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**TWO DIVERGENT APPROACHES
TO COMPARATIVE LEGAL
STUDIES IN EUROPE AND THEIR
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HISTORY**

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TWO DIVERGENT APPROACHES TO COMPARATIVE LEGAL STUDIES IN EUROPE AND THEIR IMPLICATIONS FOR LEGAL HISTORY

Comparative legal studies have established themselves as the reaction of legal scholarship towards the legal diversity of our shrinking world today and in the past. Despite their potential, such studies occupy a marginal place in legal curricula and practice across Europe. This unhappy situation has brought about debates within the community of comparatists about possible causes and eventual remedies. In this paper, I look at this debate as the incarnation of the century-long confrontation among 'erudite' and 'pragmatic' legal scholars; the former group identify with the agenda of Rodolfo Sacco and the latter are led by Basil Markesinis. My aim is to draw implications from this debate for comparative legal history. In order to do so, I begin by introducing the main tenants of the two 'schools'. Secondly, I investigate the main stumbling blocks of the debate between them: Eurocentrism, the selective scope of research, interdisciplinary and cultural studies. Thirdly, I contemplate the implications of the debate for legal history and a possible synthesis of the two approaches suggested by Uwe Kischel. My main point here is to encourage legal historians in two respects: (1) to engage in cooperation with comparatists in order to enhance our understanding of the context(s) and the paradigm(s) of European legal culture in the face of the ongoing internationalisation of law and legal studies and, (2) to pursue the task of revealing the hidden factors that slow down the transformation of positive law when the changing world calls for it, as is the case with acknowledging new kinds of legal subjects.

Keywords: comparative legal history, legal scholarship, methodology, post-modern cultural studies, Eurocentrism, contextual comparison, hidden legal formants,

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‘[C]ertain doctors[...] tried to treat our science [of law] in a syllogistic, sophistic, and dialectical manner.... [It] had its origin with the ultramontane doctors of whom some [...] were more subtle than useful though some were of great excellence and knowledge. In our science, when it is a question of chopping someone's head off, to argue about formed and form, substance and accident, and in similar ways [...] is not well founded. Nor was this style followed by our old fathers and doctors[...]. This disease, indeed, has crept into the science of theology for the modern preachers forsake sacred scripture for figures, philosophers, poets, and fables[...].’²

This passage goes back to the mid-14th century and is early evidence of the debate between legal scholars who inclined to either more formalistic or more rhetorical approaches to legal studies. It was one of the confrontation lines that animated the history of European legal scholarship through the centuries: *mos italicus* vs *mos gallicus*, German *usus modernus* vs Dutch elegant school, Pandectists vs sociological jurisprudence and revived jusnaturalism etc. In our age of cross-cultural contacts and the progressive internationalisation of law, the divide has also marked comparative legal studies.

The border between the two camps has never been a Great Wall. Some scholars began their carrier in one camp but switched sides in their later years, as was the case with Andrea Alciato or Rudolph Jhering. I suggest considering these camps as Weberian ideals which are supposed to be the starting point of research. Another, more important reason to attend to this split is the sense that academic debates often become hotbeds of innovative ideas.

Until now, legal historians have not engaged in active dialogue with comparatists. The communication stumbles over several stereotypes about comparative law as the great unifier (while legal history is to cherish diversity) or a potential threat to the autonomy of legal history as a discipline. Earlier, in volume 9(2) of this journal, I tried to show that most of such convictions turn out to be stereotypes based on outdated comparative methodology. Those few scholars who practice comparison in contemporary and older law call for mutual support and understanding between the two disciplines.³

In this paper, I would like to survey what insights legal historians may expect for their discipline from the dispute between the two camps of comparatists, which I here call 'elegant' and 'pragmatic'. The former is represented by Rodolfo Sacco, the patriarch of Italian comparative law; the latter by Basil Markesinis who, despite his Greek origins, assumed the pragmatic mentality of common law.⁴ I focus on the ideas that shaped the corresponding didactic literature and which are likely to reach a wider readership of young comparatists and law students.

Critical legal studies teach us that there is no neutral observer in any academic community. My viewpoint is determined by the East European context. It is a valuable vantage point in the face of the disputed Eurocentrism and the fashionable cultural pluralism in (not only) legal scholarship. So, occasionally I feel invited to make remarks as an outsider as to the relevance of the two camps of Western legal scholarship for the other part of Europe.

This paper consists of three parts. First, I introduce the positions of the two rival groups of comparatists. Secondly, I present the stumbling blocks in their debate and discuss the implications for (comparative) legal history. Thirdly, I contemplate the eventual balance between the rivals in the form of contextualized comparison and suggest implications for legal history.

