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# 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<sup>1</sup>

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## 1 Introduction: Waiting for Zimmermann

Legal history handbooks pay almost no attention to methodology, which makes it hard to find any general statements in them about the relationship between legal history and comparative law, whereas these are very common in books about comparative law. Yet, like their comparatist counterparts legal historians will agree that legal history and comparative law are two sides of one coin. Both expand beyond their own place and time, the difference only being one of orientation, the legal historian travels in time, whereas the comparative lawyer travels in space. However, although they have many things in common, there used to be little cooperation between legal historians and comparative lawyers. Except for the study of Roman law, legal history was first and foremost national legal history, as becomes clear in titles like *Deutsche Rechtsgeschichte* and so on, whereas comparative lawyers in many cases were only paying lip service to the link with legal history. Once they had made the obligatory remark about the close relationship between legal history and comparative law, references to the former were only superficial.

In this climate, there were few initiatives which really brought legal history and comparative law together, and even if efforts to do so were made, they had little impact. The best example of that is to be found in the work of the Belgian legal historian John Gilissen, which was probably the best gift from legal historians to comparative law ever. His own handbook, *Introduction historique au droit*, was to some extent a comparative legal history. Comparative lawyers could start with this and then go on with Gilissen's greatest legacy, the volumes of the *Société Jean Bodin pour l'histoire comparative des institutions*, in which certain topics of legal history, ranging from the legal status of women to the great empires, were studied from a universal point of view. The starting point was to find a definition of the subject to be studied which would be uni-

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versally valid, so that one could be sure all contributions to a volume would be dealing with the history of the "institution" under discussion (the term is not really apt, as one can hardly call women or children institutions, although they were also studied) in a certain country or region. The next step was to bring the results of these small studies together into a more general synthesis, a comparative study for a certain period or a certain part of the world. The final step was a general synthesis which sketched the possible variations of the "institution" and the evolutions it had undergone all over the world. Comparative lawyers and legal historians who wanted to explore the legal history of other countries on their own, could turn to another of Gilissen's projects, his *Introduction bibliographique à l'histoire du droit et à l'ethnologie juridique/Bibliographical Introduction to Legal History and Ethnology*, a huge series of bibliographies of the legal history of the world's countries. Remarkable about all this was not that Gilissen was able to inspire so many colleagues to contribute to his projects, but the lack of response they engendered. While comparative lawyers never used the treasure houses Gilissen set up for them, legal historians used his work primarily as a source of information for the study of their own law and not as the starting point for comparison.

However, times have changed and in the last fifteen years comparative legal history has become fashionable. True, national legal history will not disappear (in fact, its greatest monument, the *Oxford Legal History of England*, is still in progress), but we now sport a law review, some congresses, surveys of literature, books, even series of books, which focus on law from a comparative and historical point of view, finally ending the isolation of comparative law and legal history. Their importance should not be overrated, as in some countries national legal history is still firmly entrenched. France is an example of this, with a legal history which is still a national legal history, completely in accordance with the strong national bias of French legal scholarship in general. This has led to strange results. For example, a scholar wanting to study French legal culture in the nineteenth century will find that some of the best books on this subject have been written by Germans, but, unless their results have been summarized in an article in French, many of their French-speaking colleagues will be unaware of their existence.

Although it is easy to find practitioners of the new comparative legal history in any country and sometimes much earlier than in Belgium, this field of study has become dominated by Germans. In fact, most of the literature about this subject is in German. Moreover, many of the new paths lead back to one man, Reinhard Zimmermann, who has become Europe's leading legal scholar. Apart

from his own prolific publications, the *Zeitschrift für Europäisches Privatrecht* is his brainchild, and likewise the *Deutsche Rechtshistorikertag* in Regensburg where the main topic was legal history and comparative law. Many other initiatives may also be attributed to him. Thus, although it is not Reinhard Zimmermann who "invented" comparative legal history, which has many more fathers, he is to be thanked (or to be blamed, depending on one's point of view) for bringing it to the forefront of the intellectual debate among legal historians and others. Consequently, any debate about the relationship between legal history and comparative law turns into a debate about Zimmermann.

His success is most of all due to the hope, the siren song (once again this depends on one's point of view) he offers to legal historians and comparative lawyers. A very simplistic view of his ideas could be this: Europe had one law in the past, the *ius commune*, which should be our source of inspiration in developing a new common law for Europe. To make that possible legal history should become comparative, its main task being to show us the common roots in the old *ius commune* of the legal systems of the European Union member states. Zimmermann's attraction for the comparative lawyer is that he offers a justification for legal unification, the common past. For the legal historian Zimmermann has an even greater appeal, because, if the key to the future is our past, then legal historians, the guardians of the treasure house of the *ius commune*, can become the new stars. However, there has been much criticism, even open and undisguised hostility to Zimmermann's ideas, which probably will be a great source of fun for later historians, in that the same man is nowadays seen as both the best and the worst thing ever (or at least in our times) to happen to legal history.

