4. Comparative legal history: methodology for morphology

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"The past is a foreign country: they do things differently there."[1]

There is much to be said for combining comparative law and legal history. It allows a real understanding of whatever is being studied, not one misled by miscommunication with forebears, relatives or neighbours.[2] The historical connection allows us to see the inner substance of the present, not just its outward form;[3] indeed comparative law has even been said to be barren without legal history.[4] On the other hand, the comparative link will help historians to appreciate the role of chance in legal development, and to assist with a further

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[1] L P Hartley, *The Go-Between* (Hamish Hamilton, 1953) 5.

[2] Michele Graziadei, 'Comparative Law, Legal History, And The Holistic Approach To Legal Cultures' [1999] ZEuP 531, 533-537; Mathias Reimann, 'Rechtsvergleichung und Rechtsgeschichte im Dialog' (1999) ZEuP, 496.

[3] Reinhard Zimmermann, 'Savigny's Legacy: Legal History, Comparative Law and the Emergence of a European Legal Science' (1996) 112 LQR 576, 598.

[4] Roscoe Pound, 'Some Thoughts About Comparative Law' in Hans Dölle and Hans Peter Coudres (eds) *Festschrift Ernst Rabel* (Mohr 1954) I, 8. The uses of such resonant terms are not always compatible cf Zweigert and Kötz's reference "comely sisters": Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 8.

critical assessment of each historiographical tradition.[5] In particular, comparative law and legal history working together can prevent three methodological assumptions: that a common rule across jurisdictions results from common needs, that a common or similar rule has been adopted solely on its merits in the market place of ideas and that a rule which has flourished in more than one place can be explained by the circumstances of only one time and place.[6]

The difficulty is not the will, but the way. The choice of methodology when attempting comparative law alone is difficult. There are competing claims to validity, and even to whether there can ever be valid comparative law. Researchers often end up adopting a practical solution to their own research questions, one that tolerably holds up to scrutiny while not satisfying the purists. The addition of the historical dimension to such research only complicates matters: first, the average legal historian discusses methodology even less than the average comparatist and second, integrating what each camp actually does raises a range of difficulties.

This paper argues that whatever the direction of the research on comparative legal history is, it can be made easier by a handful of methodological steps drawn from both comparative law and legal history.

1. INTRODUCTION

Comparative law could be described as the investigation of how different spheres of power regulate law. It sees the divergent frameworks within which many similar and some different real-life problems are dealt with and it seeks to be able to relate everything in bubble A to

[5] Michele Graziadei, 'Comparative Law, Legal History', *supra* note 2, at 532.

[6] James Gordley, 'Comparative Law and Legal History' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (OUP 2006) 768.

everything in bubble B. It is often described as a search for comparators; as a sifting of the same and the different.[7] In that sense it is, at its best, a distillation of intelligibility. One does not need, though one could, talk of similarity, unity, commonality or equivalency; the focus should first be on understanding across divides. These are in fact often vast divides of, on the one hand, language and values and on the other, of fact, structure, reasoning, principle and solution. Thus the comparative "translation" must carry meaning across great distances.

Legal history might be called the study of how and why a given legal event in the past happened. That event might be defined broadly to take into account a hundred years, or narrowly to encompass the goings-on in a judge's mind before he puts judicial pen to paper. Nonetheless, it is the study of the causation in historically and legally relevant events; the charting and usually explanation of events. More powerful legal history tends to draw these events together in some fashion, analysing or explaining how they lock together into a progression or can be viewed from above to form a larger picture. In any case, such work is always conditioned by the system within which it, and the researcher, operates.[8]

However, beneath the surface, what the comparatist and legal historian seek to achieve can often be the same: to chart and explain the law without being limited by one view of that law.[9] If there is one message of this paper it is that this goal can be achieved by sharing some of the tools that comparatists and legal historians use on their own work. For

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[7] Nils Jansen, 'Comparative Law Within the Field of Comparative Disciplines' in Reimann and Zimmermann, *Oxford Handbook of Comparative Law*, *supra* note 6, at 305.

[8] It is for this reason that Zweigert and Kötz argue there is much more to comparative law and legal history than only the dimensions of time and space: Zweigert and Kötz, *Introduction to Comparative Law*, *supra* note 4, at 8.

[9] Ironically, this view has pedigree in a number of different jurisdictions: *see, e.g.*, Frederick Pollock, 'The History of Comparative Jurisprudence' (1903) 5 Journal of the Society of Comparative Legislation (New Series) 74, 75 (citing Maine on the historical and comparative methods not being distinguishable from each other in at least some of their applications) and 76-79. See also Mathew Dyson, 'If the Present Were the Past' [2016] American Journal of Legal History 41.

instance, the comparative legal historian will often be asking why something happened at one particular time, rather than five years before or fifty years after, just as much as she might ask why it happened in one place or another. It should be possible to draw up a list of techniques for generating questions like that, aiming to get deep into legal objects. This paper presents six methodological propositions to assist comparative legal historians in their work.[10]

2. METHODOLOGY SHOULD EMPOWER, NOT RENDER POWERLESS

Doing comparative legal history well is not easy, but it can be done. The scholar should indeed fear all that the comparatists fear, with his painstaking task not shortened by adding a historical dimension; but he or she should nonetheless proceed with his research, seeking to make the best of the difficult situation. Indeed, there is much to learn from the wisdom of each. This paper argues that both comparatists and legal historians chart and explain the law without being limited by one view of that law.[11] However, each has addressed the difficulties in this work in different ways.

Comparative lawyers, fearful of language, of projecting their own system and of sourcing the authority for their work, fall commonly into two categories. Those who discuss

[10] These propositions were developed in the context of the European Legal Development Project, an Arts and Humanities Research Council funded project led by Professors David Ibbetson and John Bell at the University of Cambridge. The first stage of the project has just been published by Cambridge University Press as six books, under the series title Comparative Studies in the Development of the Law of Torts. While the propositions set out below were born in the author's own work on the relationship between tort and crime in England and Spain, they were nurtured through working on the ELD project, and in particular by conversations with David Ibbetson and John Bell.

[11] *See, e.g.*, James Gordley, 'Comparative Legal Research: Its Function in the Development of Harmonized Law' (1995) 43 American Journal of Comparative Law 555, at 566: 'The method needed to understand [the law within one's own country] is transnational, indeed, transtemporal'.

methodology at length, and those who focus on smaller, more discrete studies which are at least achievable and yield some level of useful information.

Legal historians, despite potentially having the same things to fear, do not seem to talk about methodology much. As a group, the closest that legal historians seem to come to describing a method is discussing how resources can be accessed and where to look for them. This is not to say that there is no method, nor to allege that it is not sophisticated and effective. Rather, it is just that methodology is not something that legal historians believe worth discussing or debating when there is so much legal history to be done.[12]

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. The methodology should provide assistance in starting, building and polishing the research. It should not be something to tire the researcher, to mire and tarnish his work.

To that end, there are perhaps some elements of comparative law methodology that might be of value to legal historians, particularly those working with comparative goals. Other than jurisprudence, comparative law has perhaps the most detailed writings on legal method of any legal sphere.[13] This is certainly the case within English law, and perhaps most common lawyers.[14] This sophistication might have been driven by many things, but three

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[12] As evidence of this, while the 19th British Legal History Conference in Exeter in July 2009 was titled 'Making Legal History: Methodologies, Sources and Substance' the majority of the papers were focused more on substance than method. The focus on method in legal history was, at the time, said by the organisers to be a first for an international conference: *Crimes and Misdemeanours* 3/2 (2009) ISSN 1754-0445, 126.

[13] This is recent: *see, e.g.*, John C Reitz, 'How to do Comparative Law' (1998) 46 American Journal of Comparative Law 617.

[14] If it is not the case in other legal systems, the extent to which comparative legal methodology is itself a result of borrowing and adapting other methodologies is an interesting question, but one for another time. It's exactly one of the methodological digressions that this paper is arguing against going too far down.

factors stand out. First, comparatists must address the methodology even if domestic lawyers do not do so consciously in order to communicate with those same domestic lawyers. The range of sources, reasoning and questions can strain discussions even within one system unless there is a clear orthodoxy as a baseline; across systems this is even harder. Second, a detailed methodology helps to strengthen comparative law against doubt. In particular, it can supply validity to the results of comparative law. It might also assuage the clash of authority paradigms that arises when lawyers from different domestic systems try to understand and potentially even use law from outside their own system. Finally, it should be acknowledged that there can be a momentum to the debates; they can carry commentators along perhaps further than they should have gone.

The result is that comparative law methodology is increasingly capable of holding a decent conversation at the bar of the social sciences club.[15] It is true that it should know its limits. For instance, like most of doctrinal law, comparative methodology has some weaknesses in empirical work. It is also only recently that attempts to present a complete but practical approach to it for the beginner have been published, rather than monographs on particular elements of it.[16]

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[15] In some areas this is because comparative law has been listening intently to the conversations between other social sciences, *see, e.g*., Geoffrey Samuel, 'Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences' in Mark van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004); G Samuel, 'Is Law Really a Social Science? A View from Comparative Law' (2008) 67 Cambridge Law Journal 288 and G Samuel, 'Can legal reasoning be demystified' (2009) 29 Legal Studies 181, 192-195.

[16] *See* now, e.g., Reimann and Zimmermann, *Oxford Handbook of Comparative Law*, *supra* note 6; Jan Smits (ed), *Elgar's Encyclopedia of Comparative Law* (Edward Elgar 2006); Esin Örücü and David Nelken (eds), *Comparative Law: A Handbook* (Hart 2007) and Olivier Moréteau, 'Premiers pas dans la comparaison des droits' in Jean-Claude Gémar et Nicholas Kasirer (eds), *Jurilinguistique : entre langues et droits* ; J*urilinguistics: Between Law and Language*, (Bruylant and Thémis 2005), 407. As an example of the depth of comparative law methodology, the Oxford Handbook has between 15 and 27 Chapters on different perspectives,

Given this depth, cherry picking is very subjective. Nonetheless there are three particular elements that comparative legal historians could use: in order to set boundaries to research, in terminology and in the purpose behind a methodology. At the very least the debates that have taken place in comparative law show some of the pitfalls, even if there is not a complete answer.

