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Comparative Legal History – But How?

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Comparative Legal History – But How?

The existence, progress and also the importance of comparative legal history are discussed in both *Oxford Handbooks* reviewed in this *Forum*. In the *Oxford Handbook of European Legal History*, Kjell Å. Modéer writes on »Abandoning the Nationalist Framework: Comparative Legal History«, and Katharina Isabel Schmidt traces the discipline's development »From Evolutionary Functionalism to Critical Transnationalism: Comparative Legal History, Aristotle to Present« in the *Oxford Handbook of Legal History*. The first aim of this *Forum* article is to comment on the chapters' intention: how to define comparative legal history. Is it a part of comparative law, a particular method, or a separate discipline? Secondly, I will discuss the history of comparative legal history as described in the two chapters. In line with this, the perspectives of a »European« or a »global« comparative legal history will be briefly outlined. Finally, I will turn to what is lacking in the two *Handbooks*: how to do comparative legal history in practice.

The chapter written by Modéer appears in the *Oxford Handbook of European Legal History*'s first part, dedicated to »Approaches to European Legal History: Historiography and Methods«, whereas Schmidt's chapter is contained in Part II of the other handbook, entitled »Approaches: Conceptualizing Legal History«. However, this is only a structural differentiation of the two *Handbooks*; significantly, both also have chapters on comparative law, but these appear in other sections. Therefore, it is not a coincidence that both chapters are willing to see comparative legal history as a discipline distinct from comparative law. Modéer introduces this distinction by first discussing the history of comparative law as a discipline and then turning to the new discipline of comparative legal history. Schmidt, on the other hand, tries to differentiate comparative legal history from historically informed comparative law, but admits that the line between them is not always very clear. In fact, both these chapters discuss the distinction between comparative law and comparative legal history extensively and strongly assert the latter's status as a separate discipline. This seems to signal a turning point in the status of comparative legal history. Back in 2006, James Gordley, writing in the *Oxford Handbook of Comparative Law*, still felt he had to

explain and justify the relationship between the two disciplines. Over a decade later, these two new handbooks take a step further and assert that a standalone discipline of »comparative legal history« exists and flourishes.

Now that comparative legal history has been established as a separate discipline, we are eager to hear about its history. Both chapters provide details. Its roots are, of course, entangled with the origins of comparative law. If we read Modéer's chapter first, we may think that he is telling a »European« story because he is writing in the *Handbook for European Legal History*. He starts from Antiquity and, not surprisingly, the International Congress of Comparative Law at the end of 19th century is underlined as the moment of »the creation of the modern discipline of comparative law«. Finally, he brings us to the *Rechtshistorikertag* (the biannual conference of German-speaking legal historians) held in Münster in 2010, where, in his view, the discipline of comparative legal history was established. Turning to Schmidt's chapter in the *Oxford Handbook of Legal History*, we might expect to hear about »global« comparative legal history. She does historicize comparative legal history extensively but, like Modéer, concentrates on Europe. Should we therefore believe that there has been no comparison in law outside Europe? An affirmative response would be too naive. For example, both chapters mention the interconnection between law and religion and how these two constructed the first steps of comparison in law. Both Modéer and Schmidt, however, focus on Christianity. Were other religions unable to generate normativities and to compare their own with other rules, generated in different locations, spheres or different periods? Besides comparison in the sphere of religion, further examples are furnished by the non-European countries that were not colonized in the 19th century. As a member of the Research Group on »Translations and Transitions« at the MPIeR, I am aware that jurists in Japan, China and the Ottoman Empire were observing Europe as well as their closer neighbours. They were constantly comparing. Jurists from these countries also travelled to Europe to learn other languages and study other legal systems. Later on, they took this knowledge back to their

home countries.¹ These »other« narratives in legal history demonstrate that the history of comparative legal history was not a solely European one.

