



Introduction: Situating, Researching, and Writing Comparative Legal History

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This volume is a selection of essays taken from the excellent range of papers presented at the British Legal History Conference hosted by the Institute for Legal and Constitutional Research at the University of St Andrews, 10–13 July 2019. The theme of the conference gives this book its title: ‘comparative legal history’. The topic came easily to the organisers because of their association with the St Andrews-based European Research Council Advanced grant project ‘Civil law, common law, customary law: consonance, divergence and transformation in Western Europe from the late eleventh to the thirteenth centuries’. But the chosen topic was also connected to the fact that this was, we think, the first British Legal History Conference held at a university without a Law faculty. Bearing in mind the question of how far institutional setting determines approach, our hope was that an element of fruitful comparison would stimulate people to think further about the range of approaches to legal history. With its explicit agenda of breaking down barriers, comparative legal history provided a particularly suitable focus for this investigation. After situating the subject matter of comparative legal history, and then discussing the levels of comparison that may be most fertile, this introduction moves on to considering the practical tasks of researching and writing such history, using the essays included in the volume to suggest ways ahead. The introduction groups the essays under certain headings: ‘Exploring legal transplants’; ‘Investigating broader geographical areas’; ‘Case law, precedent and relationships between legal systems’; and ‘Exploring past comparativists and the challenges of writing comparative legal history’. Yet the essays could be kaleidoscopically rearranged under many headings. We hope that the book, like a successful conference, includes many stimulating conversations.

F. W. Maitland wrote that ‘history involves comparison . . . an isolated system cannot explain itself, still less explain its history’.¹ Comparative approaches are vital for answering broad questions and understanding specific issues. Investigating both difference and similarity, they can seek patterns, construct narratives and test theories of causation. Sometimes they are explicit, sometimes implicit. Comparison, conscious or unconscious, is inevitably present in producing and testing analyses, in asking ‘what if this were not the case?’, ‘what if we change certain conditions?’ Such has been described as the ‘quasi-Popperian’ role of comparison: ‘comparison is the closest that historians can get to testing, attempting to falsify, their own explanations’.² At the same time, comparison may also produce fresh hypotheses, for example, asking ‘is this pattern of change replicated elsewhere?’ or ‘are differences more assumed than real?’, hypotheses that may be more resilient after themselves being tested through further comparison.

Comparison has long featured in investigation of legal development, be it between the Germanic and the Roman in the great founding works of German legal historical scholarship, or between Common law and Civil law in classic works on English legal history. Studies of comparative legal history have grown in the twentieth- and the twenty-first centuries,³

¹ F. W. Maitland, ‘Why the History of English Law is Not Written’, in *The Collected Papers of Frederic William Maitland*, ed. H. A. L. Fisher, 3 vols. (Cambridge, 1911), vol. I, 480–97, at 488–9.

The work presented in this introduction has been supported by the European Research Council, through the Advanced grant n. 740611, ‘Civil law, common law, customary law: consonance, divergence and transformation in Western Europe from the late eleventh to the thirteenth centuries’ (see <http://clicme.wp.st-andrews.ac.uk/>). We would like to thank Matt Dawson, our co-editors and the other members of the ERC project for their comments on drafts of this introduction. John Hudson would also like to thank Susan Reynolds for her comments and for decades of exhortation always to compare.

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

³ Possible starting points include W. W. Buckland and A. D. McNair, *Roman Law and Common Law: A Comparison in Outline*, 2nd edn (Cambridge, 1952); A. Watson, *Legal Transplants* (Edinburgh, 1974); R. Sacco, *La comparaison juridique au service de la connaissance du droit* (Paris, 1991); R. Zimmermann, ‘Savigny’s Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science’, *Law Quarterly Review*, 112 (1996), 576–605; A. A. Levasseur and M. Reimann, ‘Comparative Law and Legal History in the United States’, *American Journal of Comparative Law*, *Supp. 1*, 46 (1998), 1–15; M. Graziadei, ‘Comparative Law, Legal History, and the Holistic Approach to Legal Cultures’, *Zeitschrift für Europäisches Privatrecht*, 7 (1999), 531–43; D. Heirbaut, ‘Comparative Law and Zimmermann’s New *Ius Commune*: A Life-Line or a Death Sentence for Legal History? Some Reflections on the Use of Legal History for Comparative Law and Vice Versa’,

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

Fundamina, 11 (2005), 136–52; D. J. Ibbetson, ‘Comparative Legal History: A Methodology’, in A. Musson and C. Stebbings (eds.), *Making Legal History: Approaches and Methodologies* (Cambridge, 2012), 131–45; M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford, 2006); K. Å. Modéer, ‘Abandoning the Nationalist Framework: Comparative Legal History’, in H. Pihlajamäki, M. D. Dubber and M. Godfrey (eds.), *The Oxford Handbook of European Legal History* (Oxford, 2018), 100–13; O. Moréteau, A. Masferrer and K. Å. Modéer (eds.), *Comparative Legal History* (Cheltenham, 2019). Also relevant are works more particularly on comparative law, but with a strong legal historical dimension: e.g. W. Ewald, ‘Comparative Jurisprudence (I): What was it Like to Try a Rat?’, *University of Pennsylvania Law Review*, 143 (1995), 1889–2149; H. P. Glenn, *Legal Traditions of the World*, 2nd edn (Oxford, 2004).

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

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

⁶ There are exceptions, with writings by historians such as D. L. D’Avray, ‘Weber and Comparative Legal History’, in A. Lewis and M. Lobban (eds.), *Law and History: Current Legal Issues, Volume 6* (Oxford, 2004), 189–99; S. M. G. Reynolds, ‘Early Medieval Law in India and Europe: A Plea for Comparisons’, *The Medieval History Journal*, 16 (2013), 1–20.