2.1 Setting Boundaries to Research

First, there is the debate over how the boundaries of the object of study can be set. Legal historians have to decide the years to bookend their research, as well as the geographical scope and the types of materials to be examined. Comparatists have to do the same. For the legal historian, the boundaries are what decide the point at which the investigation can stop, but they must also frame whatever is being investigated. The boundaries are therefore defined by the subject matter, not the reverse. Similarly for comparatists, the boundaries are necessary to the work, but they are selected according to what best furthers the study.[17]

Therefore, both researchers shape their work through the boundaries they use. Beyond the constraints a legal historian needs, the comparatist must identify the species of law he is to investigate. Knowing how to identify that law can help comparative legal historians as well. For example, Gordley has argued that we should not compare, nor even refer to ‘legal systems’ as such.[18] He argues this because, at least with the European world, the term ‘system’ does not capture the interlocking and interdependent nature of two thousand years of borrowing, transplanting and tinkering. Gordley suggests that the legal system, defined

methods and paths of development of comparative law, depending on how widely those terms are interpreted.

[17] This is the better view, compared to the simplistic statement that the more boundaries a legal historian uses the easier his work is, while the more the comparatists uses, the harder his work is.

[18] James Gordley, ‘Comparative Law and Legal History’, *supra* note 6, at 761-762, 763-764.

implicitly as a system of rules, is ill-suited to be either an object of study or short-hand for the object and its related issues because those same rules have been borrowed or transposed from elsewhere: the codes in, for instance, the German or French 'systems':

> incorporate a conglomerate of ideas, developed over centuries, some incorporated because they had been traditionally accepted, some at the whim of the drafters. But that hardly makes them a system in the sense of an ideological or philosophical system, in which each part is intelligible only in terms of every other part.[19]

This may well be true for many or all of the European legal systems, but it would be going beyond Gordley's evidence to say that all "systems" are like that. It may well be that there are isolated places in the world whose law could be described as a system through lack of transplants. More promisingly though, there may be legal systems where the foreign influences and transplants have been conceptually and structurally united. The availability of such systems will depend on our definition of system. Gordley seemed to be using an objective and rationale analysis, though others, like a subjective one, might also be possible.

Also hidden in this line of reasoning is a shift from demarcating the object of study to limiting the work involved in studying it. The term used to describe the source and bounds from which an object is picked up saves time and energy, though Gordley is right to show that is can be loaded up with other ideas.

[19] *Ibid*, 761. For further discussion, see Matthew Dyson, 'Symposium on Legal Domains and Comparative Law. Wheels Within Wheels: Using Legal Domains for Domestic Comparative Law' (2013) 17 Edinburgh Law Review 420-424, symposium ends 430; M Dyson, 'Divide and Conquer: Using Legal Domains in Comparative Legal Studies' in G Helleringer & K. Purnhagen (eds), *Towards a European Legal Culture* (Hart, Beck Nomos 2014).

One way to avoid the conceptual debate about the term "system" is to refer to a "jurisdiction".[20] In this way a procedural term is used to avoid nominate issues like the ones discussed by Gordley. It is an avoidance, rather than a solution. In the same way as the old answer to whether a matter is civil or criminal ("look to see which court you are in"[21]) has become inaccurate[22] but remains the most practiced approach, so too do comparatists use imperfect terminology but at least they do so now knowing of its imperfections.

A more substantive solution, aside from the linguistic concerns, is to identify rules as having their own neutral character, which is then affected by its location. The foremost proponent of this approach is Sacco.[23] His approach is of core ideas, which may have a variety of shells to work effectively in different environments. To this legal development adds questions on why and how such shells work, as well as why some core ideas have strength that others do not. It works to build, from an understanding of why each moment of adoption or rejection occurs, a picture of the processes in change, including how formants dress themselves for each system. In some part, to understand how the formants become transposed and incorporated into a system, one must surely focus not only on the formants, but on the other parts of the system as well.

[20] On which *see, e.g.*, Vernon Valentine Palmer, 'Mixed Legal Systems . . . and the Myth of Pure Laws' (2007) 67 Louisiana Law Review 1205.

[21] Glanville Williams, 'The Definition of Crime' (1955) Current Legal Problems 107, though Williams' argument first focuses on legal consequences, this then becomes a discussion of how the location of the proceedings determines their consequences.

[22] Matthew Dyson, 'Connecting Tort and Crime: Comparative Legal History in England and Spain since 1850' [2009] Cambridge Yearbook of European Legal Studies 247.

[23] *See, e.g.*, Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 American Journal of Comparative Law 1 (Part 1) and 343 (Part 2).

However, comparatists should not restrict themselves to comparing jurisdictions, legal systems or legal families[24] for that matter. That is, procedural, national, familial or linguistic boundaries are not the only ones comparatists can traverse. Standing the conventional approach on its head, comparatists can compare wherever there is value in the comparison. For instance, in France the division between the *pénaliste* and *civiliste* is very strong and rarely crossed. It is based on legal techniques as well as the apparently normative difference between the two. And yet, if there is a divide there, the comparatist should be able to compare what falls on either side of it. Equally, in England it is not uncommon to hear someone referred to as "a pure company lawyer" or that a student is not "thinking like a tort lawyer". If there truly are specific forms of legal reasoning rather than simply discrete areas of knowledge, there is ample space for a comparatist to explore them. This approach could be particularly useful to those who apply a technique outside of the realm where it is most commonly found, such as a law and economics approach to an area of private law. To understand how to use such a technique effectively, a researcher would need to apply comparative law tools to it as well as the technique.[25]

2.2 Terminology

The second element of comparative methodology builds on this precision in terminology. There are some useful terms from comparative law which could assist legal historians in

[24] *See* the seminal H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (OUP 2000); To fully understand the scope of this work (in respect of the second edition in 2004) *see* William Twining et al 'A Fresh Start for Comparative Legal Studies? A Collective Review of Patrick Glenn's Legal Traditions of the World, 2nd edition' (2006) 1 Journal of Comparative Law 1.

[25] The phrase "a law and economics approach" yielded 56,000 hits in a google search and a strong representation of private law topics can be seen even within the astounding range of subject areas there.

sharpening and translating concepts. There are three examples that are particularly useful: functionalism, legal culture, and “law in minds”.

Functionalism is a methodology for identifying what should be compared. It is perhaps now the traditional position, first used by Rabel perhaps taken from the literature on sociology.[26] A given legal rule, for instance, is compared with whatever performs the same function in the other jurisdiction. This method focuses on action, on the role the rule performs; it does not focus on other conceptualisations of the legal system, like structure, culture and even the names used for rules. This focus on function applies both to the author’s own legal system and to the other system being studied. It encourages the study of parts of objects that may appear different, revealing their surprising unity of function. This approach has much to commend it, at least in the sense that function is important in working out what to compare. The difficulty is that this initial message can be taken too far, particularly when its subtle message is not fully understood. As Zweigert and Kötz influentially put it:

> [T]he legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results. The question to which any comparative study is devoted must be posed in purely functional terms; the problem must be stated without any reference to the concepts of one’s own legal system.[27]

[26] Ernst Rabel, *Aufgabe und Notwendigkeit der Rechtsvergleichung* (Max Hueber 1925) 4; E Rabel, *Das Rechts des Warenkaufs* (vol I, De Gruyter 1938) 67. For more detail on Rabel, *see* Annalise Riles, *Rethinking the Masters of Comparative law* (Hart 2001). On a possible borrowing from Sociology *see* M Rheinstein ‘Teaching Comparative Law’ (1938) 5 University of Chicago Law Review 617 and R Cotterell, ‘Comparatists and Sociology’ in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003).

[27] Zweigert and Kötz, *Introduction to Comparative Law*, *supra* note 4, at 34.

There is, in a sense, a range of functions in each system: any function should be identified first and then, second, the ways different systems use to perform it can be compared. The risk is that if taken too far, too much can be assumed. What is not useful is to move from stating an assumption, to using the assumption as a ground to select material to fulfil it.[28] Therefore no hypothetical *praesumptio similitudinis*[29] should be a tool for the comparative legal historian. Yet just as the comparative legal historian should be wary of assuming similarity, he should be wary of assuming excessive difference. Functionalism has at times appeared to exclude certain areas of law from its field of application owing to their influence by "moral views or values". Examples are family and succession law.[30] This is challenging: while on the one hand legal solutions might be assumed to be the same, their ethical and cultural matrix can rapidly become too alien to be compared. It may be that some ideas, more than areas of the law, are less amenable to a functionalist approach, but as will be shown below, a blanket dismissal of a division of law may be hard to sustain.

Functionalism remains a starting point for identifying what to compare. The issues functionalism focuses on less, like how the rule came to be, why it has remained in place and what its doctrinal or moral significance is, cannot be forgotten.[31] When the researcher then turns to analysing and explaining rules, he should be willing to look elsewhere for them. At this point comparative law has not run dry. Three ideas in particular might be useful: legal culture, "law in minds", and the "mirror thesis".

[28] For a similar point *see* J Hill, 'Comparative law, Law Reform, and Legal Theory' (1989) 9 Oxford Journal of Legal Studies 101, 107-111.

[29] Zweigert and Kötz, *Introduction to Comparative Law, supra* note 4, at 40.

[30] One might argue that there are parallels in the notion of *ordre public* in private international law.

[31] Lawrence Rosen, 'Beyond Compare' in Pierre Legrand and Roderick Munday (eds) *Comparative Legal Studies: Traditions and Transitions* (CUP 2003).