After having constructed the back story of comparison in law, Mod  er goes on to discuss how the »nationalist framework was abandoned«. Similarly, Schmidt tells us about the discovery of the »transnational in law«. Both are careful to make us aware of the scholarly discussions about the different conceptions of reception, borrowing, transplantation, transfer etc. Schmidt is very good at giving the reader details of how interdisciplinary research sheds light on legal historians' ways of analyzing the transnational in law. Her text takes us to debates of legal pluralism, legal transplants, and translation theory, all of which can be very productive for someone interested in comparative legal history. In the end, both authors suggest possible future projects and developments for comparative legal history. Mod  er gives the example of the importance of this new discipline as a tool for finding compromise among the member states of the European Union. Among other things, Schmidt proposes that future research might explore »evil ideas« (such as slavery) that found their way to becoming transnational, or the non-globalization of ideas that failed to become transnational.

If we bear all this in mind, we leave the Eurocentric position behind. Neither the history of comparative legal history nor its future can be limited to one part of the world. Comparison knows no borders.

The two contributions thus make important, and sometimes overlapping, suggestions. But the question remains how to do comparative legal history in practice. There are two main alternatives. Scholars can do comparative legal history on their own, which necessitates that they acquire extensive knowledge on the various legal systems they seek to compare. The second option is to work together with others in a team whose members combine different areas of expertise. It is not a coincidence that Schmidt's bibliography includes David Ibbetson's 2013 essay on »The Challenges of Compara-

tive Legal History«. ² Taking also Ibbetson's suggestions into account, my aim in the following is to show some of the concrete problems that have to be overcome when doing comparative legal history.

As mentioned above, sometimes we try to do research in comparative legal history by ourselves. When we do so, we know the challenges we might encounter. We need to be (almost) fluent in several languages or to be able to read/understand an old language no longer spoken today. We have to be able to gather at least a solid working knowledge of the legal histories we are comparing. We might be comparing different territories with each other, or different periods in the history of the same territory's legal system. In addition, we have to be able to follow the current developments in the scholarship on the legal histories we want to compare. And, of course, in the end after having gathered sufficient data, we have to find a way to truly compare rather than merely listing what differences or similarities we found. Only then are we really doing comparative legal history. In specific cases, the list of challenges might be even longer. What is important is that when single researchers attempt comparative legal history, they need to learn how to overcome these challenges on their own.

On the other hand, it is true that two (or more) heads are better than one. In this scenario, we gather a group of legal historians; be it under the umbrella of an institution or be it in the shape of regular or irregular conferences. Doing comparative legal history together is an amazing opportunity to practice comparison with people who are already experts in one legal history. However, broadening the scope within a team of legal historians involves other challenges. As David Ibbetson suggests, in a collaborative work, the members of the group should follow the same research questions and methodological approach. This tends to be easier within a small research group. Its members, however, still have to develop tools to constantly keep exchanging knowledge and bear the comparative dimension always in mind. To find

1 The Research Group »Translations and Transitions« at the Max Planck Institute for European Legal History is led by Dr. Lena Foljanty and works on these new perspectives, focusing on legal practices in Japan, China and

the Ottoman Empire in the 19th and 20th centuries.

2 David IBBETSON, *The Challenges of Comparative Legal History*, in: *Comparative Legal History 1* (2013) 1–11.

these tools is not an easy task, either. On top of that, even such small research groups cannot be the only future of comparative legal history because they, too, could become stronger by expanding. Perhaps unconsciously, we are already living in such expanded groups: all around the world, there are legal history departments in universities, there are institutions or academies specializing in legal history. There are even societies like the European Society for Comparative Legal History, mentioned by Mod er, that are specifically focused on this new discipline. More and more conferences on comparative legal history are being organized. These different platforms do not have one single research question, one shared method or a common aim. However, in the globalized world, these platforms and researchers are connected. Any real attempt to do something with all these opportunities and connections that already exist would result in doing comparative legal history with a very fruitful and broad perspective. It is clear that in this last scenario, it is not easy to determine whether com-

parative legal history is used as a method or a discipline. In either case, such an immense web of knowledge in legal history from all over the world should find a way to be a part of comparative legal history. Technological developments such as new software or online tools can be important in this regard. We definitely need the help of digital humanities tools. These possible problems of comparative legal history together with their possible solutions are not (and could not be) covered in Mod er's and Schmidt's handbook chapters, but we need to consider them. Comparative legal history is not easy to do, whether individually, in a small group or big team. There is not one way of doing it either. Yet, it is – at least partially – the future of legal history. Even if we opt out from doing it now, at some point we may want to connect the legal histories we have with others. Let's get prepared for that.