2 Albericus de Rosate, *Commentaria*, proemium (cited after Gordley J., *The philosophical origins of modern contract doctrine* (Oxford ; New York : Clarendon Press, 1991), p. 35; in his later book *The Jurists: A Critical History* (see below) the author attributes the authorship of these words to Richardus Malumbra).

3 Gordley J. 'Comparative law and legal history', in: Reimann M., Zimmermann R. (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford, 2008), p. 768–772.

4 Comparatists prefer to call the two divergent approaches 'cultural' and 'functional' with the focus on the main method. In this paper I prefer to underline comparatists' attitude towards theoretical knowledge.

1. The elegant vs the pragmatic approach in comparative law

Comparative law is surely the fruit of the western legal tradition where the two great branches of civil law and common law are more visible than the Nordic or East European offshoots. The substantial divide between those branches is believed to be nested in the mentality of lawyers. This discrepancy might be the reason for the two types of comparatists.

The age-old metaphor of knowledge as (divine) light has been inspiring European intellectuals since the revival of legal studies. Irnerius, the founder of the law school in Bologna, was nicknamed '*lucerna iuris*'. Guillaume Budé, perhaps the first French legal humanist, was said to transfer the light of knowledge across the Alps. These and other examples illustrate (another light-inspired word) the significance of learning and knowledge in forming a better individual. 'Learn everything and you will see later: it was not in vain; limited studies are weary' ('*Didascalicon de studio legendi*', VI, 3). These words of Irnerius' contemporary, Hugues de Saint-Victor, could be taken as the motto of the 'elegant' school of comparative law.

In the words of Rodolfo Sacco, the task of legal comparatists is to pay attention to all 'factors present today which determine how cases will be resolved in the near future'.⁵ This ambitious task reveals the concession of the continental scholar to the advances of legal realism and case law studies, but on the other hand, it sticks to an agenda of learning foreign law and culture in order to reveal three groups of factors ('legal formants'):

- (1) principal formants, such as legislation, case law and legal doctrine;
- (2) additional formants, which are perceived but not quoted as the principle argument, that is, principles, standards, rules of argumentation, ideology or policy;
- (3) hidden formants, or cryptotypes, which exercise their impact as part of common sense (part of the general culture and intellectual background – cultural values, basic assumptions of legal solutions and stereotypes).

Such an erudite perspective treats legal studies as a 'science'. It goes back to Friedrich Savigny's concept of professional law as *Rechtswissenschaft*, introduced to comparative law in the early 20th century by Ernst Rabel. His saying about the purpose of comparative law as 'science' (*Wissenschaft*) is even more ambitious than Sacco's agenda. Rabel suggested studying:

*'everything that affects the law, such as geography, climate and race, developments and events shaping the course of a country's history[...]. Ideas of every kind have their effect, for it is not just feudalism, liberalism and socialism which produce different types of law; legal institutions once adopted may have logical consequences, and not least important is the striving for a political or legal ideal. Everything in the social, economic and legal fields interacts.'*⁶

The cultural turn(s) of the second half of the 20th century (see below 2.3) reinforced the perception of law as part of culture and set the purpose of comparison as a fuller understanding of law (both foreign and domestic). This essentially hermeneutical task facilitated setting-up the framework to investigate the pluralism of law, its conceptualisation, and the methods of legal studies.

The most 'popular' fruit of this transformation is the refurbished didactic literature on comparative law. Unlike René David's *opus magnum*, Sacco's and Gambaro's textbook on '*The law of the West and elsewhere*' presents a meaningful methodological introduction and allows more space for non-Western law.⁷ The approach is especially appealing to comparatists focusing on the law 'elsewhere', that is, in Asia or Africa⁸, but also in

5 Sacco R., "Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)", in *American Journal of Comparative Law*, 39 (1991), p. 23.

6 Rabel E., 'Aufgabe und Notwendigkeit der Rechtsvergleichung', in: *Recueil des travaux suisses présentés au Congrès international de droit comparé* (cited after Zweigert K., Kötz H., *An Introduction to Comparative Law*, (Oxford : Oxford University Press, 1998, 3rd ed.), p. 32.

7 Gambaro A., Sacco R., Vogel L., *Le droit de l'Occident et d'ailleurs : traité de droit comparé* (Paris : LGDJ, 2011; after Italian edition of 2008).

8 Menski W., *Comparative law in a global context: the legal systems of Asia and Africa* (Cambridge: Cambridge University Press, 2009, 2nd edn.).