Legal culture describes the training, mindset and human dimension to the operation of the law. Culture has been described as "the framework of intangibles within which individuals operate in a given society", with legal culture being a sub-culture constituted within the community of lawyers.[32] It is closer to anthropology than some of the other ideas in comparative law, but none the worse for that.[33] The key point is that law exists through the action of legal actors, those legal actors act within a culture and that culture will affect the law's existence.[34]

"Law in minds" is a term for addressing the law as it is thought to be, rather than its form in statutes or cases, or as seen through outcomes.[35] Ewald has been a leading proponent of this view:

> What comparative law should aim for is an understanding of the conscious ideas at work in the foreign legal system; that is, the principles, concepts, beliefs, and reasoning that underlie the foreign legal rules and institutions. The crucial thing to observe is that this theory imposes no substantive restrictions on the *content* of the ideas studied. The ideas can be ideas about economics, or about sociology, or about agriculture, or about witchcraft and magic, and still be an appropriate object of comparative legal study. In other words, there is no requirement that the content be philosophical . . . as a matter of empirical fact, the large-scale differences between the thought processes of two different legal cultures can only be explained and understood in historical terms.[36]

[32] Pierre Legrand, 'Comparative Legal Studies and Commitment to Theory' (1995) 58 Modern Law Review 262, 263.

[33] For a collection of some interesting references on this, *see* Pierre Legrand, 'How to Compare Now' (1996) 16 Legal Studies 232, 233 note 4.

[34] A classic text is John Bell, *French Legal Cultures* (Butterworths 2001).

[35] For a more up-to-date note *see* James Gordley, 'Comparative Law and Legal History', *supra* note 6, at 765-766.

[36] William Ewald, 'Comparative Law and Legal History' (1999) 3 Zeitschrift für Europäisches Privatrecht 553, 557.

This helps to prevent the scholar from reading his own views back into earlier work.[37] Law in minds could be a useful concept for legal historians, likely only as a term to capture what many are already doing. Its value is that it reminds the researcher of the power of reasoning to shape the law, as opposed to making a judgment on that reasoning.[38]

Finally, the mirror thesis is the proposition that law is a direct product or reflection of society. Generally academic consensus is now against a direct and universal link. Watson has famously argued against ascribing such force to society or economics for instance,[39] supported at least selectively by Ewald[40] and Graziadei.[41] They give a number of practical examples of how systems with opposite goals had similar methods and that while much of the law is functional and designed to aid society, law and society cannot always be understood in functional terms. Transplants are very common. They do not have roots in every jurisdiction where they thrive and they are often imported without full understanding.

[37] For a classic comparative work in this vein, *see* James Gordley, 'Myths of the French Civil Code' (1994) 42 American Journal of Comparative Law 459.

[38] A point raised by Dirk Heirbaut in his paper at the 19th British Legal History Conference in Exeter in July 2009 on 'Exploring Minds of Lawyers: The Duty of the Legal Historian to Write the Books of Non-Written Law'.

[39] Again, Alan Watson's contribution to this field is strong in value and number. See, for instance, for some of Watson's numerous works on the topic: Alan Watson, *Legal Transplants: An Approach to Comparative Law* (1st edn, Scottish Academic Press 1974, 2nd edn, University of Georgia 1993); A Watson, *Society and Legal Change*, (Scottish Academic Press 1977); A Watson, 'Aspects of Reception of Law' (1996) 44 American Journal of Comparative Law 335.

[40] William Ewald, 'Comparative Jurisprudence: What Was it Like to Try a Rat?' (1995) 143 University of Pennsylvania Law Review 1889; William Ewald, 'The Logic of Legal Transplants: Comparative Jurisprudence Part II' (1995) 43 American Journal of Comparative Law 489.

[41] Michele Graziadei, 'The Functionalist Heritage' in Mark van Hoecke (ed), *Methodology and Epistemology of Comparative Law* (Hart 2004).

If nothing else, an awareness of the mirror thesis debates helps to focus the comparative legal historian on the role of non-law. Indeed, Ewald himself asked for a means to unite Watson's force with a softer and more nuanced appreciation of the role of non-legal factors.[42]

2.3 Purpose and Method

The third and final element of comparative methodology that the comparative legal historian can take from comparative law is also a lesson in when to stop, in this case when to stop discussing it and actually use it.

Whatever methodology adopted should aid research, rather than stifle it. Requiring only one methodology before accepting a piece of work as valid is not usually going to advance the research agenda, given the amount that is out there to do. Of course, there are all kinds of things that a good methodology might prohibit, but the key aim should be to promote valuable research. Legal historians are aware of this already, as they seem to get on with serious and scholarly work without discussing methodology in detail. Comparatists, on the other hand, have not always done so well.

It has been argued that meaningful comparative law is not possible. Legrand, for instance, has stated that much of what is claimed to be methodology is either superficial, biased or seeking, consciously or not, to promote an ideological agenda.[43] In other words, it lacks sufficient recognition to different legal cultures or *mentalities* as well as the social and

[42] William Ewald, 'The Logic of Legal Transplants', *supra* note 40, at 510.

[43] Pierre Legrand, 'How to Compare Now', *supra* note 33, at 239, on comparatists needing 'a proclivity towards an acknowledgment of "difference"' rather than a belief in inherent similarity; P Legrand, 'Comparative Legal Studies and Commitment to Theory', *supra* note 32, at 263-264.

political context of the law.[44] This is not an attack that any legal historians would wish levelled against them either. However, good legal historians tend to focus on timeframes and substantive matters where they feel they can put themselves into the place of the legal actors they are studying. This may be easier where it is one country, and one timeframe, but it inevitably requires some knowledge of cognate disciplines like history, economics, sociology and philosophy.[45] The same could probably be said of good comparatists.

Underlying some of this debate is whether comparative law is a method, a body of rules, or something else. If it is a method, it is something that anyone with enough experience of it could use.[46] Comparative law would not be a separate subject. If it is a body of rules, they would have to be acquired through study and specialism; if something in between, then what? Legrand has asserted that comparative law:

> presents a new *perspective*, allowing one critically to illuminate a legal system—another's or one's own—much in the same way as, say, critical legal studies, feminist legal studies, legal semiotics or economic analysis of law can do.[47]

This statement gives comparative law quite a modest purpose. It is particularly interesting that legal history was not on Legrand's list. It is surely arguable that legal history can provide the same critical distance and blow the dust off to reveal what was always there. In the same way, comparative legal history has to consider whether it is a methodology, a subject area or something in between. Yet that consideration should not take up all the energies of scholars.

[44] Pierre Legrand, 'European Systems Are not Converging' (1996) International Comparative Law Quarterly 52.

[45] More barbed critiques of comparative law claim that it has so far never managed to fulfil its promise, or indeed, fulfil any purpose at all; *see* the discussion in Anne Peters and Heiner Schwenke, 'Comparative Law beyond Post-Modernism' (2000) 49 International and Comparative Law Quarterly 800.

[46] Otto Kahn-Freund, 'Comparative Law as an Academic Subject' (1966) 82 Law Quarterly Review 40, 41.

[47] Pierre Legrand, 'Book Review' (1988) 36 American Journal of Comparative Law 788, 788-91.

The comparative legal historian will best find out how best to research and how best to characterise that work by reflecting and discussing his work as he does it. The work should go on, steadily getting better. Comparative legal history must avoid the "surfeit of methodology and self-inspection"[48] that comparative law has borne. Methodology should empower, not render powerless.

3. SEEK PRECISION, RATHER THAN PREJUDICE, IN THE OBJECT OF STUDY

Recent comparative law scholarship has set out the different roles for comparative law in the courts. This work is fascinating and has greatly contributed to the debate on what the courts have done, what they can do, and what they should do. Of those three elements, it is more relevant to comparative legal historians for the first two: its insights into the range of decisions that have been taken and that could be taken. A clear lesson from comparative legal methodology is that there are many valid objects of study, rather than only one. The combination of these different objects is what will help to construct a detailed overall picture.

An attempt to categorise what courts could do with comparative law was put forth by Jane Stapleton, in a work largely focusing on how comparative law can enrich the development of tort law.[49] Stapleton argued for the transferability of legal reasoning, at least

[48] Otto Kahn-Freund, 'Comparative Law as an Academic Subject', *supra* note 46, at 59.

[49] Jane Stapleton, 'Benefits of Comparative Tort Reasoning: Lost in Translation' (2007) 1 Journal of Tort Law 6, 37, reprinted in Mads Andenas and Duncan Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (OUP 2009) and cf, Mads Andenas and Duncan Fairgrieve, 'There is A World Out Elsewhere'—Lord Bingham and Comparative Law' in the same volume, 856-862. A second work has more recently built on Stapleton's categorisation: Ken Oliphant, 'Fairchild v Glenhaven Funeral Services (2002)' in Charles Mitchell and Paul Mitchell (eds) *Landmark Cases in the Law of Tort* (Hart 2010). For an earlier exploration in French, *see* B Markesinis, Unité ou divergence: à la recherche des ressemblances dans le droit européen contemporain [2001] Revue internationale de droit comparé 807.

within linguistically and culturally close limits. Though they are the children of Stapleton's work, the objects below are altered and refocused not on what the courts do, but on what can be analysed comparatively. The objects of Comparative Law are:

1. Fact patterns
2. Institutions
3. Reasoning
4. Principles and concepts
5. Substantive legal rules
6. Procedure
7. Outcomes

This is not meant to suggest that number one is more important than five or vice versa: rather it is a progression based on the chronological order in which information can be gleaned from many legal sources. For instance, a paradigm example that could provide information on all five objects is a case. A case could first be used, at least within the English system of reporting, to show key points about why the parties are in court. Second, how the legal actors place the problem on the map of law, and which bodies are appropriate to deal with it can be seen from a case. Third, once so located, the intellectual conception of the problem will appear from the treatment in the report. This will show the way the problem is perceived, knowingly or not, contextualised and weighed, beyond the formal logic used. Fourth, the next issue will be what principles and concepts the law uses, such as liability based on fault or on strict liability justified by some other means. This will often combine with issues, like reasoning. For instance, many legal tests use a "balancing act" of some kind or other, but the weight to put on different factors on the scales will be affected by many value-judgments and cultural preferences. Fifth, the substantive principles and rules will be analysed. Sixth, the procedure through which the substance is examined can be expressed: such as what the rules of evidence are, and how those parties got into a particular court (and indeed, why a court, rather than a tribunal or a national insurance system). Finally, the case will be able to show how that fact pattern was "resolved" by a court order.

We turn now to look at each of these uses in more detail.