⁷ E.g. Graziadei, ‘Comparative Law’, 532; D. Michalsen, ‘Methodological Perspectives in Comparative Legal History: An Analytical Approach’, in Moréteau et al. (eds.), *Comparative Legal History*, 96–109, at 97, 100, 108–9; Modéer, ‘Abandoning the Nationalist Framework’; J. Gordley, ‘Comparative Law and Legal History’, in Reimann and Zimmermann (eds.), *Oxford Handbook of Comparative Law*, 754–71, at 754; A. Masferrer, K. Å. Modéer, and O. Moréteau, ‘The Emergence of Comparative Legal History’, in Moréteau et al. (eds.), *Comparative Legal History*, 1–28, at 7. M. Dyson, ‘Comparative Legal History: Methodology for Morphology’, in Moréteau et al. (eds.), *Comparative Legal History*, 110–38, at 119, includes history in a list of ‘cognate disciplines’, along with economics, sociology and philosophy. Absent from citations are works such as Wickham’s *Problems in Doing Comparative History*, familiar in the footnotes of historians. Note also, e.g. the focus of Lévassieur and Reimann, ‘Comparative Law’, esp. 1, 13, 15, on scholarship in Law schools with only a passing reference to History departments; also D. Ibbetson, ‘What Is Legal History a History of?’, in Lewis and Lobban (eds.), *Law and History*, 33–40, at 34. There are exceptions amongst those writing on comparative legal history; e.g. Heirbaut, ‘Comparative Law’, 147; M. Lobban, ‘The Varieties of Legal History’, *Clio@Thémis*, 5 (2012), 1–29, at 19, 21–2.

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

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

The Subject Matter of Comparative Legal History

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

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

⁹ Such matters of terminology differ between languages. Also very stimulating is J. Gardner, 'Legal Positivism: 5½ Myths', *American Journal of Jurisprudence*, 46 (2001), 199–227.

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

¹¹ See e.g. R. Gordon, 'Critical Legal Histories', in his *Taming the Past: Essays on Law in History and History in Law* (Cambridge, 2017), 220–81, at 229–30.

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

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

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

¹² E. Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. W. L. Moll (Cambridge, MA, 1936), on which see, e.g. S. P. Donlan, 'Comparative? Legal? History? Crossing Boundaries', in Moréteau et al. (eds.), *Comparative Legal History*, 78–95, at 85–6. For 'relative autonomy', see, e.g. E. P. Thompson, *Whigs and Hunters* (London, 1975), 258–69; Kennedy, *Rise and Fall*, x, 2; Gordon, 'Critical Legal Histories', 224, 248–53, 266.

¹³ F. W. Maitland, 'The Law of Real Property', in *Collected Papers*, ed. Fisher, I. 162–201, at 175–6 (the word about which he is talking here is feudalism).

¹⁴ Thompson, *Whigs and Hunters*, 261. Other metaphors include, for example, the 'stickiness' of legal rules, and also 'transplant', on which see below, 13–16.

¹⁵ Here comparative legal history may feed back into theories about law; note, e.g. M. Lobban, 'Legal Theory and Legal History: Prospects for Dialogue', in M. Del Mar and M. Lobban (eds.), *Law in Theory and History* (Oxford, 2016), 3–21. For relevant discussion of other issues that may be described as ones of 'legal theory', note J. Whitman, 'The World Historical Significance of European Legal History: An Interim Report', in Pihlajamäki et al. (eds.), *Oxford Handbook of European Legal History*, 3–21.

¹⁶ See e.g. J. Austin, *The Province of Jurisprudence Determined*, ed. W. E. Rumble (Cambridge, 1995), 18, 106 (the opening of Lectures I and V).

of practice and knowledge in which certain people have expertise.¹⁷ Take the following suggestion by Brian Simpson:

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

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

What Sort of Legal History?

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

¹⁷ Note P. Bourdieu, ‘The Force of Law: Toward a Sociology of the Legal Field’, *Hastings Law Journal*, 38 (1987), 805–53. More specifically legal historical comments appear in D. Freda, ‘Legal Education in England and Continental Europe between the Middle Ages and the Early Modern Period’, in Moréteau et al. (eds.), *Comparative Legal History*, 242–66.

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

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

²⁰ E.g. Michalsen, ‘Methodological Perspectives’, 96, 98. Cognate issues arise with studies of comparative law as well as legal history.

between varieties of legal history, partly although not solely disciplinary.²¹ Is the concentration to be the internal history of law, described by David Ibbetson as follows: ‘A legal system does have its own separate history . . . and even though it is inevitably embedded in the extra-legal world . . . legal change takes place within this system and can only be understood in terms of it’?²² Or is it to be the external history: ‘External legal history is the history of law as embedded in its context, typically its social or economic context.’²³ Or should the two be integrated, not least because some views of law render the division more difficult? Is integration particularly necessary regarding causation, periodisation and construction of a narrative?²⁴ Likewise, is the focus – in Roscoe Pound’s useful if contested phrase – ‘Law in books’ or ‘Law in action’? And is there a point where the social history of law – as epitomised, for example, in *Albion’s Fatal Tree* – ceases to be a form of legal history?²⁵

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

²¹ E.g. Lobban, ‘Varieties of Legal History’; Ibbetson, ‘What Is Legal History?’.

²² Ibbetson, ‘Comparative Legal History’, 132.

²³ Ibbetson, ‘What Is Legal History?’, 34.

²⁴ Note e.g. Dyson, ‘Comparative Legal History’, esp. 128–31, 138; Donlan, ‘Comparative? Legal? History?’, 83; Kennedy, *Rise and Fall*, xxvii. A further highly pertinent critique is provided by P. Legrand, e.g. in his ‘On the Unbearable Localness of the Law: Academic Fallacies and Unseasonable Observations’, *European Review of Private Law*, 1 (2002), 61–76, esp. 63–4, 66. On the significance of the specific context for court decisions that will assume a major, differently contextualised place in the internal history of law, see A. W. B. Simpson, *Leading Cases in the Common Law* (Oxford, 1995); external context, specific or general, may be particularly important to decisions in the type of difficult case that may drive Common law development, and to the later utilisation of those decisions.

