ESSAYS IN HONOUR OF MICHAEL BOGDAN

OFFPRINT

Juristförlaget i Lund
2013
1. Prologue
When Michael and I wrote our dissertations at the Lund Law Faculty in the beginning of the 1970’s, comparative law and legal history had quite different status and positions within the Swedish legal community. Both of them were marginal disciplines within the legal curriculum due to the modernity of the monolith Swedish nation-state. Comparative private law was a rising star. Legal history, however, was more regarded as a burned-out star, very close to disappearing behind the horizon. Why this was so is a long narrative which cannot be told within the limited space of a contribution to Michael’s Festschrift. Let me, however, sketch the background. Around 1970, the icons of post-war European comparative law – René David, Konrad Zweigert & Hein Kötz and Léontin Jean Constantinesco – had all contributed important works within comparative law. They also inspired the Swedish legal community. The majority of post-war Swedish legal historians, however, were either lawyers (but historians or/and theologians) or right-wing parliamentarians. Already for this reason they were regarded as outsiders in the legal paradigm of their time. Pragmatically, the international perspective had become more important when the European Communities established their institutions – and in 1973 Denmark became a member of the Communities. So Michael jumped on a high-speed train rolling towards an expanding future, while I was directed to take the steam-train, which in addition seemed to lack coal for its continuing journey. This metaphor describing the differences between two meta-disciplines in space and time within the law should have been regarded as an amusing witticism by the majority of the Lund law faculty in the mid-1970’s. In retrospect I have no reason to be bitter. I have forgiven – but not forgotten. Legal historians in general have always literally been steam train enthusiasts. Since then, within the Swedish legal community, the metaphorical steam train
has been continuously remodelled into a late-modern vehicle, equivalent to that of the “comparative law train”.

Swedish legal modernity in the 1970’s was much more interested in a visionary future than in an obscure and sinister past. The deputy minister in the Department of Justice during Olof Palme’s social-democratic government was Carl Lidbom (1926–2004). He was a distinctly reform-orientated modernist, and was the instrumental in important reform legislation directed towards the ordinary citizen within the Swedish welfare-state. Several legal fields – labour law, family law, consumer law and tenant law – were all reformed during this period of time. In Lund, international private law also became an important discipline when Lennart Pålsson (1933–2011) was appointed professor in international law in 1969 and started to construct an intellectual cluster, which for decades was called “Lennart Pålsson’s Empire” (with a distinct reference to hierarchic German professorship). Within this evolutionary empire, Michael rapidly advanced to be one of the dukes.

To a great extent, though, Swedish legal history, in the post-war period had lost its grip on the real world. Medieval legal history was still a dominant field of research – far away from the “real life”-orientated and sociologically based research related to modern history developed by Willard Hurst at Madison, Wisconsin and his colleagues in the United States in the 1950s and 1960s. Legal history became a well-established discipline, first within the Law and Society (sociology of law) movement and later the Marxist-inspired Critical Legal Studies movement. In Europe the renaissance for legal history research arrived later than in the United States, and here it got a special twist within the so-called critical schools and postmodern deconstructivism among European scholars.

To legal historians, transparency within law has always been a part of the paradigm. The reception of a common, learned European law, *ius commune*, into national, originally customary law-based legal systems, *ius patrium*, became an important research field in the aftermath of World War II, and especially in the renaissance of natural law in Western Europe in the late 1940s. The Max Planck Institute for European Legal History in Frankfurt/Main, founded in 1964 with Helmut Coing as director, became an important centre for research in this field. The impressive handbook on European legal historical sources and literature within private law ¹ – still a project in progress – became a parallel within legal history to the work by Konrad Zweigert and Hein Kötz in

comparative private law at the Max Planck Institute for International Private Law in Hamburg.\textsuperscript{2}

Interestingly enough, comparative law in the United States developed to a great extent due to representatives of German law among the émigrés who had to flee Nazi Germany after 1933.\textsuperscript{3} As one of their students remarked: “It is clear that the comparative law establishment in the United States is dominated by the intellectual traditions and peopled by the students of the expatriates.”\textsuperscript{4} Friedrich Kessler at Yale, Stefan Riesenfeld and Albert Ehrenzweig (the German Twins) at UC Berkeley, and Max Rheinstein at the University of Chicago were some of the important persons who established comparative law in law curricula and fostered a new generation within comparative law in the United States.

When a group of younger scholars from the Lund Law faculty were sponsored in the early 1980s with grants from the American Council of Learned Societies and got the opportunity to spend a year at an American law school, something important happened. All of them embraced the break from the national (I would even say the local!) scene and developed a more open and concerned attitude to alternative legal systems, legal theories – and comparative law.