Eastern Europe.⁹ In addition to general books on legal comparison, the same agenda can be set for each branch of law, including constitutional law where the researcher has to overcome national isolationism.¹⁰

The influence of the elegant school is now challenged by pragmatically thinking comparatists led by Basil Markesinis, a Greek-British barrister and legal scholar who lectured in over 25 universities and was knighted in 2005 for services to international legal relations. In his words, the purpose of comparative law should be to assist judges and lawyers in solving particular cases, not to entertain law students with stories about exotic legal orders. He is very determined to understand comparative law in terms of its practical usage: 'Our hunch is that there, as well, concrete, focused, detailed and practically relevant studies are used rather than work which looks at the past or at other areas of human knowledge *unless it can be shown to have a close bearing on the subject under scrutiny*' (emphasis in the original – D.P.).¹¹

This pragmatic attitude must be shared mostly by practitioners, legal advisers for the government and private companies who engage with foreign law in various *travaux préparatoires* and memoranda, but the comparison of those lawyers is not presented in the form of academic papers.¹² Those who do, do not insist on identifying themselves as comparatists. On the contrary, academic writers are less inclined to follow in the footsteps of pragmatism. And this is where Markesinis sees the actual problem of rescuing the discipline from its current isolation. The last remark brings us directly to the collision between the two camps.

2. The stumbling blocks of the debate

The two camps of comparatists are divided by their goals (understanding the law vs assistance in the solving of actual cases) and approaches (immersion into various legal transplants vs the study of legal materials proper). The divergent views on these two key elements of research produce disagreement on other issues of the debate between the advocates of intellectual elegance or pragmatism: how to promote comparative legal studies; how to evaluate Eurocentrism, the selective scope of research, the impact of post-modernism, and interdisciplinary interaction. All of them ultimately revolve around two perennial questions: who is to blame and what to do to promote comparative studies?

2.1. The isolation of comparative law: who is to blame?

Although comparatists claim to have overcome the Cinderella complex, the discipline is still believed to be located on the fringe of the legal profession as the majority of lawyers remain 'professionally parochial'.¹³ That brings all the concerned parties directly to the question – who is to blame? The elegant school deplores the overall erosion of theoretical disciplines in legal curricula and the collapse of the grand (legal) narrative in post-modern times. In the context of Eastern Europe, one adds the legacy of socialist jurisprudence, which brought about the progressive isolation of lawyers from international legal scholarship and cemented a formalistic legal mentality.¹⁴

In contrast, pragmatically thinking scholars tend to believe that this is a self-generated ghetto that comparatists get into 'by ignoring reality and the needs of the professional community'. On the top of their list of wrongs is engaging with outdated law (Roman law, primitive law), mixing the study and comparison of advanced legal systems with less developed ones, and flirting with post-modernity and interdisciplinary

9 Lafitcki V.I., *Comparative jurisprudence in the images of law* (Moscow: Statute, 2010, 2 vols., in Russian); Slyschenkov V.A., *Methods of comparative law: significance for post-Soviet jurisprudence*, in: Slyschenkov V.A. (ed.), *Problems of post-Soviet theory and philosophy of law: collected papers* (Moscow: Yurlitinform, 2018), p. 224-270 (in Russian) (with further references), available at: <https://msses.ru/download/conferences/Проблемы%20постсоветской%20теории%20и%20философии%20права%20-%20Сборник%20статей.pdf> (last accessed on 1 March 2019).

10 Frankenberg G., *Comparative constitutional studies: between magic and deceit* (Edward Elgar Publishing, 2019). On the difficulty of constitutional comparison see the introduction to: Rosenfeld M., Sajó A. (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford : Oxford University Press, 2012).

11 Markesinis B., Feldtke J., *Engaging with Foreign Law* (Oxford : Hart publishing, 2009), p. 110.

12 One should look for such a comparison in the *travaux préparatoires* of the lawmakers or the rulings of higher courts. For constitutional courts see: Troitskaya A., Khramova T., 'Usage of foreign experience by bodies for constitutional supervision', in: *Gosudarstvo i pravo*, 8 (2016), p. 5–22. (in Russian), available at: <http://www.eastview.com> (last accessed on 1 March 2019).

13 Siems M., *Comparative Law* (Cambridge : Cambridge University Press, 2018, 2nd edn.), p. 1.

14 See Antonov M., 'Considerations on teaching theoretical jurisprudence in post-Soviet Russia', in: *Problems of post-Soviet theory and philosophy of law* (cited above, n. 9), p. 4-23 (in Russian).

studies.¹⁵ This confrontation cannot be understood, let alone resolved, without addressing the main points of disagreement.