²⁵ D. Hay (ed.), *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* (London, 1975). Ibbetson, ‘What Is Legal History?’, 33, distinguishes ‘legal history’ and ‘history of law’. The discussion here does not exhaust possible types of legal history; see also, e.g. below, 10–11, on structures of legal thought. Another type is ‘presentist’ legal history, on which see e.g. D. V. Williams, ‘Historians’ Context and Lawyers’ Presentism: Debating Historiography or Agreeing to Differ’, *New Zealand Journal of History*, 48 (2014), 136–60; see also Whitman, ‘World Historical Significance’; Heirbaut, ‘Comparative Law’, 143–8; Lobban, ‘Varieties of Legal History’, 24–5; Zimmermann, ‘Savigny’s Legacy’, esp. 598–601. For a critique of certain forms of presentism, helpfully formulated in terms of the ‘instrumental impulse’, see Legrand, ‘Unbearable Localness’.

fitting personal aptitude – that individuals pursue different approaches, whilst ensuring those approaches are explicit and in dialogue: what may be called legal historical pluralism.

Making Comparisons

Beyond these issues, there are further clear difficulties in conducting comparative studies. Familiar from many discussions are difficulties such as the comparative use of concepts such as ‘ownership’ or ‘crime’.²⁶ A solution – be it functionalist or other – again must avoid treating such concepts as unchanging, uncontextualised universals, whilst not lapsing into uninformative, irreducible nominalism where all that is apparent is difference. In contrast, theoretical writings are sometimes surprisingly vague as to what comparative legal history is seeking to explain. Two related aspects that have received attention are legal transplants and entanglements.²⁷ Whilst such analyses sometimes are comparative, and can indeed benefit greatly from a comparative aspect,²⁸ sometimes they are not, and perhaps need not be; rather, they are intent on creatively disrupting supposedly separate units. However, topics such as transplants do emphasise that comparative legal history must help to explain not just the particular legal systems compared but also the nature, processes and causes of legal change.²⁹ Such is yet another reason for the difficulty of comparative legal history. To the difficulties of comparative law, it adds a third dimension of comparison: time.

²⁶ On problems of terminology, see, e.g. J. Vandelinden, ‘Here, There and Everywhere . . . or Nowhere? Some Comparative and Historical Afterthoughts about Custom as a Source of Law’, in Moréteau et al. (eds.), *Comparative Legal History*, 140–66. Developing interest in comparative legal history is linked to, but not identical with, developing interest in global perspectives, with its broadening of geographical perspectives, emphasis on interconnectedness, and questioning of assumed concepts and values; see esp. T. Duve, ‘European Legal History – Concepts, Methods, Challenges’, in T. Duve (ed.), *Entanglements in Legal History: Conceptual Approaches* (Frankfurt am Main, 2014), 29–66, esp. 30–1, 55, 56; also T. Duve, ‘Global Legal History: Setting Europe in Perspective’, in Pihlajamäki et al. (eds.), *Oxford Handbook of European Legal History*, 115–38. Note further G. Frankenberg, *Comparative Law as Critique* (Cheltenham, 2016).

²⁷ See esp. Watson, *Legal Transplants*; Duve (ed.), *Entanglements in Legal History*. The word ‘transplant’ for the introduction of English laws to Scotland was already used three centuries earlier by Sir Mathew Hale in his *The History of the Common Law of England* (London, 1713), 200.

²⁸ See below, 13–16; see also, e.g. W. Swain, ‘The Common Law and the *Code Civil*: The Curious Case of the Law of Contract’, in Moréteau et al. (eds.), *Comparative Legal History*, 379–99.

²⁹ See below, 12–13, on causation.

Bearing in mind the above, what are the possible units of comparison for the legal historian?³⁰ Generally, comparison has been between ‘legal systems’ – archetypically between Civil law and Common law – or between geographical areas, especially between political units.³¹ Comparison could also be between types of law – unwritten and written, custom and academic – or across time as well as place and system, as in comparisons between procedures in English Common law and Roman law.³²

A further issue is level of comparison and consequent generalisation. The ‘comparative method’ was crucial to the developing social sciences in Victorian England, including comparative law and legal history, personified by Sir Henry Maine. Supported by ideas of evolution, writers were confident in generalisations not just about specific or common patterns but about necessary and universal ones. Deprived of this belief in broad evolutionary patterns for human social and cultural development, and subjected to detailed empirical criticism, such theories have gone out of academic fashion. Only occasionally are writers prepared to speculate on whether legal systems have a ‘natural history’ or to attribute to them anthropomorphic characteristics.³³

Still, there is an opposite – probably reactive – danger, of insufficiently broad comparison. This may lapse into lists of similar or dissimilar rules or procedures. Rather than comparing individual rules or attempting to uncover universal patterns, therefore, the task is to find an intermediate level of comparison, to seek contrasting or shared patterns of legal norms, processes and change.³⁴ Very useful lists for comparison have been offered, for example: ‘1. Fact patterns. 2. Institutions. 3. Reasoning. 4. Principles and concepts. 5. Substantive legal rules. 6. Procedure. 7. Outcomes.’³⁵

³⁰ Note also, e.g. Michalsen, ‘Methodological Perspectives’, 106–7.

³¹ For problems with ‘legal systems’ as a basis for comparison, see, e.g. Gordley, ‘Comparative Law and Legal History’, 761–4, Dyson, ‘Comparative Legal History’, 114–16.

³² Note, e.g. S. F. C. Milsom, *The Natural History of the Common Law* (New York, 2003).

³³ E.g. Milsom, *Natural History*; Buckland and McNair, *Roman Law and Common Law*, xxi. Note also E. Conte, *Diritto comune* (Bologna, 2009). On broad generalisation, see also Duve, ‘European Legal History’, 45. For caution as to the extent of decline in influence of evolutionary assumptions and models, see e.g. Gordon, ‘Critical Legal Histories’, 225–7, 231–4. For an invigorating reassertion of the importance of the broad generalisation and comparison, see Whitman, ‘World Historical Significance’. For pertinent comments on non-legal historians using anthropomorphic and other metaphors, see E. A. R. Brown, ‘The Tyranny of a Construct: Feudalism and Historians of Medieval Europe’, *American Historical Review*, 79 (1974), 1063–88, at 1075–6.

³⁴ Wickham, *Problems in Doing Comparative History*, 11–15, reaches a similar conclusion.

³⁵ Dyson, ‘Comparative Legal History’, 120.