The dramatic geopolitical shift in Europe in 1989-90 was the beginning of the paradigm shift in legal science into what we today call the late modernity. The Berlin Wall fell in November 1989, the Soviet Union was dissolved and the European Single Act was introduced by December 31, 1992. The Maastricht Treaty of 1992 spoke not only of merging institutions and legal systems, but also of the respect for cultural diversity.

The critical perspectives on law became increasingly important and challenged the positivist perspective on law dominating twentieth-century legal science. In my view, this challenge was a positive one. It resulted not only in a renaissance for legal science, but also very dynamic discourses on contextual and interdisciplinary theories and methods related to comparative law and legal history. Here ends my introductory survey, and now I will concentrate on how current late-modern discourses have created a new relationship between comparisons in space (comparative law) and comparisons in time (legal history).


2. The creation of a synthesis

The ongoing discourses reckoning with the past have opened up for new perspectives on the legal modernity of the twentieth century. Today the explanations and narratives about how emphasis of pragmatic positive law (Positivierung) within private law evolved, and neglected international as well as historical perspectives have been commonplace. In a recent article, Stefan Vogenauer describes how the historical perspectives within comparative law around 1900 were increasingly minimalised. Édouard Lambert (1866–1947) and his pragmatic school took over the scene. The positive law-orientated perspectives dominated. Legal dogmatic and rule orientation dominated not only in French and German comparative law; it was also this perspective that the well-educated (and gebildeten) German law émigrés brought to the United States during the Third Reich.

The uncritical and ignorant development projects within law in the United States after World War II were very similar to a legal colonialism, and they received heavy criticism. Since the late 1960’s Stanford School of Law has opened up for new perspectives, especially from two of its law professors, Lawrence M Friedman and John Henry Merryman. Friedman published a law review article in 1969 called “On Legal Development”, in which he heavily criticised the modernisation of law formulated within law and development projects, which aimed to modernise (read: Americanise) the law in the developing countries. It was in this article Friedman used this often-quoted metaphor: “[y]et no one could modernize a country by changing its clothes.” And it was in the same article Friedman introduced the concept of legal culture, which has been so important for the contextualisation of legal history in increasingly transparent and heterogeneous nation-states. When legal historians invented new constructs with the help of the concept of culture, comparative lawyers constructed meta-systematic entities in legal families and Rechtskreisen.

Both concepts lacked distinct legal formulas and created huge discourses. The concept of legal culture has been criticised for vagueness and the concept of legal families has been decried for being geopolitically outdated.

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The critical legal studies movement and postmodernism meant the breakup from legal realism and functional comparative law. It was regarded as “newstream” and as a negligible for mainstream positivistic attitudes within the legal community. The Critical Legal Studies Symposium at Stanford in 1984 demonstrated the peak of this movement in the U.S.10

But it is impossible to ignore the movement’s importance for contemporary US legal science. Even if the “Crits” and their ideology today have faded out, the movement remains commonplace to some degree. As one of my American colleagues recently stated, “To some extent we are all crits today”.

Initially “newstream”, the critical schools, have become increasingly mainstream in the American legal community. In Europe, Pierre Legrand was regarded for a long time as the rebel within his epistemological field of research, comparative legal cultures.11

In an article in honour of his colleague John Merryman, the comparativist and legal historian Lawrence Friedman identifies “the ills of comparative law as well as its strengths”.12 In this article, Friedman characterises comparative law “as being preoccupied with the problems of translation across cultures and the corresponding search for functional equivalents.” Comparative law from this position “has the virtues and the faults of a dictionary. A dictionary is an essential reference tool, but nobody can learn a foreign language, or grasp its essential genius from a dictionary alone … The vital core of a language is not to be found in the dictionary, but in the mouths of real people, using a language in their daily lives.” You can’t understand a legal system just by using dictionary tools, Friedman argues: “A living body of law is not a collection of doctrines, rules, terms and phrases. It is not a dictionary but a culture, and it has to be approached as such.”13

John Merryman took a similar position when he was interviewed by Pierre Legrand in 1997. Like Friedman, Merryman argued that comparative law has done a good job of generating information on materials that facilitate cross-border transactions. Nevertheless, Merryman bluntly criticised the pure dogmatic and “exclusively rule-centered” comparative law, “dominat-

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12 Tom Ginsburg, Friedman’s Comparative Law (2011), 56.
ed by European legal theory”. In Legrand’s interview he returned to his statement in that respect: “It seems so obvious that comparison based on statements of rules of law, which is the dominant mode of comparative law scholarship, is a relatively trivial kind of enterprise.” With Friedman’s and Merryman’s contextual and culture-based scientific approach and argumentation, we cannot only understand but also respect those blunt statements. Of course they met criticism from European comparative lawyers. Merryman’s statement, however, must be read in its scientific and American context. He continued, saying that of course there are “professional activities for which rule comparison is directly useful, but scholarship is supposed to have larger concerns. To the extent that one engages in serious scholarship in comparative law, one soon exhausts whatever value there may be in rule comparison.”