2.2. Eurocentrism – a blessing or curse for legal scholarship?

During the long 19th century Western culture used to have 'a big mouth and small ears' (an African saying). Since the mid-20th century, many western comparatists have deplored the lack of knowledge about non-European legal cultures. Advances in this direction have recently been well presented in the textbooks by Werner Menski and Patrick Glenn.¹⁶ But until now the bulk of comparative legal knowledge remains oriented towards the West. Even Sacco's textbook, which aims at presenting law 'elsewhere', gave more than 300 pages to European and North American law, while the rest of the world got only a hundred pages; the same proportion as in the standard textbook by René David.

In the face of this inertia, the advocates of legal diversity should probably sprinkle ashes upon their heads. However, the pragmatic comparatists see the situation very differently. Basil Markesinis evaluates the bias positively. First, Europe radiates 'practically relevant' ideas and is producing practical and relevant rules. The state of learning in Europe is enviable. Otherwise why do many other countries – such as China, South Korea, and the former Eastern European bloc – invest so much in studying these major Western European and American systems and try to import their notions and institutions.¹⁷ Secondly, we have to be selective as reading time is 'a sharply limited commodity'. This is a warning which applies equally to the legislator, judges and academics who could not immerse themselves deeply enough into different legal cultures to understand and learn from them.

In Eastern Europe, one can imagine the debate of 'Westerners' and 'nationalists' revived. The camp of Westernizers includes legal historians (Andrei Medushevski, Dmitry Dozhdev), legal theorists and constitutionalists (Mikhail Antonov), civil law scholars (Eugeniy Sukhanov) who face the harsh reality of post-soviet relics in positive law and the formalism of legal doctrine. One can find parallels in other post-socialist countries. In the case of Central Eastern Europe, one can refer to the divergent views of the Romanists Tomasz Giaro or Wojciech Dajczak and the network of critical legal studies led by Adam Sulikowski and Rafał Mańko. The former deplore the legal backwardness of Eastern Europe. The latter warn against the large-scale importation of western law as unfit for many particular needs of the nations driven to the 'periphery of the West'.

Legal historians did not escape the temptation of Eurocentrism which sunk deep roots in the metaphor of the *Sonderweg* of (Western) Europeans, their legal tradition is marked by anthropocentrism, legalism, and intellectualism which stemmed from the synthesis of Roman law, Christianity, and ancient philosophy in the late medieval universities.¹⁸

Other scholars intend to overcome this bias via global history¹⁹, or local (legal) histories from a global perspective. Most notably, the Max Planck Institute of European Legal History has become a forum for 'local perspectives on global histories, and for the need to be aware of the translations these transnationally circulating ideas and models underwent, once they began to be put into action.'²⁰

With this intricate combination of local and global, legal historians aim at newly designed research which does away with projecting a national agenda on the whole course of European history and, at the same time, protects the discipline from the dominant discourse of global comparative studies. This agenda drives the criticism of such projects as *The Oxford International Encyclopedia of Legal History* (2009). Its editors decided

15 Markesinis B., Feldtke J., *op. cit.*, p. 33-46.

16 See Menski W., *Comparative law in a global context: the legal systems of Asia and Africa* (Cambridge : Cambridge University Press, 2009, 2nd edn.); Glenn H.P., *Legal traditions of the world : sustainable diversity in law* (Oxford : Oxford University Press, 2014, 5 edn.).

17 Markesinis B., Feldtke J., *op. cit.*, p. 47.

18 Wieacker F., 'Foundations of European Legal Culture', in: *The American Journal of Comparative Law*, 38(1) (Winter, 1990), pp. 1-29. For a similar thesis on the foundations of Europe see the Polish textbook on Roman law: Giaro T., Dajczak W., Longchamps de Bérier F., *Prawo rzymskie : u podstaw prawa prywatnego* (Warszawa : Wydawnictwo Naukowe PWN, 2018), p. 39.

