Introduction: Situating, Researching, and Writing
Comparative Legal History

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This volume is a selection of essays taken from the excellent range of papers presented at the British Legal History Conference hosted by the Institute for Legal and Constitutional Research at the University of St Andrews, 10–13 July 2019. The theme of the conference gives this book its title: ‘comparative legal history’. The topic came easily to the organisers because of their association with the St Andrews-based European Research Council Advanced grant project ‘Civil law, common law, customary law: consonance, divergence and transformation in Western Europe from the late eleventh to the thirteenth centuries’. But the chosen topic was also connected to the fact that this was, we think, the first British Legal History Conference held at a university without a Law faculty. Bearing in mind the question of how far institutional setting determines approach, our hope was that an element of fruitful comparison would stimulate people to think further about the range of approaches to legal history. With its explicit agenda of breaking down barriers, comparative legal history provided a particularly suitable focus for this investigation. After situating the subject matter of comparative legal history, and then discussing the levels of comparison that may be most fertile, this introduction moves on to considering the practical tasks of researching and writing such history, using the essays included in the volume to suggest ways ahead. The introduction groups the essays under certain headings: ‘Exploring legal transplants’; ‘Investigating broader geographical areas’; ‘Case law, precedent and relationships between legal systems’; and ‘Exploring past comparativists and the challenges of writing comparative legal history’. Yet the essays could be kaleidoscopically rearranged under many headings. We hope that the book, like a successful conference, includes many stimulating conversations.
F. W. Maitland wrote that 'history involves comparison...an isolated system cannot explain itself, still less explain its history'. Comparative approaches are vital for answering broad questions and understanding specific issues. Investigating both difference and similarity, they can seek patterns, construct narratives and test theories of causation. Sometimes they are explicit, sometimes implicit. Comparison, conscious or unconscious, is inevitably present in producing and testing analyses, in asking 'what if this were not the case?', 'what if we change certain conditions?' Such has been described as the 'quasi-Popperian' role of comparison: 'comparison is the closest that historians can get to testing, attempting to falsify, their own explanations'. At the same time, comparison may also produce fresh hypotheses, for example, asking 'is this pattern of change replicated elsewhere?' or 'are differences more assumed than real?', hypotheses that may be more resilient after themselves being tested through further comparison.

Comparison has long featured in investigation of legal development, be it between the Germanic and the Roman in the great founding works of German legal historical scholarship, or between Common law and Civil law in classic works on English legal history. Studies of comparative legal history have grown in the twentieth- and the twenty-first centuries.


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2 C. Wickham, Problems in Doing Comparative History (The Reuter Lecture, 2004; Southampton, 2005), 3.

along with some studies of the history of comparative legal history.\(^4\) The work has been conducted predominantly by scholars situated – by disciplinary formation or institutional affiliation – within Law rather than History. This is evident, for example, when examining the list of contributors to volumes such as the 2019 collection *Comparative Legal History*, which describes itself as ‘an emblematic product of the European Society for Comparative Legal History’.\(^5\) This predominance is true both of studies of specific legal topics and of writings on approaches.\(^6\) In the latter, it is manifest in the focus upon the relationship of comparative legal history to law and comparative law, with little or no mention of a relationship to history and comparative history.\(^7\)

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\(^4\) E.g. A. Giuliani, ‘What is Comparative Legal History? Legal Historiography and the Revolt against Formalism, 1930–60’, in Moréteau et al. (eds.), *Comparative Legal History, 30–77.*

\(^5\) Moréteau et al. (eds.), *Comparative Legal History, vii–xiii* for list of contributors, xiv for quotation.


The present volume is deliberately subtitled ‘Essays in comparative legal history’; the essays tackle aspects of law, including practice, doctrine, and academe, rather than being theoretical or methodological papers on comparative legal history. Likewise, this introduction concentrates on possibilities and problems of practice, rather than on the philosophical, unless one counts pragmatism and pluralism as philosophies. Such is not to put a perspective from History in place of a perspective from Law. Nor is it simply advocacy of pluralism from two authors who are hybrids in their own disciplinary formation and/or attachment. A similarly pragmatic desire resonates from at least some lawyers’ methodological studies:

Comparative legal historians should find a middle road between elaborating a potentially overly sophisticated comparative methodology and simply getting on with research without a conscious or at least obvious one. . . . [T]he final element of comparative methodology that the comparative legal historian can take from comparative law is . . . a lesson in when to stop, in this case when to stop discussing it and actually use it.8

The Subject Matter of Comparative Legal History

A preliminary question must be ‘what is the subject matter of legal history?’ The simple answer of course is ‘Law’ – or ‘law’ or possibly ‘the law’.9 However, as comparative legal scholars are particularly aware, considerable difficulty remains in defining this subject matter.10 Modern definitions or characterisations of law are contested. The effect of different definitions upon the writing of legal history is readily apparent.11 So too is the effect of characterisations of law that rest less on definition of what a law or the Law is than on the perceived functioning of law, be