First, legal data can show the type of facts and events that can occur. There is nought more surprising in the world than what actually happens. A classic example is when a novel piece of technology appears: suddenly new factual situations require teasing apart and sifting. On some occasions those facts might fit within frameworks set up for other situations, such as the automobile replacing the horse and carriage on the streets of Europe.[50] On other occasions the fact pattern might be completely new, such as sparks from railways[51] or how someone's appearance can be protected once such an easy means of copying/capture as the camera has been invented.

Second, legal data can be used to show what institutions the law is divided up into: the "map" the law makes, as well as the legal actors who play a part in it. This includes institutional perspectives, structures and legal actors.[52] For instance, the nature of legal academic publishing in Germany and England is very different; both cultures put a lot of pressure on academics to publish, but the kinds of work required vary dramatically. German output is larger, including journals aimed at explaining the current law directly to students

[50] See, e.g., Wolfgang Ernst (ed), *The Development of Traffic Liability* (CUP 2010) at 5-10.

[51] See, e.g., Miquel Martín-Casals (ed), *The Development of Liability in Relation to Technological Change* (CUP 2010) at 2-12.

[52] For an example of comparing legal actors, see Ugo Mattei, 'The Comparative jurisprudence of Schlesinger and Sacco: A Study in Legal Influence' in Annalise Riles (ed) *Rethinking the Masters of Comparative Law* (Hart 2001).

rather than presenting new research. German (and Austrian) academics also play a greater role in forensic decision-making than their English counterparts: they are cited more, their opinions are both knowingly and unknowingly given great weight; at times official opinions of academics are directly sought to aid the court, such as on descriptions of foreign law given by the Max Planck Institute for Comparative and International Private Law in Hamburg or the Institute for Tort Law in Vienna.

Third, legal materials can shed light on how a legal problem is conceived of by legal actors. This includes the preconceptions and illusions internal to the system as well as how legal actors think the gears of the law are turning. This category is another way to refer to what has been described by some as a question of *mentalité*,[53] by others as tradition, ideology or "praxis", all capturing different aspects of the same core idea. It is expressed here in the handy, rather than perfect, term "legal reasoning". Even if the substantive law across two cultures is the same, as it is increasingly the case within the EU, the perception, conception and character of that law may be different.

A number of commentators have argued for this to be the focus of comparative law work, though not necessarily the exclusive focus. Ewald, for instance, has forcefully sought to reshape comparative law as a discipline for investigating "law in minds" rather than law in the books or law in action:

> What comparative law should aim for is an understanding of the conscious ideas at work in the foreign legal system; that is, the principles, concepts, beliefs, and reasoning that underlie the foreign legal rules and institutions.[54]

[53] E.g., Pierre Legrand, 'European Legal Systems are not Converging' (1996) 46 International and Comparative Law Quarterly 52, 60-61.

[54] William Ewald, 'Legal History and Comparative Law' (1999) ZEuP 553, 557; Stapleton, 'Benefits of Comparative Tort Reasoning: Lost in Translation', *supra* note 49.

One of his examples for this, putting rats on trial, is gone into some depth in perhaps his most famous article.[55] He later summed this up as: “The sixteenth century courts that placed weevils and locusts on trial plainly had some outlandish beliefs; but the most striking of those beliefs were about insects, and not about legal philosophy.”[56]

Another way to look at this use is as a “legal science”. Savigny’s famous preference was for common ways to think about and apply law rather than top-down codifications; or, for a journey to be characterised by the mode of taking steps rather than metaphorically swinging through the treetops. Zimmermann has described Savigny’s technique as starting with a common legal grammar, rather than common outcomes.[57]

Fourth, the crystallisation of the above three areas are the principles and concepts used in making and applying the law. Principles also include matters that are more abstract than rules; they are the linking stage between conception and application. Examples would be the public policy rule that “no man may benefit from a wrong” and the principles of fair labelling, harm and fairness in criminal law.

Fifth, these principles and concepts are boiled down into substantive legal rules. Rules that generate liability, set out defences and allocate remedies are all covered here. The substance of the law is some of the most commonly covered comparative and historical material: researchers trace particular rules, sometimes back to origins in Roman law or similar, and compare how they have been interpreted or developed. Sometimes particular rules, such as the presence or absence of strict liability, or free or forced testamentary disposition, become markers of traditions of legal systems, such as the common law or civil

[55] Ewald, ‘Comparative Jurisprudence: What Was it Like to Try a Rat?’, *supra* note 40.

[56] Ewald, ‘Legal History and Comparative Law’, *supra* note 54, at 557.

[57] Zimmermann, ‘Savigny's Legacy’, *supra* note 3, at 596.

law. These markers can even attain the same currency as markers as the methods those different traditions use.

Sixth, legal data can highlight what procedures are used to allow the substantive rights, duties and other legal objects to be analysed. Classic examples include who is allowed to give evidence, what forms must be filed and how court orders are enforced. Historical work not grounded in legal procedure risks failing to explain how cases were really resolved, and indeed, why many were brought in the first place. Similarly, comparatists need to fight assumptions about procedure, assumptions they might even be making about their own legal system. Here barriers between academic work and the work at the coalface of the law can be distinctly disadvantageous if not crossed judiciously.

Finally, legal data can be used to understand outcomes. That is, what real impact does a legal result have on those concerned? Does tort law allow real vindication of a right, even against a public body, or should public or administrative law be the option of choice? Does contract law always promote efficient outcomes or would a different system be better? “Outcomes” is preferable to another potential term, “output”, because an output is dependent on an input and a process: it is not distillable, capable of purification or, indeed, of transplantation. “Outcome” also better captures how, internally, the data being looked at might suggest how those within the jurisdiction have found what they considered a remedy to the problem at hand. There are those who argue that outcomes, or more particularly the outcomes found in case law or “decisional law”, should be the prime interest for the comparatists.[58] These outcomes could be focused on for many reasons, primarily, transplantation, adaptation, comment, rejection or ridicule.

One of the most rewarding articles in comparative law is Sacco's simple demonstration that objects might have their own neutral character that is then affected by their location.[59] That is, a core neutral rule which is clothed, equipped and given character for and by different environments. We might then turn to ask why and how such outer layers work, as well as why some core ideas have strength that others do not. Thus we might build a picture of the processes of change as a first step to understanding why each moment of adoption or rejection occurs. This might logically include understanding how formants dress or are dressed for each system. To understand how the formants become transposed and incorporated, one must focus not only on the formants, but also on the body of objects they are joining.

These seven objects are therefore merely starting points: the next question is where you go to compare one object with another.

Traditionally, comparatists say we compare across "legal systems". For instance, Bogdan sets out the ambit of comparative law: ". . . the comparing of different legal systems with the purpose of ascertaining their similarities and differences;"[60] The phrase "legal system" is useful as a large enough box to carry a lot without having to unpack it. Few comparatists bother to attempt to unpack it. René David has given one of the few definitions:

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[58] E.g., Basil Markesinis, 'Unity or Division: The Search for Similarities in Contemporary European Law' in Duncan Fairgrieve, Mads Andenas & John Bell (eds) *Tort Liability of Public Authorities in Comparative Perspective* 451 (BIICL 2002). Cf Legrand, 'European Legal Systems are not Converging', *supra* note 53, at 55-60; Andrew Lewis, 'On Not Expecting the Spanish Inquisition: The Uses of Comparative Legal History' (2004) 57 Current Legal Problems 53, 57-73.

[59] *See, e.g.*, Rodolfo Sacco, 'Legal Formants', *supra* note 23.

[60] Michael Bogdan, *Comparative Law* (Kluwer 1994) 18.

> Each law constitutes in fact a *system*: it employs a certain vocabulary, corresponding to certain concepts; it groups the rules into certain categories; it has methods to formulate and interpret the rules; it is part of a certain conception of social order which determines the means of application and the function of “law” in that society.[61]

In fact, this quite short definition was followed by five pages of discussion on how to define a “Legal Family”, a grouping of related legal systems; similarly Konrad Zweigert and Hein Kötz did not define a legal system in their leading text, but did spend five pages on what a “legal family” might be.[62]

A fuller idea of a legal system must be teased out. The word “system” comes originally from the Greek σύστημα (systêma), meaning “stand together” and hence in modern English an organised or connected group of objects.[63] There are four characteristics that contribute to such an organised and connected *legal* system: jurisdiction, culture, interdependence and universality. These characteristics are meant to be a starting point for

[61] René David and Camille Jauffret-Spinosi, *Les grands systèmes de droit contemporains*, (11th edn, Dalloz 2002) 14, author’s translation. *See also* Klaus A. Ziegert, ‘“Within Law the Land Shall be Built”—The Case of Changing Norms Seriously’ in Guenther Doeker-Mach and Klaus A. Ziegert (eds), *Law and Legal Culture in Comparative Perspective* (Franz Steiner Verlag 2004) 159: ‘a universal network of legal communication subservient to human society as a universal system of communication’; see also 148, focusing on legal *regimes*; Esin Örücü, ‘Developing Comparative Law’ in Esin Örücü and David Nelken (eds), *Comparative Law: A Handbook* (Hart 2007) 56-62.

[62] René David and John E C Brierley, *Major Legal Systems in the World Today, An Introduction to the Comparative Study of Law*, (2nd edn, Stevens 1978) 20-21; Zweigert and Kötz, *Introduction to Comparative Law, supra* note 4, at 67-72.

[63] CT Onions, *Oxford Dictionary of English Etymology* (Clarendon 1996) 897.

analysis, not a jurisprudentially robust definition of a legal system.[64] They may not all exist in any one instance, nor in one instance exist in a complete form, such as a system being "fully" interdependent and unified.

The first characteristic of a legal system is that there is a jurisdiction to enforce laws within the ambit of their application. This is a procedural perspective: whatever a legal system is, it must be able to enforce its rules. Jurisdiction is meant here in a broad sense to cover the apparatus of enforcement of rules and procedures to enable it to happen.[65] Laws are rarely created without the prospect of application, or at least, rarely created separate from a system designed for their application. States not uncommonly create an extra-territorial jurisdiction for specific laws, for instance by making conduct a criminal offence wherever it happens in the world. Nonetheless the premise is that the laws can be enforced, usually only when an individual enters the territory of the state.