Objects of comparison may range from the broad to the very particular, from structures of legal thought, through legal learning and education,³⁶ clusters of rules and practices, to individual rules or the related functions of different rules in the compared systems, and on to the very specific, for example the judicial activities of one individual in different courts.³⁷ Multiple perspectives can contribute: be it in litigation or transaction, starting from the participant point of view – ‘actor-based’ analysis – may reveal similarities and differences between types of law hidden to comparative analysis starting from legal rules or procedure.

Such explorations can also be formulated in specific research questions, again of differing scope. For example, such questions may form part of a wider analysis of the generation, development, and functioning of legal norms. Are clashes between unwritten customs resolved in different ways from clashes between written rules? Is there a difference in the strictness of application of procedural and of substantive norms? How far are norms brought into play by litigants, how far by those presiding over courts? In what ways do legal norms and processes fit diverse circumstances into set forms, and how are problems arising from such constrictions then remedied?³⁸ Such analysis will return to questions such as that of the relationship of procedure and substantive norms, and to Maine’s oft-quoted but rarely tested suggestion that ‘substantive law has at first the look of being gradually secreted in the interstices of procedure’.³⁹

Similarities uncovered by comparison may thus be in patterns of law or legal development, rather than identical rules. The focus may be on what notions structure legal thought. There may be similarities or differences in assumptions, in underlying principles or pervasive ideas, in what S. F. C. Milsom described as ‘elementary legal ideas’ so fundamental that they are rarely stated yet must be uncovered to allow any possibility of further understanding.⁴⁰ Investigation at this level may also allow exploration, not just of what existed, what changed, or when and why, but also of how law worked and developed, for example through replicable and adaptable units. Such intermediate level comparisons of groupings of

³⁶ E.g. Freda, ‘Legal Education’.

³⁷ See J. G. H. Hudson, *The Oxford History of the Laws of England, Volume 2: 871–1216* (Oxford, 2012), 533, for the possible wider consequences of this point.

³⁸ Note Y. Thomas, ‘Présentation’, *Annales HSS*, 50 (2002), 1425–8, at 1425–6.

³⁹ H. S. Maine, *Dissertations on Early Law and Custom* (London, 1883), 389.

⁴⁰ S. F. C. Milsom, *The Legal Framework of English Feudalism* (Cambridge, 1976), esp. 37; Milsom, *Natural History*.

ideas, assumptions and practices may analyse what Duncan Kennedy termed a 'subsystem' in legal consciousness, 'a small set of conceptual building blocks, along with a small set of typical arguments as to how the concepts should be applied, to produce results that seem to the jurists involved to have a high level of coherence with and across legal fields'.⁴¹ Such analysis may in turn reveal the coexistence of competing subsystems or models, the interaction of which may be central to legal development.⁴²

Researching and Writing Comparative Legal History

The above discussion has been punctuated with statements of difficulties and with numerous questions. And, one fears, the problems are not yet exhausted. A further reason for the absence in particular of book-length comparative studies is the sheer amount of research required. Maitland encapsulated the difficulty in his requirement that "The first step towards an answer must be a careful statement of each system by itself. We must know in isolation the things that are to be compared before we compare them."⁴³ All too easy are flawed shortcuts, particular in researching comparators beyond the author's particular speciality. Such shortcuts are manifest in assumptions of uniformity within the systems compared – including such casual contrasts as 'Anglo-American Common Law' and 'Continental European Civil Law'⁴⁴ – or in comparing a full picture of law on one side with a picture solely of 'Law in books' on the other. The

⁴¹ Kennedy, *Rise and Fall*, xiv, and also, e.g. viii, ix–xi, xiii, xxxiv, 3, 5, 6, 7, 16–17, 21, 26, 27, 43, 192–3, 205, 208–9, 250–1, 256–7.

⁴² Ibbetson, 'What Is Legal History?', 36–9; Hudson, *Oxford History*, 375. Exploration of a different but sometimes related kind of competition may start with R. Cover, 'Nomos and Narrative', *Harvard Law Review*, 97 (1983), 4–68. Note also Ibbetson, 'Comparative Legal History', 136: 'A further facet of the level of legal doctrine . . . is the degree to which it allows a substantial measure of indeterminacy.'

⁴³ F. Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I*, 2nd edn, reissued with a new introduction by S. F. C. Milsom, 2 vols. (Cambridge, 1968), vol. I, cvi.

⁴⁴ See e.g. D. Osler, 'The Myth of European Legal History', *Rechtshistorische Journal*, 16 (1997), 393–410. To the medieval English legal historian, familiar with the resounding baronial expression of preference for 'English laws' over Canon law on the issue of whether subsequent marriage of parents legitimised children born before marriage, it comes as a salutary awakening to find the Orléans jurist Jacques de Revigny mentioning a similar local preference for 'our laws' (*iura nostra*) on this issue; K. Bezemer, *What Jacques Saw: Thirteenth-Century France through the Eyes of Jacques de Revigny, Professor of Law at Orleans* (Frankfurt am Main, 1997), 5, 11; cf. e.g. J. G. H. Hudson, *The*

challenge of the balance between the possible and the ideal, present in most research, is especially prominent here. The sheer bulk of material multiplies particularly if the approach emphasises the external or the social history of law,⁴⁵ but also if it involves a widely defined notion of 'legal culture'.⁴⁶ Moreover, volume of research looms still more threateningly if it is felt methodologically desirable to have more than two comparators in order to avoid coincidental patterns achieving mistaken significance. Collaboration provides an answer, but the danger remains of a plethora of fragmented studies, awaiting the immensely challenging process of synthesis: more data does not automatically provide more explanation.⁴⁷

The hope will be that comparison provides better explanation. Take analysis of causation of legal change, with an external perspective: if similar legal developments occur in markedly different socio-economic settings, apparent links between legal and socio-economic change must be rejected in favour of other or more complex explanations. Comparison may often have a destructive rather than constructive effect. This may be particularly true of causal explanation within external approaches to legal history, but is not limited to such:⁴⁸

comparative law and legal history working together can prevent three methodological assumptions: that a common rule across jurisdictions

Formation of the English Common Law: Law and Society in England from King Alfred to Magna Carta, 2nd edn (London, 2018), 206.

