105</sup> Hidden in Jolowicz’s assertion is of course a methodological point: the textbook writer does not just descriptively state the law. He or she has to reason and to systematise and so the object legal knowledge can so easily be seen as nothing more than principles and systematisation. The law maker and the law actors are factored out of what constitutes legal knowledge.<sup>106</sup>

### REALISM (OR FUNCTIONALISM) VERSUS FORMALISM

However it would appear that the textbook writer might well be in a somewhat different methodological world than the judge. Thus according to one Law lord:

Your Lordships’ task in this House is to decide particular cases between litigants and your Lordships are not called upon to rationalise the law of England. That attractive if perilous field may well be left to others to cultivate. [...] Arguments based on legal consistency are apt to mislead for the common law is a practical code adapted to deal with the manifold diversities of human life, and as a great American judge has reminded us, “the life of the law has not been logic; it has been experience.”<sup>107</sup>

Whether a Supreme Court judge would sum up the role of her court in this way today is perhaps open to question. Yet it must surely remain the case

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<sup>104</sup> See eg Jamin ‘Le droit des manuels de droit ou l’art de traiter la moitié du sujet’ supra note 62 at 17–24.

<sup>105</sup> Jolowicz, H (1963) *Lectures on Jurisprudence* Athlone at 314. See also Siems ‘A World Without Law Professors’ supra note 3 at 79–82.

<sup>106</sup> But Forray, V and Pimont, S (2017) *Décrire le droit... et le transformer* [To Describe the Law... and to Transform It] Dalloz.

<sup>107</sup> Lord Macmillan in *Read v J Lyons & Co* [1947] AC 156 at 175.

that appeal court judges would emphasise dispute resolution over the rationalisation of the law. This is the distinction between judge and jurist.<sup>108</sup> Consequently when asking the question about what lawyers know it would seem that one of the first responses is to ask other questions. Is one talking about judge, practitioner, jurist, legislator, negotiator, mediator or what?<sup>109</sup> And, if so, should one be looking not just at what they actually do but at their backgrounds, their beliefs, their working environments and so on?

Perhaps one starting place is to reflect upon the distinction between 'law' and 'dispute resolution' since this distinction is becoming ever more important with the growth of forms of alternative dispute resolution procedures (ADR), a trend that is as important in the civil law as in the common law.<sup>110</sup> Clearly knowledge of law and knowledge of dispute resolution are not synonymous, but where is the line of demarcation? Interestingly this question leads one on to an epistemological issue that has long worried comparative lawyers. To what extent can one use the term 'law' to cover dispute resolution processes to be found in very different cultures than those within the Western tradition? The worry for comparative lawyers, or at least contemporary ones, is that of legal imperialism: is one imposing an epistemological model—that of 'law' as traditionally understood in European thinking—on a culture that has no historical understanding of this European notion? If one were to adopt an extreme realist position—namely that all dispute resolution processes are forms of 'law'—then comparative law would generate one view of legal knowledge. Yet does this view accord with traditional Western legal theory? One can appreciate this problem even within the Western tradition. Does the common law notion of a 'leading case' have any relevance, say, in German law? Does Dworkin's

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<sup>108</sup> Goff, R (nd) 'The Search for Principle' reprinted in Swadling, W and Jones, G (eds) (1999) *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* Oxford University Press 313.

<sup>109</sup> Atias, C (1994) *Épistémologie du droit* [Epistemology of the Law] Presses Universitaires de France at 21–28.

<sup>110</sup> See eg Cadiet, L and Clay, T (2016) *Les modes alternatifs de règlement des conflits* [Alternative Dispute Resolution] Dalloz.

chain novel analogy have any meaning for French lawyers and jurists?<sup>111</sup> What is so important about these comparative law issues is that they feed into fundamental epistemological debates within Western law itself.<sup>112</sup> Are those who assert a strictly formalist view of legal knowledge—or indeed those who assert some form of realist theory—indulging in intellectual imperialism?