19 Conrad S., *What is global history?* (Princeton : Princeton university press, 2016).

20 Duve T., 'Entanglements in Legal History. Introductory Remarks', in: *Entanglements in Legal History: Conceptual Approaches* (Frankfurt am Main : Max Planck Institute for European Legal History, 2014), p. 19; Idem, 'Von der Europäischen Rechtsgeschichte zu einer Rechtsgeschichte Europas in globalhistorischer Perspektive', in: *Rechtsgeschichte–Legal History*, 20 (2012), p. 18–71.

to describe European legal history under the entry 'Medieval and post-medieval Roman law' as one among many other traditions, such as African law, Chinese law, English common law, Hindu, Islamic, South Asian, Latin American, and Anglo-American common law. Thus, due to today's global agenda, 'the entry on Germany covers five columns, while the editors have allotted 130 columns and many subentries to China and the Chinese law.'²¹ Another reason for discontent is the reduction of European legal diversity to the reception of Roman law when local studies bring in more evidence of legal pluralism and the limited influence of *jus commune*.²²

2.3. The selective scope of research – is it normal or abnormal?

The range of jurisdictions studied is closely linked with Eurocentrism. Academics from the elegant camp understand the undeniable focus on some 'leading' systems only as another birth-mark of comparative law. One can easily ascribe it to the 'big mouth' of ideological imperialism and a tool to impose and maintain the 'centre-periphery' perspective of the leading Western powers and the rest of the world. This is no longer regarded as normal in post-modern academia. Rodolfo Sacco praises comparative studies for presenting a wide range of alternative models to organize societies according to their needs (e.g. the existence of law without the lawmaker, lawyers, or even the state).²³ Günther Frankenberg, one of the leading critical comparatists of constitutional law, calls attention to '*other-constitutions*', that is not 'textbook hegemony' but lesser known ones, because 'almost each one has a story to tell, showing a wider range of transformations'. His publication is about selection, not encyclopedic comprehensiveness, and it is to be treated as a workbook, written to stimulate a transnational, comparative constitutional conversation.²⁴

The pragmatic scholar sees nothing wrong with focusing on the constantly changing (but not closed) group of 'influential systems'.²⁵ The choice is not motivated by reasons of political correctness, or intellectual curiosity. Although the comparatist should not lapse into 'cherry picking', that is, collecting only those foreign solutions which are in line with his or her views and values while concealing the other ones. The comparatist has to take into account at least two points. First, less developed systems are studying the way more advanced systems organise markets or devise laws, and the list of such sources of inspiration is limited. Secondly, broadening one's search to include all legal systems makes it even more superficial. Therefore, engaging with foreign law requires relevance *ratione materiae* and the need to ponder 'where borrowing may be viable and where it is better avoided'.²⁶

The narrative of legal history is also selective and its biases are often criticised. The advances of comparative legal history enable contemporary scholars to claim that truly European legal history is yet to be written.²⁷ It is more difficult to justify why such authors as Randall Lesaffer or Antonio Padoa Schioppa in their textbooks tacitly substitute European legal history with the Western European one, or, like Uwe Wesel, attempt to present pan-European legal history from the point of view of the 'core lands' of Italy, France, and Germany. This perspective has to do with the legacy of Paul Koschaker, Franz Wieacker, and Helmuth Coing, not with the implementation of the ideas of legal pluralism and critical investigation of the ideologies behind legal histories.

This is not to say that the narrative of European legal history from an East European perspective is a meaningful alternative. In the face of scarce studies in this domain, the perception of a pan-European legal past is shaped by western literature, while national legal history enjoys an autonomy that breeds a sense of national peculiarity.

21 Duve T., 'German Legal History : National Traditions and Transnational Perspectives', in: *Rechtsgeschichte–Legal History*, 22 (2014), p. 32.

22 Donlan S.P., Heirbaut D., 'A Patchwork of Accommodations: Reflections on European Legal Hybridity and Jurisdictional Complexity', in: SSRN Electronic Journal (2014), available at: <https://www.ssrn.com/abstract=2477325> (last accessed on 1 March 2019).

23 Gambaro A., Sacco R., Vogel L., *op. cit.*, p. 17-19.

24 Frankenberg G., *op. cit.*, p. ix-x.

25 Markesinis B., Feldtke J., *op. cit.*, p. 49.

26 Ibidem, p. 50-52.

27 Pihlajamäki H., 'Comparative Contexts in Legal History: Are We All Comparatists Now?', in Adams M., Heirbaut D. (eds.), *The Method and Culture of Comparative Law. Essays in Honour of M. Van Hoecke*. (Hart, Oxford, 2014), p. 127.