⁴⁵ Note Maitland's response to a request that he write a chapter on the early modern reception of Roman law in Germany: 'I have seen just enough to know that the subject, if it is to be made interesting, is beset by enormous difficulties. For instance the writer would be expected to say whether Roman law really harmed the peasantry, and that is a matter about which I dare not give any opinion. No one ought to have any opinion about it who does not know the economic position of the German peasants before and after the Reception, and even such a one would be in great danger of arguing from *post* to *propter* if he did not know France and England also'; *The Letters of Frederic William Maitland*, ed. P. N. R. Zutshi (Selden Society, Supplementary Series, xi, London, 1995), no. 174.

⁴⁶ The advantages of using clearly comparable bodies of source material are clear in, e.g. P. R. Hyams, 'The Common Law and the French Connection', *Anglo-Norman Studies*, 4 (1982), 77–92, 196–202. Note also Wickham, *Problems in Doing Comparative History*, 5; Donlan, 'Comparative? Legal? History?', 84.

⁴⁷ Note also Gordon, 'Critical Legal Histories', 237.

⁴⁸ See e.g. Gordley, 'Comparative Law and Legal History', 763–6, 770; Gordon, 'Critical Legal Histories', 237–43; Ibbetson, 'Comparative Legal History', 143–5. Note further M. Lobban, 'The Politics of English Law in the Nineteenth Century', in P. Brand and J. Getzler (eds.), *Judges and Judging in the History of the Common Law and Civil Law* (Cambridge, 2012), 102–37.

results from common needs, that a common or similar rule has been adopted solely on its merits in the marketplace 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.⁴⁹

These are indeed general problems in analysis of historical causation and in construction of narrative.⁵⁰ However, rather than the scholarly reaction being one of defeat, we may welcome the opportunities for removing misinterpretation, for accepting the role of contingency,⁵¹ and for redoubling efforts to construct and test explanation.

The essays presented in this volume illustrate some of the ways in which comparative legal history may be approached, and how such studies can test all-too-easily accepted narratives or provide fresh perspectives on familiar legal and historical developments. The approaches that have been taken vary, all in their different ways examining and illuminating the causes and nature of legal change. Several essays directly explore legal ‘transplants’. Others consider the uniformity of legal development across broad geographical areas. Further authors examine a related issue, the role of case law and precedent in legal development, an examination which not only challenges an oft-assumed bright line between Common and Civil law systems, but also encourages examination of the relationship between jurisdictions sharing a Common law heritage. A final strand of essays concerns the work of past comparativists, which can reveal much about how fundamental units of comparison such as ‘legal systems’ have been understood historically. These essays also allow us to compare our own experience of comparative study with the endeavours of those attempting such work in the past.

Exploring Legal Transplants

A comparison of the essays concerning legal transplants reveals a variety of forms that such transplants can take, and how they may or may not work. Alice Taylor discusses the transplant of a text from one legal system to another; that is, the appearance of much of the content of

⁴⁹ Dyson, ‘Comparative Legal History’, 110.

⁵⁰ Note, e.g. Gordon, ‘Critical Legal Histories’, 243, 248, 270–2; Ibbetson, ‘Comparative Legal History’, 141–2; and, in particular for construction of analytical narrative, Dyson, ‘Comparative Legal History’, 128, 130–1, 136, 138.

⁵¹ Dyson, ‘Comparative Legal History’, 110: ‘the comparative link will help historians to appreciate the role of chance in legal development’. Also Ibbetson, ‘Comparative Legal History’, 139–40 (including use of the word ‘capricious’).

the twelfth-century English legal treatise known as *Glanvill* in the fourteenth-century Scottish treatise *Regiam maiestatem*. This is a cross-border transplant for which the probable passage of time between the production of the *Glanvill* text and its introduction into another system adds not only complexity but also explanatory potential. The similarities between *Glanvill* and *Regiam maiestatem* have long been recognised, but Taylor offers a new explanation of why *Glanvill* was used so extensively. *Regiam maiestatem*, she argues, may be seen as an ‘intercontextual translation’, whereby the authority of *Glanvill* was used as a vehicle for conveying an argument for the *maiestas* of Scottish kings during the reign of Robert I. Traditional narratives have emphasised the importance during this period of ideas about the ‘community of the realm’; the idea of royal *maiestas*, Taylor argues, represents an important alternative strain of political thought, which offers a new interpretation of the intellectual underpinnings of Robert I’s kingship. Taylor’s essay thus illustrates how the study of legal transplants can disrupt familiar narratives. It also shows how such transplants may create only the illusion of legal change or convergence, and therefore be of little obvious consequence to the internal history of law, yet nevertheless be extremely politically significant and also have a long-term effect on legal culture.

Taylor’s essay focuses more on the broad political principle that could be promoted through *Regiam maiestatem* and less on the individual rules contained in the text. In contrast, Ciara Kennefick’s essay addresses the transplant of an aspect of a particular rule from one system to another. This is the concept of ‘continuous’ in relation to the rule that an easement which is ‘continuous and apparent’ may be created in certain circumstances by implication, rather than by express grant, when land held by one owner is subsequently divided. Following the point made by Simpson in an earlier article, Kennefick shows how this rule concerning servitudes can be traced to an idea in the French Civil Code.⁵² It crossed the sea and entered English law when it was included in Charles Gale’s *Treatise on Easements*, published in 1839, and from that moment it caused difficulties of interpretation. Kennefick adds another perspective to Simpson’s argument by analysing this development from a comparative perspective. She shows that this was a transplant of a legal rule that was also problematic in the donor jurisdiction, an insight which adds a fresh perspective to the struggles of the English courts to interpret it.

⁵² A. W. B. Simpson, ‘The Rule in *Wheeldon v. Burrows* and the Code Civile’, *Law Quarterly Review*, 83 (1967), 240–7, at 240.