These kinds of question do not seem to worry some formalists. One rights theorist—that is to say a theorist who asserts that ‘[r]esolving the conflicts between the rights of one another does not depend upon wider social policies or goals, as rights do not take the justification for their existence from such concerns’<sup>113</sup>—has asserted that although ‘the Greeks literally didn’t have a name for “rights”, all of us at all times and places have them.’<sup>114</sup> It is unlikely that a comparative lawyer, or indeed a legal historian, would make such a comment today not just because it runs the risk of intellectual imperialism but also because it begs a question about ‘law’ as a body of knowledge in itself. Can one say of an ancient society, by way of analogy, that although it had no word that gives expression to the modern notion of ‘science’, all humans have this notion as an object even if they are not conscious of it? One is looking at a practice—resolving disputes or constructing an irrigation channel—and then applying an *a priori* conceptual form. In the case of rights, this form is one that makes a complete separation between the key element in the conceptual structure, namely the ‘right’, and any social function that this element may be said to have. The social function does not inform the definition. This tension is partly one of observation. The rights theorist is operating at a strictly individualist level and looking at the relation between two humans (or ‘as if’ humans, such as corporations); it is a matter of constructing a *iuris vinculum* (or whatever)

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<sup>111</sup> On this chain novel analogy, and the relevant text from Dworkin, see Samuel, G (2016) *A Short Introduction to Judging and to Legal Reasoning* Edward Elgar at 52–53.

<sup>112</sup> Some of these issues are pursued in Samuel, G (2014) *An Introduction to Comparative Law Theory and Method* Hart Publishing.

<sup>113</sup> Stevens, R (2009) ‘The Conflict of Rights’ in Robertson, A and Wu, TH (eds) (2009) *The Goals of Private Law* Hart Publishing 139 at 164.

<sup>114</sup> *Ibid.*



between two actors.<sup>115</sup> The social realist (using the term widely) is operating at a much higher level. She is looking at humans as a collective entity and propounding a theory that operates strictly at this level.<sup>116</sup> The historian operating at one level is unlikely to enter into a legitimacy argument with a colleague just because the latter is functioning at a different level. A book about wars in the twentieth century can happily co-exist with a work about a specific battle in one of the wars. Yet the level tension in law not only creates friction between theorists but gives rise to arguments about the very legitimacy of a theoretical approach.<sup>117</sup>

Steve Hedley sees this friction as arising from the difference between an internal and external point of view.<sup>118</sup> This is helpful in that it indicates the context in which the authority paradigm has its role.<sup>119</sup> An internalist considers the work of judge and jurist as work focusing on texts acting as the formal source of law; in turn these texts—legislation and reported cases—are considered by judge and jurist as having an absolute authority in the sense that the methods employed in analysing and applying them are limited by strict formal boundaries. The statutes and judgments can be criticised and interpreted, but their authority as ‘law’ cannot be questioned. This authority paradigm restriction has an important ideological dimension in that judicial decision-making should be both free from personal bias and orientated towards making the law as certain and predictable as possible. The authority paradigm in other words is part and parcel not just of the rule

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<sup>115</sup> See eg Nolan, D (2009) ‘Causation and the Goals of Tort Law’ in Robertson and Wu *The Goals of Private Law* supra note 113 165.

<sup>116</sup> See eg Hedley, S (2016) ‘The Unacknowledged Revolution? From Individual to Collective Liability in Negligence’ paper presented at the Obligations VIII conference *Revolutions in Private Law* University of Cambridge, July 2016.

<sup>117</sup> See eg Beever, A and Rickett, C (2005) Interpretative Legal Theory and the Academic Lawyer (68) *Modern Law Review* 320. See also on this point Hedley, S (2009) ‘Looking Outward or Looking Inward? Obligations Scholarship in the Early 21<sup>st</sup> Century’ in Robertson and Wu *The Goals of Private Law* supra note 113 193 at 208.

<sup>118</sup> Hedley ‘Looking Outward or Looking Inward?’ supra note 117. David Ibbetson also adopts such an approach in his chapter on historical research in law: Ibbetson, D (2003), Historical Research in Law, in Cane and Tushnet *The Oxford Handbook of Legal Studies* supra note 3 863.