2.4. Should legal studies be linked with neighbouring disciplines?

The formal and professional institutionalisation of law in Europe suggests that law is to a large extent autonomous and translates impulses from society into its own normative language. But do legal scholars need assistance from economists, sociologists, anthropologists or the like in such a translation? The answer tends to be negative. Franciscus Accursius answered in his *Glossa ordinaria* that law students should not study theology because legal science incapsulated 'the sufficient goal in itself' and entirely rests on the *Corpus juris civilis*.²⁸ The motive of disapproving 'extra-legal' arguments remained part of academic debates ever since (see the opening quotation above). Dogmatic jurisprudence of the 19th century also tended to isolate legal discourse. In the words of Bernhard Windscheid, issues of politics, morals, religion, or economics should not be the concern of lawyers. This view lived on through the 20th century thanks to the scholars who, like Alan Watson, claim that legal changes are controlled internally, within the legal system and by its (professional) elites.²⁹

Early comparative law, or comparative legislation, shared a similar viewpoint. Yet, the post-WWII critique of legal formalism in combination with cultural turn(s)³⁰ paved the way for 'post-modern' comparative law which seeks a fuller understanding of foreign law via a plurality of methods and approaches. Contacts or clashes of civilizations and technological innovations challenge many legal conventions and require comparatists to reflect on the cultural or paradigmatic foundations of both foreign and domestic law. Such ambitious objectives cannot be achieved with the regular toolbox of legal scholarship and motivate comparatists to look at:

- *legal philosophy*, to reveal the limits of law, its ideals, basic assumptions and the like,³¹
- *sociology*, to explore conflicting social interests which shape the law within society, 'law-in-action',
- *anthropology*, to study the relics of primitive mentalities in our societies and to shed new light on the mythical background of contemporary law, family structure and blood relationships, alternative methods of dispute resolution,³²
- *legal history*, to identify the hidden factors of legal solutions in the common sense of lawmakers, judges, and lawyers because law is understood as the complicated combination and outcome of the mentality, legal style, and morphemes of each nation rooted deep in its past.³³

However, the post-modern programme of interdisciplinary comparative legal studies has never been fixed in a coherent manifesto. Its advocates often argue with one another, exposing themselves to a pragmatic counter-attack. Basil Markesinis accuses such an approach as being not properly 'packaged' without a clear legal aim in mind, which makes it closer to humanities than to law. Another concern is its high level of abstraction and the lack of 'applied research' which prevents practitioners from ever consulting the results or taking them as a good starting point to handle any legal problem.³⁴ The link between legal scholarship and particular neighbouring disciplines also deserves its share of criticism for being utterly impractical and alien in any European courtroom.

28 'Iuris sola scientia habet caput et finem' (*Glossa ad Inst.* 1.1).

29 Watson A., *Legal transplants : an approach to comparative law* (Athens, London : University of Georgia Press, 1993, 2nd edn., 1st end. University Press of Virginia, 1974).

30 Till today cultural (interpretive, performative, reflexive) turn(s) have exercised a considerable impact in the humanities and social sciences. One of the main implications being the vision of social world as composed not of people but of meanings ascribed to those people, their actions and things. The actions are being constantly transformed into signs which makes culture the social texture. 'social actions are constantly being translated into signs so that they can be ascribed meaning'. See: Bachmann-Medik D., *Cultural Turns: New Orientations in the Study of Culture* (Berlin : De Gruyter, 2016), p. 49 (with further references to Hayden White, Clifford Geertz, Michel Foucault, Pierre Bourdieu, Julia Kristeva et al.).

31 Ewald W., 'The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"', in: *American Journal of Comparative Law*, 46 (1998), p. 701–707; Gordley J., *The Jurists: a Critical History* (Oxford : Oxford University Press, 2013); Valcke C., 'Reflections on Comparative Law Methodology – Getting Inside Contract Law', in: Adams M., Bomhoff J. (eds.), *Practice and Theory in Comparative Law* (Cambridge : Cambridge University Press, 2012), p. 22–48.

32 Rouland N., *Antropologie juridique* (Paris : Presses Universitaires de France, 1988) (building on theory he suggests to conduct this study on the basis of M. Alliot's theory of coexisting archetypes or modes of thought in the societies); Fikentscher W., *Modes of Thought* (München : C.H. Beck, 2012, 2nd edn.); Moore S.F., 'Doctrine as Determinism: A New Old Grand Theory' (review of Fikentscher, Modes of Thought), in: *Rechtshistorisches Journal*, 15 (1996), pp. 447–461.

33 See, for example, references to the publications by James Gordley above.

34 Markesinis B., Feldtke J., *op. cit.*, p. 54.

The cultural turn had a strong impact on legal history. The team of contributors of a recent work of reference, *'The formation and transmission of Western legal culture'* (2017), swear by it and present the whole legal history of Europe as cultural legal history.³⁵ The moral duty of legal historians to cooperate in interdisciplinary research has been voiced more than once (although with rare specific projects until now).³⁶ As a result, the thematic field and approaches to doing legal history have expanded spectacularly.