Friedman’s contextual and cultural perspectives and Legrand’s dialogue with Merryman has given a lot of stimuli to the ongoing discourses within newstream comparative law. By emphasising different texts and the context-orientated paradigm of cognitive structures, both of dialogues have also brought legal history in focus.

When the deep structures of the law became a topic of the day, it was regarded as newstream. International public law offers good examples of how history not only gives renewed perspectives on legal problems, but also a better understanding of and solutions to current legal questions.

3. Comparative law – A historical turn?
The new millennium also brought a historical turn within legal science. In 1999 on-going discourses were visible in the public environment. At the American Association of Law Schools annual meeting in New Orleans that year,

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comparative lawyers and legal historians discussed the question of whether comparative law was to take “A Historical Turn?”

Later that same year, the same question was raised at the German Biannual Legal Historians’ Meeting, 32. Deutscher Rechtshistorikertag, in Regensburg September 1999, where one session was devoted to comparative law and legal history. Six legal historians and comparative lawyers gave papers and the discussions were very stimulating. Mathias Reimann was one of the speakers. He sketched the challenges and possibilities and the opportunity to reach a mutual conception. He also foresaw the synthesis: comparative legal history.

Since 1999, a lot of water has passed under the bridge. The proposal of merging comparative law with comparative legal history has been frequently discussed. The discourses have identified that this is not a question of comparative law or legal history. The inevitable strategy is the combination: “As well as”. One of the most eminent representatives of this strategy (comparative legal history) has been Reinhard Zimmermann in Hamburg. In his Clarendon lectures at Oxford 1999, he used the metaphor “a legal tapestry of many different shades and nuances” to describe the historical past of the “mixed legal systems”, evident not only in South Africa and Scotland, but also in continental legal systems. “They all constitute a mixture of many different elements: Roman law, indigenous customary law, Canon law, mercantile custom, and Natural law theory, to name the most important ones in the history of the law of obligations.”

When, in his plenary lecture at the 29. Deutscher Rechtshistorikertag in Köln, Zimmermann emphasised the medieval ius commune with contemporary trends within European law, his comparisons were met with great suspicion and reluctance from many of his colleagues. Today the core of his message in that lecture (comparison in time) must be regarded as commonplace within

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comparative legal history.\textsuperscript{23} The new comparative perspectives were met with critical points of view. The borders between the disciplines were deep and related to historical cognitive structures.

By this point, the historical turn had also popped up within international law. Martti Koskenniemi’s work *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870 – 1960* (2001) started up a new discourse within this discipline, also representing “a historical turn, where memory plays an essential role in its development”.\textsuperscript{24}

Legal historians like Matthias Reimann and Reinhard Zimmermann are on the same track. *The Oxford Handbook of Comparative Law* they edited some years ago demonstrates the breadth, complexity and diversity within the field of comparative law.\textsuperscript{25} I take them as examples of legal scholars who have brought global and comparative law into the field of legal history. Today a comparative legal history focusing on diversity and contextual differences is in focus for an impressive majority of younger legal historians all over the globe. The second Biannual Meeting of the *European Society of Comparative Legal History*\textsuperscript{26} in Amsterdam in July 2012 testifies to my statement in that respect. Some 120 representatives from about 30 countries representing postmodern as well as late-modern legal history were all very interested in comparative perspectives, and not only comparisons in space but also in time. The long-term perspectives, the *longue durée*, the deep structures of law, are also frequently observed and studied. The comparison in time is frequent, as well as the concept of legal tradition – the orally form of transferred communication.

4. Mixed legal systems, legal plurality and legal hybridity
The European constructs of organising national legal systems into legal families have been heavily criticised. The late-modern concept of the state is much more complex and heterogeneous than the modern nation-state. Postcolonial studies identified mixed legal systems – a concept well elaborated upon by (among


\textsuperscript{24} George Rodrigo Bandeira Galindo, “Martti Koskenniemi and the Historiographical Turn in International Law”, 16 *The European Journal of International Law*, Nr 3 (2005), 539 ff.