Kennefick's study thus provides three lessons for legal history, one general, two specific: (i) we must not always assume that a rule being transplanted was a good fit even for the donor system; (ii) the influence of the French Civil Code on the Common law has been underestimated; and (iii) English legal treatises were an important influence (for better or worse) on the development of certain areas of English law. By studying transplants from an explicitly comparative perspective, Kennefick's essay also illustrates how change may not occur because of deep-rooted and widely shared structures of legal thought. Instead, it emphasises, as mentioned above, the potential role of contingency in legal development.

The complexities that may be caused by the transplantation of legal doctrine are also evident in Justine Collins's essay, which discusses the way in which pre-colonial English law crossed the ocean and served as a basis for the slave laws of the British West Indies. This essay focuses on three broad areas: (i) the idea of slaves as chattels; (ii) the overlapping idea that slavery was analogous in many respects to villeinage; and (iii) the influence on West Indian slavery legislation of attitudes and laws concerning the control and subjugation of the lower orders in England. A related concern is the way in which colonial administrators seized upon ideas concerning the use of martial law and applied them to the governance of their territories. The legal transplants discussed by Collins operated in a system quite different from that of England, and, as Collins explains, their introduction involved a degree of improvisation. As such, attempts to connect the law of chattels and villeinage to slavery created a plethora of issues that were never fully reconciled.⁵³ This was especially clear when the transplanted ideas that had been adopted and adapted in the British West Indies returned to their donor system in cases requiring adjudication by the English Common law courts. Through her discussion of this last point, Collins's essay also reveals how these cases, which stimulated debate about the precise nature of a transplanted rule or concept (such as villeinage), are very useful sources for legal historians seeking to understand attitudes towards the rule or concept in question.

The discussion of transplants in this volume is not limited to the transplantation of texts or of disembodied legal ideas. Ian Williams discusses the transplant of a *person*, James VI Scotland, who progressed ceremonially from Edinburgh to London in the days following the death of Elizabeth I of England in 1603 and acceded to the English throne that

⁵³ This is not to suggest that laws introduced with considerable thought for their place in their respective legal framework cannot also lack consistency and coherence.

same year. As Williams notes, 'While law as idea is important, law can only be applied (at least for now) by people. As people move, the law in practice can change.'⁵⁴ Although considerable attention has been devoted to James's attempts to influence the work of his judges, Williams's essay addresses the less-studied area of the king's own judicial activity in both England and Scotland. As the author explains, it was not unusual for a king to act as a judge in Scotland during this period. This was not the case in England, although Williams notes that such a practice was 'not unthinkable'. Williams investigates whether James applied his ideas about how and when a king should sit in judgment consistently, not just within each country, but also between realms. Such a consideration introduces another unit of comparison to the study: the potential differences between theory and practice. Williams shows that James certainly did seem to act according to some discernible principles applied uniformly in his activities throughout England and Scotland. However, Williams also adds a chronological dimension to his comparative matrix. James's views on certain subjects changed over time, but Williams argues that he nevertheless continued to apply them consistently irrespective of realm: 'The comparative exercise here lets us reach a conclusion which would surely have delighted James himself: in his ideas and practice of royal judgment we have an example of genuinely British legal history.'⁵⁵

Investigating Broader Geographical Areas

Discussion of legal transplants is not confined to the above essays,⁵⁶ although they are the ones that deal most directly with such issues. It is clear that transplants can lead to the implementation of the same legal rules in different places, and another significant theme of the essays in this volume concerns similarities of legal development over a broad geographical area. Attilio Stella's essay examines narratives of legal change and the development of 'feudal law' in Western Europe during the late twelfth and early thirteenth centuries. He focuses on the activities of five lawyers, two from Italy (Obertus de Orto and Iacobus de Ardizone) and three from France (Jean Blanc, Jean de Blanot and Iacobus de Aurelianis), and compares the

⁵⁴ Below, 87.

⁵⁵ Below, 117.

⁵⁶ For example, Cecchinato's essay on Blackstone's use of Civil law principles to address issues arising from the largely customary nature of English law may lead us to ask whether we can see this as a transplant of legal ideas. See below, 140–160.

way in which they related local practice and custom to 'learned' doctrine and written law, particularly that contained in the *Libri feudorum*, a highly influential composite work concerning north Italian custom, produced in various stages between c. 1150 and c. 1250. His conclusion disrupts the simplistic narrative that in this period there was a wholesale replacement of the 'warm natural custom', which reflected the spirit of the people, by the uniform 'cold artificial law' of professional lawyers. Instead, unwritten local legal traditions often survived and shaped Western European experiences of law during this formative period of the *ius commune*.

David Williams likewise considers legal doctrine. He examines the development of the doctrine of radical title – the underlying title of the Crown to Commonwealth land – and the response of courts to the question of whether this title would be burdened by the pre-existing interests of the indigenous population. Three main jurisdictions are considered – Canada, Australia and New Zealand – and reference is made to some Privy Council decisions concerning smaller territories. As Williams notes, 'A reasonably coherent account of legal history on this topic might seem possible, and even plausible, if one focused on the development of the Common law in just one of the three legal systems.'⁵⁷ However, comparison of the case law relating to all these jurisdictions reveals that the development of the Common law in this area has been unsystematic and often directed by policy decisions and pragmatism rather than clear legal principles.

A central, sometimes implicit, concern of Williams's essay is the value that courts have been willing to attach to indigenous peoples' own understanding of their relationship to their land, a relationship not necessarily expressed in legal concepts or even perhaps a form of 'law', familiar to a Common law lawyer. Here then, like Stella, Williams provides another insight into how a developing legal system may (or may not) integrate pre-existing normative structures into its overarching system of rules. This perhaps surprising connection between the two essays illustrates well the creative possibilities of using issues such as 'integration' as a tool for comparison.

Case Law, Precedent, and Relationships between Legal Systems

Williams's and Stella's essays both raise questions about the use of past cases, and how they may be employed either to integrate local

⁵⁷ Below, 261.

circumstances into the interpretation and development of norms, or to ensure the consistent development of legal principles. Case law is most strongly associated with Common law systems, where the doctrine of precedent provides the foundations and framework for much legal development. In contrast, it is often regarded – at least in the Common law world – as less important to Civil law systems. Without deeper comparison, however, this casual contrast between Common law and Civil law jurisdictions may obscure similarities or distort differences.