Despite all that, interested scholars repeatedly raise complaints about historical knowledge being squeezed out from law faculties under various pretexts. The pragmatic critique is especially harsh for legal history. Markesinis' claim in this regard is clear: 'our agendas, unlike our dreams, must be shaped in the light of the current financial condition of European law faculties...' Changing the real world is the 'reason why legal history in general and Roman law in particular have lost and, more importantly, *deserve* to lose their decisive grip over comparative law' (emphasis in the original – D.P.).³⁷

On the other hand, even pragmatic minds among lawyers do not go as far as to discard legal history altogether. Richard Posner is among those who acknowledge law's dependence on the past in terms of the genealogy of its concepts and the legitimacy of its normative models.³⁸ Perhaps, its major value lies in the accumulated range of possible legal solutions that could *inspire* us to seek new solutions.

I can explain these divergent opinions of these two pragmatic minds only by referring to different approaches to legal history. The first (I label it 'antiquarian') orients historians towards reconstructing the law as it was at a particular moment in time. The historian does his job well even if he does not trace the development of the old norms through to modern times. The second (I label it 'applicative') charges the historian with the task of keeping an eye on the law's development towards its contemporary form. Some historians oppose the latter as it reminds them of the subordinate position of legal history in times of the late Pandectists (*Magd der Dogmatik*). But the majority of lawyers and law students are interested in the issues relevant for today's realities. Perhaps legal history should not reject opportunities to empower dogmatic studies with historical depth.³⁹ The key issue here is to establish a coherent approach.

3. Contextualized comparison as possible synthesis

The debate between the elegant and the pragmatic approach to legal comparison reveals pros and cons on each side. Many academic scholars do a lot to raise lawyers' awareness of the legal diversity of the world, which becomes more relevant in the face of cross-cultural contacts. Yet, a plethora of knowledge about law as culture is not always helpful for solving cases in the courtroom.

To give an example, one can think about the sensitive issue of recognizing the legal capacity of robots with more or less sophisticated artificial intelligence (AI). AI can cause robots to act in a way that their developers could not envisage. It raises the very practical issue of legal liability for eventual damages. There are several models of allocating legal liability but this purely practical issue can hardly be resolved without theoretical justifications. The debates about the European Parliament resolution of 16.02.2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)) revealed the unwillingness of the legal advisors involved, let alone the politicised MPs, to acknowledge robots as subjects in legal relationships.

Recently, two Russian authors claimed that the reasons for this unwillingness are the confusion of legal and philosophical discourses about persons.⁴⁰ The mainstream conception identifies subjects with personalities,

35 'Law is culture' is the first phrase of the general introduction. See: Dauchy S., Martyn G., Musson A., Pihlajamäki H., Wijffels A., *The formation and transmission of Western legal culture: 150 books that made the law in the age of printing* (NY : Springer, 2017), p. 1.

36 See, for example: Heirbaut D., 'Exploring the law in medieval minds : non-written law', in: Musson A., Stebbings C. (eds.), *Making legal history : approaches and methodology* (Cambridge : Cambridge University Press, 2012), p. 118–130.

37 Markesinis B., Feldtke J., *op. cit.*, p. 69.

38 Posner R., *Frontiers of legal theory* (Cambridge, Mss. : Harvard University Press, 2001), p. 6, 145 f.

39 Some recent textbooks on Roman law give a good example of a historical approach to the genealogy of contemporary concepts and normative schemes. See, for example: Waelkens L., *Amne adverso : Roman legal heritage in European culture* (Leuven : Leuven University Press, 2015); also Giaro T., Dajczak W., Longchamps de Brier F., *op. cit.*

40 Gadzhiev G., Voinikanis E., 'Could Robot be a Legal Subject?', in: *Pravo-Zhurnal vysshei shkoly ekonomiki* (4) 2018, p. 24–48. The resolution

that is individuals, or at least entities controlled by them (legal persons). Such an identification goes back to Savigny's modern Roman law, which diverged from the strict separation of *persona* (legal mask) and *homo* (human being) in ancient Roman jurisprudence. The confusion of the 19th century was due to the philosophy of the Enlightenment and the conceptualistic approach to legal definitions. The Pandectist jurisprudence (*Begriffsjurisprudenz*) notably emphasised defining the 'essence' of legal concepts as if they were a kind of thing in legal reality. It is the legacy of 19th century jurisprudence that still causes many lawyers to put forward emotional arguments against recognizing robots as subjects of the law: one should not give equal rights to individuals and insensate robots; one should not provide legal grounds to transform humans into slaves of those robots; one should preserve the humanitarian foundations of the law in EU member states. In other words, the issue of the legal status of robots cannot be resolved without prior investigation of the basic assumptions of such a discourse which, in turn, belongs to a legal culture or paradigm.