<sup>119</sup> On the authority paradigm see Samuel ‘Interdisciplinarity and the Authority Paradigm: supra note 21.

of law principle but of justice itself.

It is of course easy to exaggerate the formalistic approach associated with this authority paradigm which in turn reveals another tension within legal knowledge. This is the tension between the language of the law itself—the legislative text or the Supreme Court judgement—and the methods employed by those who are interpreting and applying these texts.<sup>120</sup> There are real choices open to those who judge actual cases even if these choices are hidden behind apparently formalised reasoning processes.<sup>121</sup> Thus it may be that at the level of methodology not only does formalism turn out to be more multi-dimensional than one might think,<sup>122</sup> but equally there ‘exists a plurality of methods and of methodological models available to lawyers.’<sup>123</sup> However one should not underestimate the policing of this methodology. ‘The legal profession and the legal academy [...],’ writes Andrew Robertson, ‘provide a significant institutional constraint by policing (in textbooks and scholarly literature) consistency, coherence and doctrinal stability, and by scrutinising and criticising assumptions made by judges about the potential social and economic consequences of particular legal rules.’<sup>124</sup> This remark is revealing. If the role of the ‘insider’ legal academic acting within the authority paradigm is largely to police the work of others, then this surely accounts for the isolation of many academic lawyers from the rest of the social and human sciences.<sup>125</sup> Policemen make enquiries of course and all scientists and social scientists are subject to intense scrutiny of their methods. Yet such scrutiny is in the interests of the inquiry paradigm itself in that inadequate methods lead to unreliable empirical results. Legal policemen, in contrast, seem to be enforcing not the production of empirical

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<sup>120</sup> Champeil-Desplats, V (2016) *Méthodologies du droit et des sciences du droit* [The Methodologies and the Sciences of Law] (2<sup>nd</sup> ed) Dalloz at 408.

<sup>121</sup> Ibid at 402–405.

<sup>122</sup> Ibid at 47–49.

<sup>123</sup> Ibid at 408.

<sup>124</sup> Robertson, A (2009) ‘Constraints on Policy-Based reasoning in Private Law’ in Robertson and Wu *The Goals of Private Law* supra note 113 at 269.

<sup>125</sup> For a particularly devastating observation made by two German scholars see Siems ‘A World Without Law Professors’ supra note 3 at 83.

knowledge but the maintenance of a metaphysical—almost theological—model (namely ‘law’) whose function is to ‘police’ society itself.<sup>126</sup> It is tempting to conclude that internalists are not scientists at all—either natural or social—but secular priests engaged in a struggle to enforce conformity at the level both of law and of law-maker. Some of the tensions within legal studies mirror the past struggle between orthodoxy and heresy in religions.

Of course the position is much more complex: there are different groups of players in the internal theatre of law. Accordingly it would be better to talk of a *habitus* where different groups of internalist lawyers function.<sup>127</sup> However these different domains are not isolated one from another. Academics often seek to influence judges while the latter might have to direct their mind to legislators when faced with an ambiguous statutory provision. These interactions themselves can generate certain kinds of knowledge, some of which can be captured either by textbooks—for example on statutory interpretation—or by other forms of publication. The legislator, although often motivated by research from other disciplines, must nevertheless express itself in terms of the printed normative proposition. Legislators, in other words, are likely to see law as a matter of rules. The judge, while no doubt accepting that law is certainly about rules, has to interact with the statute in a different way, for what is in issue is the resolving of a dispute between two parties. The academic as policeman might in turn argue that any dichotomy between rule and dispute resolution is a false one since the role of the judge is to apply the rule to the facts and that this is a matter—at least in easy cases—of syllogistic logic. Formalism masks both interaction and tension.

There is also complexity with respect to the internal (authority paradigm) and external (enquiry paradigm) dichotomy itself. There are many academics who operate in both theatres and who are able, for example, to

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<sup>126</sup> Ibid.