8 Dyson, ‘Comparative Legal History’, 112, 118; see also 112–13, 119, 120 (‘Comparative legal history must avoid the “surfeit of methodology and self-inspection” that comparative law has borne’), 124, 137. Note also, e.g. Ibbetson, ‘Comparative Legal History’, esp. at 134. For pluralism, note the pertinent comments of D. Kennedy, The Rise and Fall of Classical Legal Thought (Washington, D.C., 2006), xiv: ‘The point was to add structuralist and critical techniques to the repertoire available for understanding law as a phenomenon too large and messy and complex to be fully grasped within any one theoretical frame.’


10 A point also made e.g. by Michalsen, ‘Methodological Perspectives’, 98, and Ibbetson, ‘What Is Legal History?’, 34. Differing conceptions of history will likewise affect our understanding of and approach to the subject.

they, for example, Marxist or Ehrlich’s ‘living law’. These produce a
different approach to the relationship between law and context.\textsuperscript{12} The
notion of the ‘relative autonomy’ of law provides a partial solution, but
only if ‘relative’ is a notion acutely interrogated rather than what
Maitland might describe as ‘a useful word [that] will cover a multitude
of ignorances’.\textsuperscript{13} Such pondering and investigation in turn may produce
the type of metaphorical language that sometimes also appears in
writings on comparative legal history, E. P. Thompson’s ‘imbrication’
being one such metaphor.\textsuperscript{14}

The comparative and historical aspects increase the difficulties still
further. What is legal history about, if both law and concepts of law are
not constant but shaped by context?\textsuperscript{15} Can modern jurisprudential tests
as to what is law, or what are rules of law, be employed to indicate the
limits of law in past societies? Such tests impose socio-culturally deter-
mined ideas, ironically sometimes applied to convict others of anachron-
ism in depiction of past ‘law’. Verbal contortions arising from, and
perhaps required for sustaining, a highly specific definition of law go
back in English jurisprudence at least to the nineteenth century with John
Austin’s use of the phrase ‘laws improperly so called’.\textsuperscript{16}

So, would it be better for the legal historian, especially when also a
comparativist, to work with a broader definition, or at least a broad core
categorisation, to answer ‘what is law?’, ‘what is the object of study?’ The
aim must be to avoid easily criticised supposed universals or precise but
unhelpful hyper-nominalism. This may involve thinking about practice
and abstraction therefrom, about the field of study being a particular area

\begin{itemize}
  \item \textsuperscript{13} F. W. Maitland, ‘The Law of Real Property’, in \textit{Collected Papers}, ed. Fisher, I. 162–201, at 175–6 (the word about which he is talking here is feudalism).
  \item \textsuperscript{14} Thompson, \textit{Whigs and Hunters}, 261. Other metaphors include, for example, the ‘sticki-
ness’ of legal rules, and also ‘transplant’, on which see below, 13–16.
  \item \textsuperscript{16} See e.g. J. Austin, \textit{The Province of Jurisprudence Determined}, ed. W. E. Rumble (Cambridge, 1995), 18, 106 (the opening of Lectures I and V).
\end{itemize}
of practice and knowledge in which certain people have expertise.\textsuperscript{17} Take the following suggestion by Brian Simpson:

\begin{quote}
The predominant conception today is that the common law consists of a system of rules; in terms of this legal propositions (if correct) state what is contained in these rules. I wish to consider the utility of this conception, and to contrast it with an alternative idea – the idea that the common law is best understood as a system of customary law, that is, as a body of traditional ideas received within a caste of experts.\textsuperscript{18}
\end{quote}

Focus on knowledge linked to practice resonates with ideas of legal cultures or ‘law in minds’ as the proper subject for comparative study.\textsuperscript{19} It may provide, if not a definitive solution to the problem of the field of comparative study, at least a way forward, and it requires the necessary examination of the definitions, categorisations and vocabulary used by those studied, and dialogue between such terminologies and our own.

**What Sort of Legal History?**

The next, related, issue is what sort of legal history comparative legal historians are doing, an issue that methodological writings only occasionally raise.\textsuperscript{20} The issue is pressing because of the extensive divisions


\textsuperscript{18} A. W. B. Simpson, ‘The Common Law and Legal Theory’, in his Legal Theory and Legal History: Essays on the Common Law (London, 1987), 359–82, at 361–2. See also, e.g. J. H. Baker, The Law’s Two Bodies: Some Evidential Problems in English Legal History (Oxford, 2001). Simpson sees this as true of the period in England from the late medieval development of the Inns of Court up to the mid-nineteenth century, when expansion of the legal profession, numerically, geographically and socially, ended the dominance of this caste. Yet elements of his point remain true today, at least within particular areas of the legal profession; note the interviews in the University of St Andrews project ‘The Law’s Two Bodies’: http://ilcr.wp.st-andrews.ac.uk/institute-projects/the-laws-two-bodies/.