The second characteristic is the presence of an identifiable legal culture. Legal cultures vary but there is an expectation that within a legal system there is some similarity in approach to law and legal problems. "Legal culture", like "legal system", does not have a clear meaning. It is typically used to describe the collection of attitudes, practices and approaches to law that are borne by those who deal with the law.[66] As Bell has argued:

> The role that an individual occupies, and the role of other actors, arise from perceptions of the task and from the cultural traditions associated with it.

[64] Such a definition has the makings of a book, indeed, of a career: *see*, Joseph Raz, *The Concept of a Legal System* (2nd edn, Clarendon 1980); The present approach is internal and descriptive cf Luc J Wintgens, 'Legisprudence and Comparative Law' in Mark Van Hoeke (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004) at 308-310.

[65] Not just in the senses of sovereign power, coercion and efficacy: Joseph Raz, *The Concept of a Legal System, supra* note 64, at 78-120.

[66] This is the internal sense of legal culture though arguably there is also an external dimension to it.

> Furthermore, the regularity of any such practice gives rise to professions, which in turn develop their own understandings . . . . Although the participant has a personal perspective on legal events, culture is a collective phenomenon where groups use the same language and have a common identity despite other differences.[67]

Bell combines this with a more subtle point. He argues that there are many different legal cultures in France, not just one, seen clearly in the title of his 2001 book *French Legal Cultures*. This point will be picked up again later.

The relevance of culture in creating and sustaining a legal system can be seen particularly at times of legal change. Culture is the medium in which other objects within a system develop. For instance, with respect to the harmonisation of legal rules, Banakas has argued that "It is legal culture that will in fact determine the degree to which harmonization will be effective."[68] Smits has a similar view of a future European Private Law:

> as long as there is a uniform *European* socio-economic or cultural segment . . . present, transplants *may* lead to uniform law in Europe, but that as far as this segment is lacking, uniform law is impossible. In assessing the possible success of legal transplants in Europe, it thus primarily comes down to identifying new European socio-economic or cultural segments.[69]

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[67] John Bell, *French Legal Cultures*, *supra* note 34, at 5.

[68] Efstathios Banakas, 'The Contribution of Comparative Law to the Harmonization of European Private Law' in Andrew Harding and Esin Örücü (eds), *Comparative Law in the 21st Century* (Kluwer 2002) 181. A point all the more important in Federal legal systems, such as the USA.

[69] Jan Smits, 'On Successful Legal Transplants in a Future *Ius Commune Europaeum*' in Andrew Harding and Esin Örücü (eds), *Comparative Law in the 21st Century* (Kluwer 2002) 149.

The third characteristic is interdependence: that the contents of legal systems are connected to each other. Internal divides and categories within the system are likely, but they should nonetheless remain to some extent coherently linked together.[70]

This interdependence is challenged by the fact of legal transplants. Watson has forcefully argued that legal transplants are the most common vehicle for legal change. If that is right,[71] are the objects[72] transplanted integrated with the rest of the legal system? They may not be integrated immediately, perhaps because legal actors need to learn to feel comfortable with them and their new place in the law.[73] If so, will they become integrated and hence part of the legal system later? But until it happens, are there objects *within the bounds* of a legal system that are not yet *of* the legal system? It seems plausible. Teubner has supplied the interesting idea of "legal irritants" to explain the process of adoption and mutual adjustment between the new object and its new surroundings.[74]

And yet, even once integrated in a legal system, does the object remain, just a little bit "irritating"? Put another way, can rules transplanted from elsewhere never take on sufficient colour from the system they are placed in? Sacco's discussion of legal formants was premised

[70] This is particularly interesting within member states of the European Union, *see, e.g.*, Karl-Heinz Ladeur, 'Methodology and European Law – Can Methodology Change so as to Cope with the Multiplicity of the Law' in Mark Van Hoeke (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004) esp. 106-107. *See also* Burkhard Schëfer and Zenon Bankowski, 'Mistaken Identities: The Integrative Force of Private Law' in Mark Van Hoecke and François Ost (eds), *The Harmonisation of European Private Law* (Hart 2000) 22-29.

[71] Cf Pierre Legrand, 'What "Legal Transplants"?' in Johannes Feest and David Nelken (eds), *Adapting Legal Cultures* (Hart 2001).

[72] Any object could be transferred, not just a rule or outcome, e.g., a type of court procedure or court functionary.

[73] *See also* Bernard Groβfeld, *The Strength and Weakness of Comparative Law* (Tony Weir tr, Clarendon 1990) 45-46.

[74] Gunter Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61 MLR 11.

on the idea that such formants could be clothed after the fashion of their new home. However, the implication from more recent discussion on "mixed legal systems" seems to suggest that something might always jar. Classic examples quoted of "mixed legal systems" include Scotland, South Africa, and the State of Louisiana. However, what does "mixed" mean? Palmer put it thus:

> . . . the presence within a single legal system of laws, methods, techniques, or legal institutions drawn from another tradition or foreign system is sufficient to constitute a mixed legal system.[75]

If, as Watson says, transplants are the default method of legal change, all legal systems are therefore mixed;[76] "[o]nly the ways of mixing and the character of the ensuing mixtures are different."[77] In which case, "mixed" adds nothing to "legal system". However, the term does allow us to highlight the fact that something called a system can have mixed substantive contents. The implication is that a system can still exist even where elements of the system have come from elsewhere at some point in their history.[78]

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[75] On which *see, e.g.*, Vernon Valentine Palmer, 'Mixed Legal Systems', *supra* note 20, at 1206.

[76] Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law* (OUP 2001) 159.

[77] Esin Örücü, 'A General View of "Legal Families" and of "Mixing Systems"' in Esin Örücü and David Nelken (eds), *Comparative Law: A Handbook* (Hart 2007) 177.

[78] Indeed, it has even been argued that legal systems used to be much more porous than they are now, while still thought of today as "systems": Luigi Moccia, 'Historical Overview on the Origins and Attitudes of Comparative Law' in B De Witte and C Forder (eds), *The Common Law of Europe and the Future of Legal Education* (Metro, Kluwer 1992) 617-618. In addition, many legal systems apply the laws of other systems in certain context, such as the English commercial court using French law where the parties selected it, *see, e.g.*, Andenas and Fairgrieve, 'There is A World Out Elsewhere', *supra* note 49, at 838-840.

Rather than transplants throwing doubt on interdependence being necessary for a legal system, interdependence should be viewed as a question of degree. Commentators certainly disagree on its extent and implication. Andenas and Fairgrieve are happy to describe a *system* as fully permeable:

> International law, European law and national legal orders are now perhaps best understood as *open systems* coexisting without any clear hierarchy.[79] (emphasis added)

On the other hand, Gordley has gone so far as to argue that we should not compare, or even refer to 'legal systems' as such.[80] Gordley suggests that the legal system, defined implicitly as a system of rules is not a coherent boundary within comparative law. The codes in, for instance, the German or French 'systems':

> incorporate a conglomerate of ideas, developed over centuries, some incorporated because they had been traditionally accepted, some at the whim of the drafters. But that hardly makes them a system in the sense of an ideological or philosophical system, in which each part is intelligible only in terms of every other part.[81]

This may well be true for many or all of the European legal systems, but it would be going beyond Gordley's evidence to say that all "systems" are like that. It may well be that there are isolated places in the world whose law could be described as a system through lack of

[79] *Ibid* at 865.

[80] James Gordley, 'Comparative Law and Legal History' in Reimann and Zimmermann, *Oxford Handbook of Comparative Law, supra* note 6, at 761-762, 763-764.

[81] *Ibid* at 761.

transplants. More promisingly though, there may be legal systems where the foreign influences and transplants have been conceptually and structurally united.

The final characteristic of a legal system is universality or comprehensiveness. This suggests that something is a legal system because within its sphere of operation it will answer every legal question, at least once it has been asked. Where there is an adjudicative function to the law, the process must culminate in an outcome: a legal system could be thought to be the smallest unit within which there must always be an answer. For instance, in France, tort law may not solve a case between a hospital and a patient but contract law or administrative law, will. French tort law is not a legal system by this reasoning, but it is a part of one.

Having decided what the characteristics of a legal system are, are the boundaries of legal systems also the right boundaries for comparative law? The answer must be no. Comparatists should not restrict themselves to comparing legal systems or legal families. Standing the conventional approach on its head, comparatists should compare wherever there is value in the comparison. To find that value we need to recognise further boundaries beyond the vague and extreme form of the traditional legal system.

The bigger question is why the researcher is looking at them. However, there tends to be a smaller range of issues here and they are clearer to the researcher. Three potentially overlapping goals stand out: to describe, to explain and to amend. Whichever of the seven objects above are focused on, the end result tends to one or more of description, explanation and amendment. Typically it is towards explanation or amendment that a commentator drives, describing as much as is necessary to get him there.

It is perhaps true that comparatists have more amongst their ranks who seek to reform the law than do the legal historians.[82] This may be because comparative law is a newer subject seeking to make its mark, or because non-comparatists ask only what the subject can

[82] A fact forcefully denounced by Otto Kahn-Freund, 'The Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 1.

provide for them. Legal historians seem more able to offer explanation rather than alternatives. In this, those comparatists focusing on altering the law might learn something from the legal historians.

4. MOMENTS OF BALANCE AND MOMENTS OF TRANSITION

The third methodological proposition is that comparative legal history is stronger when it can explain why the law moved from a moment of balance to a moment of transition. It is this explanatory power that the discipline should focus on, whatever the object being studied is. Harold Dexter Hazeltine, Downing Professor of the Laws of England, put it thus:

> No body of law is ever, even for a single moment, in a state of absolute repose; for it is of the nature of law to be restless. Law is continually moving, changing, in response to the pressure of the forces that arise in the inner life of the community or that penetrate from outside.[83]

Moments of balance are being used here to say that there is no change in the position of an object. The object is not moving despite forces pushing in different directions. The name of forces can be described, as could the strength and directions in which they push or pull. Balance does not just mean exactly equal forces. It could be that any force that would change the position of the object is not opposed by an equal force, but is in fact rendered irrelevant by a much greater force. For example, a log sitting on the road is balancing between the force of gravity and the support of the road. An ant pushing the log along the road may not move it,

[83] HD Hazeltine, 'The study of comparative legal history' [1927] Journal of the Society of Public Teachers of Law 27, 33.

but not because there is another ant on the other side. Thus there is a sliding scale of why an object is in balance.