<sup>127</sup> Atias *Épistémologie du droit* supra note 109 at 28.

move their levels of observation with ease. In addition there are jurists who can work with proficiency in more than one discipline. Once one can stand outside the authority paradigm *habitus* one needs a different epistemological framework. But this of course brings one back to the tension between formalism and realism, the latter term being understood in a very wide sense (embracing perhaps all inquiry orientated approaches). Just as the researcher researching the sociology of the science laboratory might not be considered by those working in the laboratory as true ‘scientists’, so those lawyers working outside of the authority paradigm—or doctrinal law as it is sometimes called<sup>128</sup>—might not be considered true ‘lawyers’ or ‘jurists’. In fact, within the common law world, such a sharp dichotomy is seemingly not a characteristic to be found in many law faculties: few wish to extract law from its social context.<sup>129</sup> Yet if one returns to the work of Robert Blanché, he observed that the sciences generally pass, in their development, through four epistemological stages. They start out from the descriptive and end up at the axiomatic, passing respectively through an inductive and then deductive stage. Law, at least within the civil law tradition, seems to conform to this pattern, arriving at an axiomatic stage with the nineteenth century German Pandectists.<sup>130</sup> The American Realists helped destroy this axiomatic vision, but where does this leave the Blanché model? Or, more generally, as James Gordley asks: *Ubinam Gentium Sumus?*<sup>131</sup> Steve Hedley has provided one convincing answer with respect to the committed internalist. It is back to the past. ‘When it comes to a detailed statement of the law of obligations,’ he writes, ‘it is striking how much of the modern

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<sup>128</sup> See Jestaz, P and Jamin, C (2004) *La doctrine Dalloz*.

<sup>129</sup> Cownie, F (2004) *Legal Academics* Hart Publishing.

<sup>130</sup> See further Samuel, G (2003) *Epistemology and Method in Law* Ashgate at 63–71. On Pandectist thought see Jouanjan, O (2005) *Une histoire de la pensée juridique en Allemagne (1800-1918)* [A History of Legal Thought in Germany (1800-1918)] Presses Universitaires de France. The idea that Roman law could be reduced to a set of *axiomata* can be traced back to JG Heineccius (1728) *Elementa Juris Civilis Secundum Ordinem Pandectarum* [The Elements of Civil Law Following the Order of the Digest]; for extracts see Samuel, G *A Short Introduction to Judging and to Legal Reasoning* supra note 111 at 15–19. In fact, as has been mentioned, the expressions *axiomata iuris* and *axiomatum* are employed even earlier by Matteo Gribaldi in his *De method ratione studendi* (1558) at, for example, 17 and 31.

<sup>131</sup> "Where are we now?": Gordley *The Jurists: A Critical History* supra note 8 at 275–312.

vision of the internalists merely repeats the views of leading law teachers circa 1880.<sup>132</sup> If Professor Hedley is right, the dichotomy between formalism and realism suddenly takes one back into another great epistemological tension, namely between the synchronic and the diachronic. Having abolished history one can escape back into it with ease and, it would seem, without embarrassment.<sup>133</sup>

As Professor Hedley points out, this retreat into the past is odd. ‘Every other branch of human knowledge—including legal knowledge—has progressed immeasurably over the past century’ notes this author. And he adds that in ‘any other area, academics would be embarrassed at using much the same theories and attitudes as were advanced a century and a half ago, with nothing to show for the work of the intervening period except some minor updating.’<sup>134</sup> Yet the oddness might well be part of legal knowledge itself in that it indicates how the authority paradigm that governs the internalist and formalist approaches has been in existence since the time of the Glossators. *Non licet allegare nisi Iustiniani leges*, said the medieval jurist Azo (1150–1230).<sup>135</sup> As this assertion indicates, the authority in the medieval age attached to the text itself, but this was to give way in the sixteenth century to an authority that attached to mathematical rationality.<sup>136</sup> The fundamental rules of law—usually Roman law—were analogous to mathematical or geometrical axioms.<sup>137</sup> By the nineteenth century, in Germany, this thinking had matured into a highly systematised science of concepts and norms where a ‘jurist’s conclusions were to follow from authoritative texts rather than immutable principles, yet they must

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<sup>132</sup> Hedley ‘Looking Outward or Looking Inward?’ supra note 117 at 199.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> Quoted in Bellomo, M (1995) *The Common Legal Past of Europe 1000-1800* translated by Cochrane LG The Catholic University of America Press at 144; and in Errera, A (2006) *Lineamenti di epistemologia giuridica medievale* [Introduction to Medieval Legal Epistemology] Giappichelli at 53.