\textsuperscript{26} esclh.blogspot.com
others) Reinhard Zimmermann and his networks. These postcolonial legal studies identified quite new perspectives with help of metaphors: “the Frontier, the Baroque and the South”. They gave the studies in comparative law new dimensions. Or, as Werner Menski put it: “[T]he Euro-centric perspective that privileged the state (lego-centrism) and territoriality (nationalist concerns) is not only quite parochial, but an idiom based on lost memory which does not lead towards a globally acceptable method of understanding law and its many pluralities, mixed manifestations, and commonalities.”

Today “mixity” is “the rule”. But the concept of mixed legal systems is, as Patrick Glenn has suggested, “very recent”. For two centuries, nationalism, monism, centralism, and positivism characterised the systematisation of the laws.

H. Patrick Glenn is one of the crusaders for the historical turn: turning comparative law into comparative legal history. For Glenn, comparative law and legal history comprise a normative unity. When he speaks of “legal traditions” instead of “legal systems”, his focus is the “historically dynamic nature of legal orders” (Donlan). Glenn’s legal history is characterised by its critique of legal nationalism, centralism and positivism. His now-classic book from 2000, *Legal Traditions of the World*, initiated intense and very fruitful discourses on tradition, religion, and other non-state norms. In 2010 it was published in its fourth edition.

The importance of moving beyond Euro-centric and state-centred concepts in an age of globalisation became evident in postcolonial studies, and this move is now also emphasised within comparative law:

“A reasonable inclusive cosmopolitan discipline of law needs to encompass all levels of relations and of ordering, relations between these levels, and all


important forms of law including suprastate (e.g. international, regional) and non-state law (e.g. religious, transnational, chthonic law i.e. tradition/custom) and various forms of ‘soft law’.

Legal pluralism\(^{34}\) and legal polycentricity\(^{35}\) have dominated theoretical legal discourses for the last twenty years, but within comparative law those concepts have not yet received the attention they deserve.\(^{36}\) Early on, however, legal historians identified the claims for an extended form of (normative) pluralism, also including e.g. traditions, customs and other normative orders. “Acknowledging a far more subtle and complex legal hybridity creates problems for any neat division of legal traditions into discrete legal families; the incorporation of normative hybridity into comparative analysis is still more difficult.”\(^{37}\)

Within these discourses on globalisation and non-state normative structures and traditions, the construct of legal families is totally obsolete and outdated.\(^{38}\)

5. Concluding remarks

“It is no exaggeration to state that in the last 20 years we have seen a true ‘comparative law explosion’: as a result of increasing globalization and Europeanization, comparative law has become more and more important.”\(^{39}\) Jan Smits’ statement (2006) is certainly true. As this contribution to Michael demonstrates, legal history is a part of this success story.

Today comparative law and history are two disciplines which are increasingly merging. James Gordley has underlined the two disciplines’ “need for mutual support”\(^{40}\). The twenty-first century has brought back the concept of legal hybridity, which was common before the modernity of the twentieth century. Comparative law and legal history had to develop as separate disciplines as a result of the contexts in which they emerged within modern legal science. Modern comparative law formed by Lambert and his contemporaries one

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\(^{36}\) Seán Patrick Donlan, Remembering (2011), 8.


century ago forgot the “legal hybridity and legal history”, to speak in the terms of Seán Patrick Donlan. Late-modern legal science, however, is constructed in much more complex contexts. The historical turn and the transparent borders between national legal systems in a transnational and even global context have not only given new perspectives on comparative law; they have also made it more complex and theoretical. It is no surprise that ordinary comparative law of the post-war era has been described as “trivial”. When Friedman and Merryman formulated contextual comparative law, they were regarded as early newstream missionaries. Today their positions are regarded as mainstream.

Thanks, Michael, for pleasant, collegial friendship throughout the decades! As this article demonstrates, comparative law and comparative legal history are spring from the same branch of the tree. This “remembering” of an old relationship between our disciplines has made them much more interesting and stimulating. For comparative lawyers, legal history has turned from an alien into an unexpected twin! The Schulenstreit between comparative lawyers and legal historians is over! The discourses within the family, however, have not been less complex in recent times – quite the opposite! So: All the best for the future! Comparativists and legal historians have much more to offer in an engaged, expanded interdisciplinary dialogue.

Today we are on the same train, Michael, and even related! I’m sure we have a lot to contribute to our common family!

43 Donlan, Remembering (2011), 35.