Moments of transition cover the point at which an object comes out of balance and moves, changes or is replaced. More than just describing legal change, the idea is to get into the reasons for why the object fell out of balance. It also reminds the researcher of the possibility for a range of paths when an object does come out balance. Perhaps a given object could only be in one of two positions, but there could also have been a number of different configurations and focusing on the transition helps to refresh this possibility. It also reminds the researcher that many objects of study are pushed out of one balance but are still in some kind of motion until they reach another position of balance. A famous example is *Donoghue v Stephenson*. In short, the question was whether the ultimate purchaser, made ill by an unsafe drink, could bring an action of negligence against the manufacturer. This landmark of English tort law is known over the world for Lord Atkin's "neighbour principle", for determining the extent of the duty to take care now fuelling the "staggering march" of negligence.[84] However, for some years after the decision it was not clear whether Lord Atkin's view or Lord Macmillan's more restricted view would win out. This doubt persisted for some years, even after further Privy Council decisions.[85]

Thinking in terms of moments of balance and transition also reminds the researcher that there must be reasons why an object of study is not changing. Until a moment of transition occurs, the legal system is operating within a restricted legal space. It is true that with each judicial or non-judicial application of the object of study, "new" law is being created. Nonetheless, this is a restricted and particular meaning of "new". There must be

[84] *Donoghue v Stevenson* [1932] AC 562; Tony Weir, 'The Staggering March of Negligence' in P Cane and J Stapleton (eds), *The Law of Obligations: Essays in Honour of John Fleming* (OUP 1998).

[85] See, e.g., *Grant v Australian Knitting Mills, Limited, and Others* [1936] A.C. 85, 88-89 per counsel for the defendant knitting mill.

reasons why this restricted space remains. In order words, legal non-change is just as much a part of legal development as legal change; comparative legal historians should be just as interested in why an object remained as it did. By considering what forces are keeping the object where it is, the researcher will also then be in a better position to explain any eventual moment of transition.

For instance, until recently in English tort law there was a rule of impecuniosity, that is, that the damage caused by a tortfeasor did not include the further harm suffered because the victim, through lack of disposable funds, could not afford to carry on their trade immediately. In 1993, in the *Liesbosch*, the eponymous dredging ship had been sunk, so the owners hired a replacement at a high cost to finish the contract because they could not afford to buy another ship in time. The owners of the Liesbosch sought to recover not only the cost of replacing their ship, but also the extra cost of the expensive hiring. The House of Lords confirmed that the claim could not extend to the hire, holding that it was the owners' lack of funds that caused this loss, not the tort that sank their ship.[86] An underlying distinction

[86] *Liesbosch Dredger v SS Edison* [1933] AC 449, 460 per Lord Wright:

> The respondents' tortious act involved the physical loss of the dredger; that loss must somehow be reduced to terms of money. But the appellants' actual loss in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort; the impecuniosity was not traceable to the respondents' acts, and in my opinion was outside the legal purview of the consequences of these acts. The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because "it were infinite for the law to judge the cause of causes," or consequences of consequences. Thus the loss of a ship by collision due to the other vessel's sole fault, may force the shipowner into bankruptcy and that again may involve his family in suffering, loss of education or opportunities in life, but no such loss could be recovered from the wrongdoer. In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons. In the present case if the appellants' financial embarrassment is to be regarded as a consequence of the respondents' tort, I think it is too remote, but I prefer to regard it as an

seemed to be that the extra hire was related to the duty on the victim to mitigate harm, and so the normal rule that you take your victim as you find him, that is, with empty pockets or with full ones, did not apply.[87]

The impecuniosity rule has since been overturned by the House of Lords. It is now possible that additional damage which the victim's lack of disposable income contributed to will be recoverable in tort law. This happened in a case called *Lagden v O'Connor* in 2003, with very similar facts to the *Liesbosch* except that Lagden was the name of an unemployed man whose car was negligently damaged rather than of the car itself.[88] While his car was being repaired, Lagden's lack of funds made his only real option a credit hire agreement, effectively increasing the hire charge payable by the tortfeasor at the end so that he didn't have to pay anything up front. All three Courts who heard the claim allowed recovery for the £659 that it cost for Lagden to hire a car (increasing the total claim by about two-thirds[89]). The House of Lords in *Lagden* dealt with policy arguments about recovery before turning to the decision in the *Liesbosch*, essentially arguing that the distinctions it was founded on were wrong and that in any case it had been overtaken by a focus on reasonable foreseeability as the core of the scope of the defendant's liability.[90]

For present purposes, the question is how the rule moved from balance to transition and now to a new rule. Trying to understand that makes the whole story more interesting,

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independent cause, though its operative effect was conditioned by the loss of the dredger.

The case builds on *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673. On the *Liesbosch* see in particular Brian Coote, 'Damages, *The Liesbosch*, and Impecuniosity' [2001] Cambridge Law Journal 511.

[87] *Liesbosch Dredger v SS Edison* [1933] AC 449, 460-461 per Lord Wright.

[88] [2003] UKHL 64.

[89] *Lagden v O'Connor*, Official Transcript, Oxford County Court, 14 September 2001, [34].

[90] *Lagden v O'Connor* [2003] UKHL 64, Lord Hope [49]-[61], Lord Scott [82], Lord Walker (in dissent on the appeal) [90]-[102].

though beyond the scope of this paper. Some questions immediately arise, for instance, why did it take 70 years to leave the *Liesbosch* at the bottom of the judicial ocean? In fact, *Lagden* was the last in a series of cases relating in some way to the impecuniosity rule. They were all cases involving cars where tort victims were suddenly able to get an interim car through the use of credit hire agencies and pass the increase cost of this facility on to the defendant's car insurer. The insurers did not appreciate the extra cost or the large increase in people seeking to reclaim it. After some initial success on contractual grounds,[91] *Lagden* was a clear loss for the insurance industry, though there will be future rumblings over whether a given victim really had so little money as to amount to no choice about using a credit hire agency. Even so, was it the number of cars getting damaged, the key role of cars in the lives of Englishmen and Englishwomen and the long-term view of insurers which brought the matter to the courts so often? Was this something that would only happen from the 1990s alone, or could it have happened earlier or perhaps later?[92]

These questions, and many others besides, focus on causality. They focus first on what is keeping an object in balance, and then, if applicable, on why it was pushed into transition. Sadly, causality is very hard to show. One type of reasoning that might be helpful is to look for "tipping points." Tipping points, long used in the sciences for changes of state like the boiling of liquid to gas, have also been used more recently by some to delve into sociology. The researcher effectively adds up the forces applying to an object while it is balanced and immediately after it begins to transition. The idea is that a small number of forces can then be isolated as being responsible for tipping the object out of balance. The difficulty with this type of reasoning is that it can overemphasize the acute change and miss

[91] See earlier e.g. *Giles v Thompson* [1994] AC 142 on the credit hire agreements not being void for champerty but they were drafted in breach of the Consumer Credit Act 1974: *Dimond v Lovell* [2002] 1 AC 384.

[92] See, e.g., Andrew Tettenborn, 'Compensating the Cash Strapped: The Sinking of the Liesbosch' [2004] Lloyds Maritime and Commercial Law Quarterly 135.

the systemic or slow-burning events. Nonetheless, tipping points can be a useful addition to the comparative legal historian's toolkit.

As for causation, more generally, there is some solace for the comparative legal historian. While it might be hard to show, there is no one more likely to show it. The following four steps set out why that is.

1. Proving causation requires sufficient historical examples of the relevant units or factors. Causation is, by its very nature, a historical statement;
2. The more specific and numerous the units/factors being used, the larger the pool of potential units will need to be. To get a "match" of sufficient precision in terms of As leading to Bs, one needs sufficient As and Bs to have happened to draw useful analogies;
3. The larger the pool the more likely it is that comparative law will be needed. The more As and Bs needed, the more likely it is that any one jurisdiction will run out before a sufficient degree of causality can be shown; and
4. The case for validating a causative conclusion for use outside one jurisdiction, is strengthened by the operation of that conclusion in other jurisdictions.

The next three methodological propositions are all instances where causation does not take what might be thought as the obvious route.

5. LEGAL PROBLEMS ARE NOT HERMETICALLY SEALED INTO LEGAL CATEGORIES

For the purposes of teaching and specialisation, law and many other disciplines are broken down into constituent areas, but areas are not sealed against the realities of human existence.

Forces within a system can manifest where there is flexibility or weakness rather than where those pressures are naturally focused. This includes indirect means to achieve the same end or a different mode of change. That is, one legal object might remain in balance but the force applied to it could be diverted somewhere else. The comparative legal historian should be willing to look in unlikely places when trying to trace a moment of transition or balance.

Take one example from English law. Picture the scene: A convicted robber is in prison, protesting his innocence for many years. The police detective who led the investigation that put him there writes an article in a newspaper saying that the convicted robber did commit the crime. How likely does it sound that the convicted robber should win a libel action against the policeman? These are the facts of *Hinds v Sparks* in 1964. Hinds had been convicted of robbing a "Maples" shop and got imprisoned largely owing to the efforts of Sparks, a former senior police officer.[93] Hinds protested his innocence and went to some effort to shorten his servitude, by both escaping and appealing multiple times. Sparks put into print a statement that Hinds was guilty and Hinds successfully sued him in libel, at least partly because the events were by then years old and so harder to prove. There was a great deal of press interest.[94] A contemporary legal commentator wrote:

> Our legal system in fact has allowed a man who, even if innocent of any complicity in the Maples robbery, may fairly be described as a notorious criminal, to ruin a former police officer whose mistake appears to have been nothing more serious than to have said that justice was done at an English criminal trial.[95]

[93] *Hinds v Sparks* [1964] Criminal Law Review 717 (QB).