<sup>136</sup> Champeil-Desplats *Méthodologies du droit et des sciences du droit* supra note 120 at 58–63.

<sup>137</sup> A good example of this axiomatic (*axiomata*) approach is to be found in Heineccius *Elementa Juris Civilis* supra note 130.

follow deductively or they would not have the same authority as the texts.<sup>138</sup>

One might think that the common law is different given that it formed outside of the Roman learning. But German thinking was hugely influential on the nineteenth century common lawyers as the latter moved away from a forms of action approach to one founded on the great European legal concepts.<sup>139</sup> Moreover, as Peter Stein noted, English law, for all its other strengths, was weak on legal theory and thus ‘turned for inspiration to the current continental theories, necessarily based on Roman law’.<sup>140</sup> The authority paradigm, in short, is an essential feature in the history of both the civil law and the common law (or at least, with regard to the latter, from the end of the eighteenth century) and it is this paradigm that in many ways holds the key to the various tensions identified as underpinning legal knowledge. As for formalistic legal knowledge, it is accordingly trapped in an epistemological cycle of its own making and this is what renders it, in relation to the other social sciences, somewhat ‘odd’.

## CONCLUSION

It would be idle to claim that this article has provided any kind of definitive single answer to the research question posed at the outset. Can social theory help the legal knowledge question? Indeed one aim of this article is to assert that there is no single answer to the knowledge question for several reasons. First, because there are different actors within the discipline of law—practitioners, judges, legislators, professors, legal administrators and so on—each of which will have a particular kind of legal knowledge. A solicitor who is an expert at negotiation, conveyancing, court procedures and the like will probably have no knowledge of, or interest in, the kind of debates about tort law philosophy going on between law professors. A judge in the family law court might well have different knowledge from a Supreme Court justice who has specialised during her career at the Bar in say tax law

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<sup>138</sup> Gordley *The Jurists: A Critical History* supra note 8. at 214.

<sup>139</sup> *Ibid* at 204–212.

<sup>140</sup> Stein, P (1980) *Legal Evolution: The Story of an Idea* Cambridge University Press at 123.

or intellectual property.

Secondly, actually to assert what is or is not legal knowledge may well not just contradict knowledge familiar to comparative lawyers, but amount to a form of orientalism. ‘Orientalism as a discourse’, the jurist Teemu Ruskola has written, ‘entails the projection onto the Oriental Other of various sorts of things that “we” are not.’<sup>141</sup> He argues that Western comparative lawyers have been coloured by their own legal mentalities when it comes to observing Asian legal systems which in turn has resulted in the representation of these systems as biased and stereotyped. Thus Western comparative law scholarship can often conclude that there is an ‘*absence of law*’ in these regions.<sup>142</sup> Now of course this article has not examined this important comparative law thesis, but it is raised here only to emphasise that the actual question—what is legal knowledge?—is fraught with dangers. To try to assert some definitive thesis could simply amount to epistemological imperialism. The epistemologist who asserts that legal knowledge does not exist in certain traditions is in real danger of exhibiting colonial or orientalist attitudes.

A third reason is the one that has formed the substance of this article. Even within the Western legal tradition, it is, as has hopefully been shown, impossible to assert a definitive thesis as to what does (and does not) constitute legal knowledge. There is a taxonomy and terminology that constitutes legal learning and legal practice in the Western tradition of law and this no doubt forms an important aspect of the discipline. There is also the idea of a normative ontology expressed in terms of the existence of rules, norms, rights, duties and the like (plus the theories that accompany this ontology). In addition there are the physical institutions of law—the courts, the judges, the practitioners and so on. Yet beneath all of these terms, categories, concepts and institutions there is the problem of what validates

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<sup>141</sup> Ruskola, T (2002) ‘Legal Orientalism’ (101) *Michigan Law Review* 179 at 209.