\textsuperscript{19} See Dyson, ‘Comparative Legal History’, 117–18, for a helpful summary and references; also e.g. Modéer, ‘Abandoning the Nationalist Framework’, 109. Note also Kennedy, Rise and Fall, 27, defining his notion of ‘legal consciousness’ as ‘the particular form of consciousness that characterizes the legal profession as a social group, at a particular moment. The main peculiarity of this consciousness is that it contains a vast number of legal rules, arguments, and theories, a great deal of information about the institutional workings of the legal process, and the constellation of ideals and goals current in the profession at a given moment.’

\textsuperscript{20} E.g. Michalsen, ‘Methodological Perspectives’, 96, 98. Cognate issues arise with studies of comparative law as well as legal history.
between varieties of legal history, partly although not solely disciplin-
ary.\textsuperscript{21} Is the concentration to be the internal history of law, described by
David Ibbetson as follows: ‘A legal system does have its own separate
history … and even though it is inevitably embedded in the extra-legal
world … legal change takes place within this system and can only be
understood in terms of it?’\textsuperscript{22} Or is it to be the external history: ‘External
legal history is the history of law as embedded in its context, typically its
social or economic context.’\textsuperscript{23} Or should the two be integrated, not least
because some views of law render the division more difficult? Is integra-
tion particularly necessary regarding causation, periodisation and con-
struction of a narrative?\textsuperscript{24} Likewise, is the focus— in Roscoe Pound’s
useful if contested phrase — ‘Law in books’ or ‘Law in action’? And is
there a point where the social history of law – as epitomised, for example,
in \textit{Albion’s Fatal Tree} – ceases to be a form of legal history?\textsuperscript{25}

To argue that any particular method is the sole correct one may require
a degree of circularity: that an internal history of law is the only proper one
because that is what the history of law is, or that a social history of law is
the only proper one because law can only be considered in social context.
Instead, a single, holistic approach, incorporating elements of all others,
might be considered the correct method. However, it may be necessary in
practical terms – and indeed desirable in theoretical terms, as well as best

\begin{thebibliography}{9}
\bibitem{lobban1995_varieties} E.g. Lobban, ‘Varieties of Legal History’; Ibbetson, ‘What Is Legal History?’.
\bibitem{ibbetson1995_comparative} Ibbetson, ‘Comparative Legal History’, 132.
\bibitem{ibbetson2002} Ibbetson, ‘What Is Legal History?’, 34.
\bibitem{dyson1995} Note e.g. Dyson, ‘Comparative Legal History’, esp. 128–31, 138; Donlan, ‘Comparative? Legal? History?’, 83; Kennedy, \textit{Rise and Fall}, xxvii. A further highly pertinent critique is provided by P. Legrand, e.g. in his ‘On the Unbearable Localness of the Law: Academic Fallacies and Unseasonable Observations’, \textit{European Review of Private Law}, 1 (2002), 61–76, esp. 63–4, 66. On the significance of the specific context for court decisions that will assume a major, differently contextualised place in the internal history of law, see A. W. B. Simpson, \textit{Leading Cases in the Common Law} (Oxford, 1995), external context, specific or general, may be particularly important to decisions in the type of diffic-
tulate case that may drive Common law development, and to the later utilisation of those decisions.
\bibitem{hay1975_albion} D. Hay (ed.), \textit{Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England}
\end{thebibliography}
fitting personal aptitude – that individuals pursue different approaches, whilst ensuring those approaches are explicit and in dialogue: what may be called legal historical pluralism.

Making Comparisons

Beyond these issues, there are further clear difficulties in conducting comparative studies. Familiar from many discussions are difficulties such as the comparative use of concepts such as ‘ownership’ or ‘crime’. A solution – be it functionalist or other – again must avoid treating such concepts as unchanging, uncontextualised universals, whilst not lapsing into uninformative, irreducible nominalism where all that is apparent is difference. In contrast, theoretical writings are sometimes surprisingly vague as to what comparative legal history is seeking to explain. Two related aspects that have received attention are legal transplants and entanglements. Whilst such analyses sometimes are comparative, and can indeed benefit greatly from a comparative aspect, sometimes they are not, and perhaps need not be; rather, they are intent on creatively disrupting supposedly separate units. However, topics such as transplants do emphasise that comparative legal history must help to explain not just the particular legal systems compared but also the nature, processes and causes of legal change. Such is yet another reason for the difficulty of comparative legal history. To the difficulties of comparative law, it adds a third dimension of comparison: time.