As a direct response to such a casual comparison, Clara Günzl's essay examines the so-called 'case-law revolution' which took place in Germany between 1800 and 1945. Despite clear doctrinal rules that prior decisions were not formally binding on courts, during this period case law began to play a more important role in the decision making of the German judiciary. In particular, the collection of decisions printed from 1847 to 1944 in 'Seuffert's *Archiv*' did much to increase awareness of previous judicial decisions and the reasoning applied in past cases. Günzl first introduces us to the debates that took place surrounding the use of case law in the period. She shows that jurists recognised the value of taking into account past decisions, but also feared the consequence that an incorrect decision would prevent courts from reaching 'the only true and right solution' in subsequent cases. This discussion naturally invites comparison of how different traditions of legal learning may view essential questions such as the existence of a single right answer to every legal problem, and how legal certainty corresponds to more abstract notions of justice. Günzl then uses a case study to show us how the knowledge of past decisions might, nevertheless, influence the outcome of a case in practice, and how this outcome could, in turn, become part of the collection of case law which circulated nationwide and influenced other decisions. In this sense, these judgments in past cases, *Präjudizien*, 'resemble most closely those of persuasive precedents in Common law countries today'.⁵⁸

While Günzl's essay encourages comparison between Common and Civil law systems, Josev's essay concerns the relationship between two jurisdictions within the Common law world. Her essay examines the period leading to Australian High Court Chief Justice Sir Owen Dixon's statement in *Parker v. The Queen* (1963) that Australian courts should no longer consider themselves bound by English precedent. As the author

⁵⁸ Below, 223.

explains, this came after a period in which the Australian judiciary are usually perceived as having displayed almost complete deference towards the English courts, and the decision has sometimes been regarded 'as the most sensational judicial *volte-face* in Australian legal history'.⁵⁹ However, Josev goes beyond this traditional account and reveals differing and evolving attitudes towards the relationship between English and Australian law in this period. Despite the desire of many Australian judges to maintain the unity of the Common law, Josev argues, considerable tensions existed in the years preceding *Parker*. These arose from differing individual attitudes between judges, as with Dixon's disapproval of Lord Denning's judicial activism in England, from wider dissatisfaction in Australia with some of the directions that English law was taking, and from serious concerns among some of the Australian judiciary about the activities of the Privy Council. Against this backdrop, Josev argues that it is difficult to celebrate the *Parker* judgment as a bold declaration of judicial independence. Rather, it should be seen as the consequence of a 'relatively gloomy period in English–Australian legal history'.⁶⁰ Meanwhile the contribution of elements such as the cooling of Dixon's admiration for Denning re-emphasises the need to consider the contingent as well as the more structural in explaining significant legal change.

Exploring past Comparativists and the Challenges of Writing Comparative Legal History

A fertile alternative approach to comparative legal history is to examine the work of past comparativists. This can help us better appreciate historical understandings of the nature of various legal systems, their relationships to each other, and the bounds and functions of law within these systems. The preoccupations of the past can also aid us in reflecting upon units that may be used in our own comparisons, be they between 'written' and 'unwritten' law, or between 'Civil' and 'Common' law, or between substantive rules and principles.

Several essays in this volume are dedicated to the history of comparative law. Carsten Fischer discusses the way in which the English Common law appeared in the pages of the *Göttingische gelehrte Anzeigen*, a German scholarly journal first published in 1739. A small but significant proportion of its pages were devoted to reviews of books

⁵⁹ See below, 289.

⁶⁰ See below, 304.

of, or concerning, English law. Fischer concentrates on two reviews in particular, both of works published by Göttingen law professors: Christian Hartmann Samuel Gatzert's *De iure communi Angliae*, published and reviewed in 1765; and Justus Claproth's partial translation of Blackstone's *Analysis of the Laws of England*, published in 1767 and reviewed in 1769. Both the content of the works reviewed in the *Anzeigen* and the reviews themselves reveal how English law was regarded and understood in Germany during this period. Fischer points out, for example, that an interest in the applicability of Roman law to English law may be found in the works of both Gatzert and Claproth. In general, however, there does not seem to have been any criteria for the selection of works reviewed in the *Anzeigen*. Nor is there anything more than a modest understanding of English law on display, and furthermore, as we shall see, problems of language affected the nature and quality of the comparisons made between English and German law.⁶¹

Andrew Cecchinato also examines an eighteenth-century attempt to compare English law with that of the Continent. In this instance, however, the individual engaged in the comparison was very familiar indeed with the Common law. Cecchinato's essay explores Sir William Blackstone's attempt to situate English law within the broader legal experience of Western Europe, and thus within a shared human endeavour to give positive expression to the eternal law of God's will. Cecchinato first draws attention to Blackstone's interpretation and grounding of the *ius commune maxim rex . . . in regno suo est imperator* within the English legal system, through which he was able to justify the preeminence of the Common law as a body of 'particular law'. Cecchinato then turns to Blackstone's attempts to reconcile the fact that, while judicial decisions could be taken as strong *evidence* of long-standing custom, it did not necessarily follow that this evidence provided *authority* for the custom. How, therefore, could it be claimed that court decisions had acquired such authority? Again, Blackstone turned to civilian legal sources, comparing the manner in which the English courts dealt with custom to the way in which the emperor had the authority to 'interpret' law with normative force, as exemplified in the *lex Si imperialis maiestas*. In turn, this gave force to Blackstone's view that judges were the 'oracles of the law', a metaphor which itself has roots in classical jurisprudence. Blackstone did not, however, uncritically adopt all aspects of

⁶¹ See below, 22.

European legal thought. His views on the importance of custom within the English legal system led him to view with disapproval how unwritten law, 'approved by the judgment of the people', had diminished in importance by the later years of imperial Rome.

While Blackstone was firmly rooted in the English Common law tradition, the subject of another of the essays, George Harris, had a background in Civil and ecclesiastical laws. Harris was an eighteenth-century civilian who was a member of the College of Advocates and who also engaged in judicial work. Łukasz Korporowicz examines his production of the first English translation of Justinian's *Institutes*, published in the mid-eighteenth century. In particular, Korporowicz draws attention to how the translation itself is accompanied by numerous notes, 'arguably the most significant element of the translation'.⁶² Korporowicz goes on to show that these notes contain references to classical sources, legal and non-legal, different traditions of Civil law authors, and, notably, an array of Common law treatises and works of writers on English law. Harris was not formally trained in the Common law, so the inclusion of this latter material is particularly striking.