[94] There were five articles in the law section of *The Times* on the progress of the case. The matter even reached the USA, e.g. *Time Magazine*, Friday, 14 August 1964.

[95] EL Johnson, 'Res Judicata: A Comparative Study' (1965) 18 Current Legal Problems 81.

To explain this outcome, you have to consider the law of evidence. For hundreds of years in England a prior conviction could not be used as evidence of the facts on which it was based in a later civil court.[96] Thus, if a man were convicted of dangerous driving for actions leading to damaging the victim's car, the victim would have to show all the facts from scratch; he could not rely on the conviction to show the presence of the defendant or not the nature of his driving at the time. These were basically the facts of *Hollington v Hewthorn* in 1943 when the "no admissibility" rule was forcefully restated.[97]

In the 1960s, libel cases began to arise where a convicted criminal brought an action in defamation "against anyone rash enough to assert his guilt of the crime for which he had been convicted, [and] put his opponent to the proof of his guilt de novo."[98] It seems to have taken a little while for this "different and perhaps alarming significance"[99] of *Hollington v Hewthorn* to come out in cases.

Another case like *Hind v Sparks* is *Goody v Odhams Press*.[100] Goody was convicted for his part in stealing £2,500,000 in what is known as "The Great Train Robbery" of 1963. The following year a newspaper published a story including a description of Goody's role in the affair, under the title of "A suburban housewife reveals how she was caught up in the great mailbag plot." Goody brought a libel action. Odhams Press at first pleaded full justification, but then sought to amend their pleadings. The defendants further amended their defence to plead in mitigation of damages in that Goody already had a reputation as a thief and convict. The case shows that even a wealthy newspaper did not wish to try to prove

[96] See Zelman Cowen and P B Carter, 'The Admissibility of Criminal Convictions in Subsequent Civil Proceedings' in *Essays on the Law of Evidence* (Clarendon 1956).

[97] See, e.g., *Hollington v F. Hewthorn & Co.* [1943] KB 587 (CA).

[98] J Campbell, 'The Civil Evidence Act 1969' [1969] CLJ 35, 37.

[99] JA Andrews, 'The Criminal in the Civil Courts' [1967] Criminal Law Review 441, 442. Andrews' article is a good contemporary introduction to the post *Hollington v Hewthorn* cases.

[100] *Goody v Odhams Press Ltd.* [1966] 3 WLR 560 (CA).

Goody's role in the robbery from scratch despite it being in the same year as he had been convicted.[101]

The cases generated a great deal of public interest. Newspapers played a leading role in this,[102] but the nature of a libel action was arguably more important because it generated a particular kind of publicity. In a libel action the claimant is presumed to be of good standing. In other words, the onus was on the defendant to justify his statement, or perhaps seek to mitigate it, as in *Goody*. More than this, the forum was a jury trial, outwardly similar to that of the criminal trial where the plaintiff had been convicted. This would play more to public sentiment than a later proceeding without a jury.[103]

Ironically, libel had not always been seen as an illegitimate way to challenge a prior criminal conviction. Indeed, before the creation of the Court of Criminal Appeal in 1907, this

[101] See, for comment, R.N. Gooderson [1967] CLJ 36, at 38. The action was successful, but Goody received only 40 shillings in damages, paying significantly more in costs: *The Times*, 22 June 22 1967. Further Great Train Robbery libel litigation did occur, e.g. on the police forensic team framing Goody for the crime, *The Times*, 7 October 1965.

[102] E.g., compare the report of counsel for Goody in *The Times*, 21 June 1967 with the "mental gymnastics" that counsel for Odhams Press said were involved for the jury to think that Goody was 'an innocent man who had had the misfortune being convicted': *The Times*, 22 June 1967. It even generated Parliamentary questions: *The Times*, 27 July 1967.

[103] See also *Barclays Bank v Cole* [1966] 3 All ER 948. There were other issues, e.g. cost, but there was a focus on the rehearing before peers: Hansard [288], col. 1346, per Lord Denning.

was the only way to clear a convict's name,[104] other than perhaps through the prerogative of mercy.[105]

While it is hard to explain why there had been little effort to remove the rule in *Hollington v Hewthorn* prior to the mid-1960s, it is clear that the libel cases catalysed reform.[106] First, Lord Gardiner LC was clear in the House of Lords that such was why he had referred the question of *Hollington v Hewthorn*'s validity to the Law Reform Committee,[107] and the role of these cases was acknowledged by other Parliamentarians[108] as well as the Law Reform Committee itself.[109] Commentators were also aware of this role.[110]

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[104] KR Handley (ed), *Spencer Bower, Turner and Handley's Doctrine of Res Judicata* (3rd edn, Butterworths 1996) [264]. Some even prefer a wider scope for a libel action, e.g. D Zeffertt, 'The Rule in *Hollington v Hewthorn* revisited' (1970) 87 South African Law Journal 330, 330-331: 'Let the quarry have as good a run as possible.' It might also have been possible for the defendant to prosecute an accuser or witness for perjury, e.g. the case of the Reverend Henry Hatch: *The Times*, 18 May 1860.

[105] See also the roots in *Helsham v Blackwood* (1851) 20 LJ (CP) 187; 11 CB 111; 138 ER 412; *Leyman v Latimer* (1877-78) 3 ExD 352; 47 LJQB 470. Even *Hollington v Hewthorn* had not forced change. Indeed, *The Times* only reported on *Hollington v Hewthorn* in the context of the libel cases 20 years later, the first being *The Times*, 21 June 1966.

[106] Other legal systems had no trouble in dealing with *Hollington v Hewthorn* immediately, e.g. South Australian legislature enacted the Evidence Amendment Act, 1945. On which see, e.g., Zelman Cowen (1953) 69 Law Quarterly Review 180, 180-181.

[107] Hansard [288], col. 1346-1347, esp. 1347. See also Hansard [239], col. 84.

[108] See, e.g., Hansard [763], col. 444.

[109] Lord Pearson, Law Reform Committee Fifteenth Report: The Rule in *Hollington* v. *Hewthorn* (HMSO, Cmnd. 3391, 1967) [1], [26], [27].

[110] See, e.g., *The Times*, Jul 27, 1967, British Columbia Law Reform Commission Report on the Rule in *Hollington v Hewthorn*. LRC 30, 1977, II. B. Note 2. *See also* CJ Miller, 'Evidence of Conviction in Civil Proceedings – III' (1971) 121 NLJ 622, 622.

6. LEGAL REASONING CAN BECOME PATH DEPENDENT

The fifth proposition is that the legal actors applying and developing the law can both limit, consciously or not, their awareness of the law as well as adhere to one reasoning process or solution only.[111]

One potent example is why the rules for compensation for harm where the wrong was both a tort and a crime are in the criminal code. This requires some background to explain, but the point being made is that sometimes objects stay in balance because legal actors develop a preference for them to stay where they are.

In the 19th century, the Spanish civil code proposals contained provisions regarded as unsatisfactory by a number of regions within Spain. These regions were able to delay and ultimately opt out of the code.[112] There were a number of other reasons for the delay in the code, but this is the single most important. The French model largely being copied, the *Code Napoléon*, had been promulgated in a unified and centralised state. However, Spain in the Nineteenth century contained a number of distinct legal systems in the so-called "foral" regions, for instance Cataluña, Navarre, the Basque Country, and was not unified or centralised.[113] Cataluña was foremost in leading the opposition to the French and Castilian

[111] J Bell, 'Path Dependence and Legal Development' (2013) 87 Tulane Law Review 787; J Bell and D Ibbetson, *European Legal Development: The Case of Tort* (CUP 2012) 24-32.

[112] Mariano Yzquierdo Tolsada, *Aspectos Civiles del Nuevo Codigo Penal* (Dykinson 1997) 22. See also Encarna Roca i Trías, 'La Codificación y el Derecho Foral' (1978) 62 RDP 596.

[113] See e.g., D Mariano Ripollés y Baranda *Discurso Leido en la Solemne Inauguracion del curso Académico de 1888 á 1889 en la Universidad Literaria de Zaragoza: El Derecho Regional y la Codificacion Civil* (C Ariño, 1888) 11: that derecho foral is a 'planta exótica en la tierra española'.

norms in the civil code drafts.[114] There were some political and some legal or cultural reasons. Obviously for some, and apparently more in the foral regions than in Castilian bureaucracy, the early to mid-19th century was not a time to be welcoming French legal imports given the memory of the War of Independence (1808-1813).[115] However, this reason alone could not have sustained opposition into the 1880s. Rather, the greatest resistance arose because of a few substantive rules based on French cultural traditions but which were anathema to the Catalan sensibilities, in particular having forced apportionment in testamentary disposition[116] and in depriving a woman of her property rights when she married.[117] The first was particularly important as a focal point for opposition, as the ability to designate a "universal heir" to maintain the economic power of the estate undivided was seen as a key to Catalan economic prosperity and culture.[118] This opposition meant that the civil code was, for a long time, not pushed forcefully forward. In the end, the code was enacted only by allowing the foral systems to create separate compilations of their own laws.

However, criminal law provided a vehicle for a related and uncontentious reform. For some reason the codification of criminal law, despite its severe penalties, did not encounter much resistance from foral regions or elsewhere.[119] The first criminal code came in 1822, but

[114] On this opposition see, e.g., Siobhán Harty, 'Lawyers, Codification, and the Origins of Catalan Nationalism, 1881-1901' (2002) 20 Law and History Review 349, at 360-383.

[115] See e.g., Stephen Jacobson, 'Law and Nationalism in Nineteenth-Century Europe: The Case of Catalonia in Comparative Perspective' [2002] 20 Law and History Review 307, 324-326.

[116] *Ibid* at 330-331.

[117] *Ibid* at 326-330.

[118] Harty, 'Lawyers, Codification', *supra* note 113, at 361-366.