26 On problems of terminology, see, e.g. J. Vandelinden, ‘Here, There and Everywhere . . . or Nowhere? Some Comparative and Historical Afterthoughts about Custom as a Source of Law’, in Moréteau et al. (eds.), Comparative Legal History, 140–66. Developing interest in comparative legal history is linked to, but not identical with, developing interest in global perspectives, with its broadening of geographical perspectives, emphasis on interconnectedness, and questioning of assumed concepts and values; see esp. T. Duve, ‘European Legal History – Concepts, Methods, Challenges’, in T. Duve (ed.), Entanglements in Legal History: Conceptual Approaches (Frankfurt am Main, 2014), 29–66, esp. 30–1, 55, 56; also T. Duve, ‘Global Legal History: Setting Europe in Perspective’, in Pihlajamäki et al. (eds.), Oxford Handbook of European Legal History, 115–38. Note further G. Frankenberg, Comparative Law as Critique (Cheltenham, 2016).
29 See below, 12–13, on causation.
Bearing in mind the above, what are the possible units of comparison for the legal historian? Generally, comparison has been between ‘legal systems’ – archetypically between Civil law and Common law – or between geographical areas, especially between political units. Comparison could also be between types of law – unwritten and written, custom and academic – or across time as well as place and system, as in comparisons between procedures in English Common law and Roman law.

A further issue is level of comparison and consequent generalisation. The ‘comparative method’ was crucial to the developing social sciences in Victorian England, including comparative law and legal history, personified by Sir Henry Maine. Supported by ideas of evolution, writers were confident in generalisations not just about specific or common patterns but about necessary and universal ones. Deprived of this belief in broad evolutionary patterns for human social and cultural development, and subjected to detailed empirical criticism, such theories have gone out of academic fashion. Only occasionally are writers prepared to speculate on whether legal systems have a ‘natural history’ or to attribute to them anthropomorphic characteristics.

Still, there is an opposite – probably reactive – danger, of insufficiently broad comparison. This may lapse into lists of similar or dissimilar rules or procedures. Rather than comparing individual rules or attempting to uncover universal patterns, therefore, the task is to find an intermediate level of comparison, to seek contrasting or shared patterns of legal norms, processes and change.

Very useful lists for comparison have been offered, for example: 1. Fact patterns. 2. Institutions. 3. Reasoning. 4. Principles and concepts. 5. Substantive legal rules. 6. Procedure. 7. Outcomes.

30 Note also, e.g. Michalsen, ‘Methodological Perspectives’, 106–7.
31 For problems with ‘legal systems’ as a basis for comparison, see, e.g. Gordley, ‘Comparative Law and Legal History’, 761–4, Dyson, ‘Comparative Legal History’, 114–16.
34 Wickham, Problems in Doing Comparative History, 11–15, reaches a similar conclusion.
35 Dyson, ‘Comparative Legal History’, 120.
Objects of comparison may range from the broad to the very particular, from structures of legal thought, through legal learning and education, clusters of rules and practices, to individual rules or the related functions of different rules in the compared systems, and on to the very specific, for example the judicial activities of one individual in different courts. Multiple perspectives can contribute: be it in litigation or transaction, starting from the participant point of view – ‘actor-based’ analysis – may reveal similarities and differences between types of law hidden to comparative analysis starting from legal rules or procedure.

Such explorations can also be formulated in specific research questions, again of differing scope. For example, such questions may form part of a wider analysis of the generation, development, and functioning of legal norms. Are clashes between unwritten customs resolved in different ways from clashes between written rules? Is there a difference in the strictness of application of procedural and of substantive norms? How far are norms brought into play by litigants, how far by those presiding over courts? In what ways do legal norms and processes fit diverse circumstances into set forms, and how are problems arising from such constrictions then remedied? Such analysis will return to questions such as that of the relationship of procedure and substantive norms, and to Maine’s oft-quoted but rarely tested suggestion that ‘substantive law has at first the look of being gradually secreted in the interstices of procedure’.

Similarities uncovered by comparison may thus be in patterns of law or legal development, rather than identical rules. The focus may be on what notions structure legal thought. There may be similarities or differences in assumptions, in underlying principles or pervasive ideas, in what S. F. C. Milsom described as ‘elementary legal ideas’ so fundamental that they are rarely stated yet must be uncovered to allow any possibility of further understanding. Investigation at this level may also allow exploration, not just of what existed, what changed, or when and why, but also of how law worked and developed, for example through replicable and adaptable units. Such intermediate level comparisons of groupings of

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36 E.g. Freda, ‘Legal Education’.