The cited article on robots as legal subjects reminded me of the recent attempt to marry the 'elegant' and the 'pragmatic' in the textbook of Uwe Kischel.⁴¹ He has written an impressive volume with the ambition to replace Rabel's functional method with the contextual approach to comparison. He draws a distinction between 'context', 'legal culture', and 'legal family' from a methodological point of view. First, 'legal family' (*Rechtskreis*) serves as a Weberian ideal type and this is the starting point of comparative research. Secondly, using basic information about the law of a given legal family and its historical background, the student should be able to develop an appropriate research design by asking the right questions and avoiding typical mistakes. Thirdly, the student is supposed to start his or her immersion into the context with all its complex interplay of historical, economic, political, cultural, and psychological factors. This kind of immersion into the context of foreign law is limited by the research goal, available data, and human abilities.

Kischel's textbook seems a remarkable combination of the 'elegant' and the 'pragmatic' visions of comparison. It possesses about 1000 pages with extensive methodological explanations (ca. 240 pages) in the first part; the second part is dedicated to legal families of the world, which goes beyond purely pragmatical needs. On the other hand, the focus on Western law is undeniable and is barely explained in academic terms with a short reference to practical considerations.⁴² Despite its unavoidable imperfections, the textbook provides a more appropriate springboard for comparative studies in our times, when the new technical and cross-cultural realities of the contemporary world challenge most legal conventions and call for wider expertise to resolve even quite practical issues, like the legal status of robots.

Conclusion

The renewed debates between 'elegantly' and 'pragmatically' minded comparatists are likely to mark legal scholarship in Europe for years to come. The vast jurisprudential horizon of legal research with several clear outlooks into anthropology, cultural studies, economics, philosophy, political science, sociology and many others will always be 'obstructed' by the facades of actual national parliaments, public offices, courts of law, and other elements of reality. After all, law 'rules' only when humans act upon it in real life. The observers and the participants of the clash between rival academic schools can benefit from this by looking into the relevant problems of jurisprudence.

Among other things, this debate raises the issue of 'making' legal history in the 21st century. Information about a law's past is still present in any solid textbook on comparative law and helps to clarify the legal diversity of contemporary jurisdictions on the macro-level, as well as the variety of legal concepts, principles, and institutes on the micro-level. On the other hand, the usage of historical data can be very schematic,

is available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0051+0+DOC+XML+V0//EN> (last accessed on 1 March 2019).

41 Kischel U., *Comparative law* (NY : Oxford University Press, 2019; 1st German edn. C.H. Beck, 2015).

42 So, the diversity of the continental legal family is presented from the point of view of the West European models (French and German) while other jurisdictions are analysed as deviations from the standard. Russian law is curiously presented as a stand-alone context (?) within the continental context and allowed only five pages dominated by the leitmotiv of legal nihilism and without references to major works on Russian law by the leading Russian scholars (discarded as nihilists?). See Kischel U., *op. cit.*, p. 586–590.

superficial, and limited by the illustrative needs, while the wealth of deep historical knowledge is often discarded as irrelevant to the current legal issues and fossilised by the passage of time.

The advances of comparative studies highlight the growing divide between the cumulative knowledge of the legal cultures of our shrinking world and the progressive marginalisation of theoretical and historical disciplines in legal curricula across Europe in the face of collapsing 'grand narratives' and multiplying challenges to age-old conventions and traditions.

Debates within the community of comparatists highlight a curious paradox of legal history today. It is widely believed to be helpful, even indispensable, for identifying the hidden formants (Sacco's cryptotypes) in professional legal culture(s). And yet the potential of legal history for comparative law remains by and large locked. While comparatists do not go deeply into the waters of legal history, legal historians stick to their particular agenda which excludes current legal issues due to the fear of subduing law's past to its present.

Such concerns are understandable but not helpful in promoting legal history in comparative legal studies. In this paper I mentioned the issue of recognizing robot's legal personality. It is a clear example of how scholars can engage with legal history to reveal the hidden formants which prevent the majority of lawyers in Europe from accepting new kinds of legal subjects. It is also a good illustration of the much needed reflection on the context(s) and the paradigm(s) of European legal culture, its present and past, in the face of the ongoing internationalisation of law and legal studies. Hopefully, legal historians will play their role in this uneasy research.

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