[119] How the criminal code could spring forth unmolested while the civil code barely left the gate is as yet not explained; Alabart merely argues that the criminal code effectively 'took a different route': Silvia Diaz Alabart, 'La responsabilidad por los actos ilícitos dañosos de los sometidos a patria potestad o tutela' (1987) 40 Anuario de Derecho civil 795 798-800.

it was in 1848 that civil liability was comprehensively regulated by it. By this time, a civil code had been in development for nearly 30 years and had come no closer to fruition. This meant that the civil law, including tort law, was still that of the *Siete Partidas*.[120] On the other hand, there was a sufficient link between criminal and civil liability based on the same act that it was suggested that the criminal code contain norms to award civil compensation. In particular, Pacheco and Silvela, two leading criminal lawyers, preferred to have updated norms in an unexpected place rather than old ones.[121] Some commentators at the time pointed out that these rules were anomalous, and were properly part of civil law.[122] Others thought there was no harm in having them in the criminal code, to which they were closely related: this was especially so because it was thought they would disappear once the civil code was in force.[123] The result was that the criminal code came to regulate what could be called a civil law concern: the compensation of harm to the victim. A similar pattern of events played out in Sweden in the Nineteenth century, suggesting that it is a pattern that may have happened elsewhere as well.[124]

[120] JM Rogríguez Devesa, 'Responsabilidad civil derivada del delito o falta y culpa extracontractual' in Niceto Alcalá Zamora et al (eds), *Libro homenaje a Jaime Guasp* (Comares 1984) 512.

[121] Tolsada, *Aspectos, supra* note 112, at 22.

[122] D. Tomás de Vizmanos and D. Cirilo Alvarez Martinez, *Comentarios al Nuevo Código Penal* (J. Gonzalez y A. Vicente 1848) 187-190; D. Pedro Gomez de la Serna and D. Juan Manuel Montalban, *Elementos del Derecho Penal de España* (Sanchez 1849) 74. Serna was later President of the Tribunal Supremo.

[123] Joaquín Francisco Pacheco, *El Código Penal* (Edisofer 2000; reprint of 1867) 279: "[Noting that the civil code will not exist for some time] Nothing bad comes from completing and rounding out this material here. It does not seem absurd to deal with, in this area of liability, things which if not daughters of a clearly criminal act, have come from one which . . . cannot be less than a crime . . . The transposition seems very small, and clearly innocent: the evil which can be derived from it cannot be seen to our eyes." See also Fernando Pantaleón, 'Perseverare Diabolicum ¿Otra vez la responsabilidad civil en el Código Penal?' (1993) 19 Jueces para la Democracia 6, 9-10.

[124] See Matthew Dyson (ed), *Comparing Tort and Crime* (CUP 2015) Ch. 5.

There have been at least eight large-scale reforms of the criminal code since 1848. However, the closest that the civil lawyers ever got to removing the ex delicto norms from the criminal code was the most recent reform of 1995. In a move that turned out to be too bold, the codification Commission had suggested removing the ex delicto provisions from the Draft Criminal Code of 1990 and would have worked with the Civil Codification team to amend both codes accordingly.[125] The strenuous opposition of the criminal judges and their vague reference to the "inconveniences" in doing so would cause ended this move.[126] This rejection went against the prevailing civil law view[127] and prompted forceful criticism.[128] Thus, the path dependency of some legal actors, particularly the criminal law judges resulted in the rules for compensating a harm that was both a tort and a crime remaining in the criminal code.

Similar examples can be found in many systems. The resilience of the non-admissibility rule for prior convictions in a later civil action is another example. It took a direct attack on the sanctity of the criminal justice system to convince the legislator to intervene with the Civil Evidence Act 1968.

[125] Article 105 of the 1990 DCP: "la ejecución de un hecho descrito por la ley como delito o falta origina la obligación de reparar los daños y perjuicios por el causados en los terminus previstos en el Cógido civil".

[126] Tolsada *Aspectos*, *supra* note 112, at 36-38. Tolsada cites, 35, note 13 and 36, *Estudios e Informes* (1990-1993), Gabinete de Estudios y Documentación de la Asociación Profesional de la Magistratura, 157 and 158: " . . . la exclusion del texto penal . . . constituye un claro ejemplo de lo que en un principio ya definíamos como mimética repetición de lo que en Derechos como el alemán acontece, con ignorancia de los inconvenientes que esas incorporaciones parciales producen en el equilibrio de nuestro particular system jurídico".

[127] See, e.g., Mariano Yzquierdo Tolsada, 'El perturbador artículo 1.092 del Código Civil: cien años de errores', in *Centenario del Código Civil* (Centro de Estudios Ramón Areces 1990) vol II, 2109, at 2111.

[128] See, e.g., Pantaleón, 'Perseverare Diabolicum', *supra* note 123.

7. POCKETS OF INVERTED OBJECTS CAN EXIST WITHIN FUNCTIONING SYSTEMS.

The last two propositions have shown how a legal system can appear to channel pressure away from one object onto another. Indeed, at times one object might be pushed so far as not to make a great deal of sense in where it comes to rest. In effect, the legal system as a whole can continue to function despite parts of it having elements clearly antagonistic to the rest. Comparative legal historians should be aware of this because the irrationality of the proposition might tend a researcher to doubt otherwise accurate sources if they lead to this conclusion.

One example will be given from Spanish law: the effect of a crime on the prescription of a pure civil action.[129] Spanish law is designed to award compensation in the criminal action, like the French *partie civile*, but it has not stopped there. The so-called ex delicto liability is the first compensatory action to arise; pure civil liability is the backup. Spanish judges have developed a rule prolonging a pure civil action where the act it is based upon contains some taint of criminality. Put another way, the criminal element to ex delicto liability is first offering a quicker means to compensation but, in addition, where that cannot be used, it offers a longer period to bring the separate civil claim. Criminal liability cannot be used in some situations. The first group is where the criminal action did not conclude because of the death of the defendant, a provisional or permanent stay of proceedings or contempt by

[129] See generally, Tolsada, *Aspectos*, *supra* note 112 and, on prescription, Tolsada, 'El perturdator artículo 1.902', *supra* note 127, at 2128-2131; For a general introduction to pure civil law prescription, see L Fernando Reglero Campos, 'La prescripción de la acción de reclamación de daños' in L Fernando Reglero Campos (ed), *Tratado de Responsabilidad Civil* (Aranzadi 2002; see also 2008 edn); F Pantaleón Prieto, 'Prescripción' in Alfredo Montoya Melgar (ed), *Enciclopedia Jurídica Básica, III* (Civitas 1995) 5008. On Spanish law generally, see Matthew Dyson (ed), *Comparing Tort and Crime* (CUP 2015) Chap 6.

non-appearance. The second is where the criminal process did not deal with the civil claim because the victim reserved it for the civil court.

The extension of civil law prescription was created not by the legislature, but by judges. There have been (at least) three lines of case law: a one-year period, an extended period ultimately fixed at fifteen years, and a period equal to that of the criminal offence in question. The first position is a literal interpretation of art. 1968(2) of one year's prescription from the time when the claim could have been brought. The second is where the norm in the civil code governing prescription for ex delicto liability is made to skip from art. 1968(2), as in pure tort liability, to another article. After somewhat unclear and adventitious beginnings in 1919, art. 1964 became the established replacement article and indeed the dominant approach, by the mid-1960s.[130] This gave a fifteen-year period. The third position is not based on the norms of the civil code; it applies criminal law prescription periods to the civil action.

These three positions have been championed by two different chambers of the Tribunal Supremo. The merits of the first and second approach are supported within the civil chamber of the Tribunal Supremo. Both factions accept the 15-year rule but disagree on when to use it. The third position, yoking civil prescription to criminal prescription and indeed the criminal code, is championed by the criminal chamber of the Tribunal Supremo.[131]

The incongruity on the ground can be the result of many things. In this example it is the different tensions within the criminal law and civil law communities combined with the way the Spanish legal system has brought those two communities together. The important point is that the comparative legal historian should be willing to accept apparent incongruities if the evidence is strong enough. The point then is to explain them.

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[130] See, e.g., A Fernando Pantaleón Prieto, 'Comentario al STS 13 julio 1984' (1984) CCJC 1953 (septiembre/diciembre) 1956: 'absolutamente dominante'.

[131] See, e.g., Alabart, 'La responsabilidad', *supra* note 119, at 885-886.

8. CONCLUSION

When a legal historian applies for a position at a University, he can usually claim to be a generalist in the sense that he could teach most subjects if he has the time to prepare. The comparatist could probably make the same claim. Both are generalists. The irony is that some lawyers apparently have some difficulty over the "practicality" or "utility" of legal history of comparative law. If a historian's research has no connection with the present or any significant value noticeable to the present, it might be dismissed as antiquarianism by some and yet vigorously defended by others.[132] Equally comparatists have to explain that their audiences should care, even if the comparatist is not directly saying how her domestic law can be improved. Comparative legal history could be thought to have this relevancy problem, but the truth is that it provides the answer. The comparative legal historian gets the closest to explaining the law as is possible.

This article has set out six methodological propositions to help the comparative legal historian fulfil his or her promise. The first proposition was that there is value in some of the terms and debates that came to legal thinking through comparative law. Legal historians and comparatists are in the same boat. Now that comparatists have some paddle-making skills to share, they could go a lot further together. The second proposition was that there is a range of objects that could be studied, but by working openly as a group, those objects can be drawn together to form a picture that is both wide and detailed. Third, thinking in terms of what is keeping an object of study from changing over time is useful as it will form a solid base for asking why an object that later changed was pushed into transition. This type of thinking also helps the comparative legal historian to consider legal non-change as well as legal change. Fourth, that the forces within a legal system can influence more than one idea at a time and

[132] See, e.g., David Johnson, 'Roman Law, Comparative Law and Legal History' (1999) ZEuP 560.

that influence takes effect in what might appear to be strange places. Fifth, that a system can, for a variety of reasons, be in balance in one position even though there are forces pushing it elsewhere simply because the decision-makers involved are acting under path dependency. Finally, that pockets of rules that appear to be out of line with established principles can exist, sometimes for extended periods of time, despite the system as a whole functioning smoothly.

There are many other tricks, tips, pitfalls and culture shocks for the comparative legal historian. This paper has set out some ideas to make the past, and comparative legal history, less foreign.