Monti's essay concerns the comparative work of Leone Levi, an Italian-born merchant who moved to England at the age of fifteen and later became a jurist, statistician and economist. Levi spent much of his life involved in commerce, and Monti shows how this eventually led to the production of his *Commercial Law of the World*. The first edition of this work, published in two volumes in 1850 and 1852, took a rather different form to the revised version, *International Commercial Law*, which appeared in 1863. Monti points out that the full title of the earlier edition named no less than fifty-nine 'countries' as the subject of comparison. The later work named only twenty-five, although the words 'and others', added to this list, also suggest that more might have been included. Together with this change, the geographical focus of the study changed somewhat. Furthermore, the first edition set out in tabular form the laws of various countries, polities and regions which were to be compared. The plan was abandoned in the later work, and a comparison was made in discursive form.

A comparison of these essays is instructive. For one, they reveal different motives for the past employment of the comparative method. Cecchinato shows how Blackstone used comparison for justificatory

⁶² See below, 130.

purposes; he sought to explain and legitimise aspects of English law. Korporowicz, on the other hand, shows that Harris intended his translation to make the *Institutes* more widely accessible in England, and that the copious notes that accompanied the translation were intended to arouse curiosity about English law. Levi's comparative works on mercantile law were likewise intended to educate, but Monti makes it clear that they were also intended to aid merchants in their dealings overseas, and to act as a step towards an international commercial code.

These essays, furthermore, provide a historical perspective on the practical challenges faced by those who have attempted and still attempt to employ a comparative method, as raised earlier in this introduction. In doing so, they encourage reflection about the process of comparative work. The issues that can arise concerning language and terminology are clear. Ideally comparatists would be highly skilled linguists, but Fischer's, Korporowicz's, and Monti's essays also highlight the importance of accurate translations for the study of comparative law. However, the accurate translation of unfamiliar and highly technical legal material is no easy task, especially when the subject matter seems so alien to the reader. These linguistic challenges are made clear in Fischer's essay, which suggests that the eighteenth-century German jurists did not enjoy their first contact with what Maitland would describe as the Common law's 'whole scheme of actions with repulsive names'.⁶³ Gatzert, in particular, complained (perhaps not unreasonably) about the 'adventurous and un-English' nature of the English legal language.⁶⁴ Fischer also notes how attempts made in the *Anzeigen* to explain the English system through analogies and descriptive terms familiar to German jurists would, in fact, have seriously misled the German reader. Here, then, is a very clear example of comparison being made through a familiar frame of reference which has the effect of distorting one's understanding of the subject matter.

Also clear is the problem of the sheer bulk of research. Blackstone had the luxury of being able to select the principles he wished to use for the purpose of his argument. In contrast, as Monti shows, Levi presented himself with the enormous task of producing a comprehensive comparison of the mercantile law of as many as fifty-nine countries. The later reduction of this number highlights the sheer work required if such an approach is to be successful, where 'a careful statement of each system by

⁶³ Maitland, 'Why the History of English Law is Not Written', 486.

⁶⁴ Below, 176.

itself' is indeed the necessary starting point.⁶⁵ The amount of labour required for comparative work is also evident from the reviews contained in the *Anzeigen*. For example, Fischer notes that in Gatzert's review (of his own work) the author questions whether he will continue down 'this arduous path'.⁶⁶ Harris's work, as described by Korporowicz, represents an intermediate approach, sitting between those taken by Blackstone and Levi. Here, a detailed commentary is provided on selected parts of a specific text. In his essay, Korporowicz clearly illustrates the astonishing depth and breadth of these comments. Still, Harris's aim was to pique his reader's interest and stimulate comparative thought; comprehensive study of several bodies of law requires still greater labours.

Perhaps just as importantly, comparative legal history may provide salutary lessons for modern comparative endeavours. It may seem obvious to note that the method employed must fit the aim of the project. However, Monti's essay shows that this may not be achieved as easily as one might hope, and that problems can arise because of assumptions that one makes about one's audience and, perhaps, oneself. She argues that the tabular comparative format of Levi's first edition of his *Commercial Law* might have been readily accessible to Continental lawyers, but to British lawyers, 'the presentation might not have been self-explanatory, and would most likely have appeared complicated and somewhat cumbersome'.⁶⁷ In contrast, the more discursive revised edition was 'better suited to the needs and expectations of an English-speaking readership'.⁶⁸ Significantly, Monti argues, 'Levi was now a British citizen who was attuned to the needs of the Empire and its colonies; he was no longer an "outsider"'.⁶⁹

Study of Levi has taken us back to James VI and I and consideration of the significance of the transplant of an individual, demonstrating how this introduction's arrangement of essays into groups is just one of many possible patterns, each capable of fertile outcomes. The valuable quasi-Popperian falsifying role is but one important function of comparative approaches to legal history. Their falsifying role, for example in breaking down assumptions of uniformity within systems, coexists with producing illuminating questions and improved hypotheses. They can generate a

⁶⁵ Above, 11.

⁶⁶ Below, 174.

⁶⁷ Below, 247.

⁶⁸ Below, 248.

⁶⁹ Below, 249.

more precise understanding of particular rules or concepts, as understood by contemporaries. They can refine our understanding of historical attitudes to law and the legal systems or doctrines that are being compared. Moreover, the pluralism of approach advocated above can produce stimulating conversation between different levels of study, from the specific to the deeper structures of Milsom's 'elementary legal ideas' or Kennedy's 'subsystems' of legal consciousness, and with a particular focus on processes of legal change.⁷⁰ Such investigation and such conversation can provide fresh perspectives that do not necessarily require the abandonment of a previous narrative, but instead suggest improvements to accommodate different evidence and different ideas. And perhaps just as importantly, comparative legal history may provide salutary lessons for modern comparative endeavours.

⁷⁰ See above, 10–11.