<sup>142</sup> Ruskola, T (2012) ‘The East Asian Legal Tradition’ in Bussani, M and Mattei, U (eds) (2012) *The Cambridge Companion to Comparative Law* Cambridge University Press 257 at 260–261.

an assertion as a legal one. As various writers have argued, law is the object of its own science—in mapping terms there is no distinction to be made between map and territory<sup>143</sup>—and this means that correspondence with some external object is absent. This leaves only coherence and consensus.<sup>144</sup> There is much literature on coherence in law and this was once seen as the key to legal knowledge,<sup>145</sup> but realists argued that such thinking was transcendental nonsense and thus coherence as the epistemological foundation of legal knowledge no longer commands support from all in the legal community.<sup>146</sup>

What is left, therefore, are the tensions. What this article claims is that it is these tensions that form the common foundation of legal knowledge. What is legal knowledge? It finds its immediate expression, as has been said, in the introductory works and the textbooks used in law schools and in the teaching and syllabi of these schools. It also finds expression in the official texts of the law—that is to say in legislation and in the judgements. There may well be a set of skills and methods as well, although again this is an area of debate.<sup>147</sup> But this textual expression, and possibly methods, is (are) only part of what amounts to legal knowledge, for not only are there forms of knowledge that go much deeper than these texts (as this article has hopefully shown) but forms of knowledge that are ambiguous and debated. There are no fixed boundaries since these boundaries are the subject of constant movement and debate. However these movements and debates can be seen as forums of knowledge in themselves. Perhaps an analogy can be made with the smuggler who constantly crosses a border pushing his wheelbarrow. The border guards

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<sup>143</sup> On which see Mathieu, M-L (2014) *Les représentations dans la pensée des juristes* [The Representation of the Legal Thought of Lawyers] IRJS Éditions.

<sup>144</sup> Soler, L (2000) *Introduction à l'épistémologie* [Introduction to Epistemology] Ellipses at 43–45.

<sup>145</sup> Champeil-Desplats *Méthodologies du droit et des sciences du droit* supra note 120 at 58–63.

<sup>146</sup> See eg Cohen, F (1935) 'Transcendental Nonsense and the Functional Approach' (35) *Columbia Law Review* 809.

<sup>147</sup> See eg Alexander, L and Sherwin, E (2008) *Demystifying Legal Reasoning* Cambridge University Press; cf Samuel, G (2018) *Rethinking Legal Reasoning* Edward Elgar at 258–284.



have equally constantly searched these wheelbarrows for the goods that they know he has been smuggling, but to no avail. They have of course been focussing on the wrong *res* just as focussing on what lawyers learn is probably the wrong object; the guards failed to see that it is the vehicle itself that should be the issue. The analogy with law is to be found between wheelbarrows and tensions.

Of course one can choose to ignore this wider tension environment and to retreat into a strictly internalist and authority paradigm viewpoint (however sophisticated) or one can embrace the wider environment and perhaps to reflect upon how legal learning might contribute to this more general social science environment. This is the general tension that now underpins legal knowledge in many law schools. But rather than argue about whether legal knowledge is restricted to some kind of *a priori* formalist model of concepts and (or) rules or whether it should take a much broader vision of the discipline is not an argument that the epistemologist can probably resolve. All that one can assert is that what should constitute the focal point for understanding legal knowledge are these kinds of tension themselves: for they are the structural foundations of social science disciplines and, even if law is not a social science, this does not mean that there are not lessons from social science epistemology that are relevant to law. In the end it must always be appreciated that social science epistemologists 'are searching to fill a multidimensional space whilst the paths taken by the researchers are limited only to one dimension.'<sup>148</sup> This is probably true of law as well.

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<sup>148</sup> Abbott, A (2006) 'Le chaos des disciplines' in Boutier, Passeron and Revel *Qu'est-ce qu'une discipline?* supra note 4 35 at 64. This translated chapter is taken from Abbott, A (2001) *Chaos of Disciplines* University of Chicago Press.