However, some criticism of Zimmermann is not so much criticism of Zimmermann himself as of the simplified lessons overeager colleagues have imparted from his writings. For example, there is now a whole body of literature stating that there was no *ius commune*, that in the past there was not a common law of Europe in the sense that everywhere in Europe the same norms were applied. Strange enough, by some this is seen as an attack on Zimmermann, but he has made clear, more than once, that what he wants is a re-europeanisation of legal scholarship, a new common legal science and legal culture, with something like a new codification for Europe only coming after legal scholars have laid the groundwork. His corresponding view of the *ius commune* is also of a commonality of legal culture and legal scholarship in

which the legal grammar, but not the legal rules, is common. Thus, authors who stress this have more in common with Zimmermann than they may think.

Some critics of Zimmermann say that he ignores the context of the legal rules he studies. This is true in many cases, but once again, if one reads his own writings, more especially his foreword to his *Law of Obligations*, it is very clear that he has not told all he should: "[T]his book is rather short", is probably one of the greatest understatements in legal history, as the book has 1305 pages.<sup>2</sup> If he had also described the larger context, how many more pages would he have needed? Moreover, it is amusing to note that the same people who claim Zimmermann ignores the context of the legal rules he studied, themselves ignore the larger context of Zimmermann's work in German legal history, legal history in general and in comparative law. Therefore, the next paragraphs will deal with all these, but first should come a context which is even less known, the Dutch debate about comparative legal history. This debate should come first anyway, as it started before Zimmermann made his entrance upon the scene of European legal science.

## **2 The Dutch context: The Ankum-Zwalve debate**

To German legal historians there is no doubt that the controversy about the new *ius commune* and comparative legal history started in 1992. Helmut Coing may have been thinking along the same lines, but the real breakthrough came in 1992 when Zimmermann's *Law of Obligations* was published in Germany and the author held an impressive speech at the *Deutsche Rechtshistorikertag*. Thereafter, the debate is a German one, with foreign scholars being relegated to the sidelines. Yet, when one looks at the debate from a Dutch point of view another view is also possible. Then it is remarkable how much the German debate was determined by Dutch concerns. Thus, to properly understand the German debate, one must be aware of the Dutch background.

The link with the Netherlands came about partly because of Zimmermann's work in which South-African Roman-Dutch law plays an important part. Thus, he has published extensively about Dutch law and consequently his work was and is well-read in the Netherlands. His *Law of Obligations* was already popular in the first, South-African, edition of 1990. But more importantly, some publications of Zimmermann were written at the request of Dutch publishers, a

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2 Zimmermann claims the book has 1241 pages, but to be pedantic one should add the 64 pages with Roman numerals preceding the rest of the book.

well-known example being his article in the book *Towards a European Civil Code*. Unfortunately many, though not all, publications in the Dutch debate have, for linguistic reasons, found a limited audience.

The popularity of Zimmermann's writings in the Netherlands was partly due to their use as ammunition in a long debate which was dividing and still divides Dutch legal historians, and which may be summarised as Groningen versus the rest. The so-called "Groningen School" originated with H.J. Scheltema, who, when confronted with the sad fact that from 1971 Dutch law students no longer had to know Latin, reformed the teaching of Roman law at Groningen. Henceforth, at that university Roman law ceased to be a historical discipline, and would instead focus on the continuity in the development of law, that is Roman law as it was understood at the time of the great codifications. Scheltema's students and successors Zwolve and Lokin further developed these ideas in Zwolve's inaugural address in 1988 (before Zimmermann's breakthrough) and in a short editorial of Lokin in a Dutch law review in 1992. Zwolve pleaded for a comparative law which would take the common historical past, the *ius commune*, into account, while Lokin pleaded for a legal history with a comparative approach through the *ius commune*.

Zwolve elaborated upon this in an article for the Netherlands' most read law journal *Ars Aequi*. In the past there were already two views about teaching Roman law, namely the *mos gallicus*, the humanist method, which studied the Roman law of antiquity, and the *mos italicus* of the commentators and their successors, who studied Roman law as it was practised in their own times. What Zwolve witnessed was that many of his colleagues were teaching in a neo-humanist way, with their attention mainly on the Roman law of antiquity, which no longer could captivate the interest of students. This way, Roman law was bound to disappear from the law schools. To make it survive, one has to opt for a new *mos italicus*, one has to teach Roman law focusing on the present, laying bare the common origins of today's legal rules in the common origins of the *ius commune*. Zwolve's article was, in fact, an attack upon his colleagues: Teach my way, or you'll disappear.

Understandably, it was followed by a reply from one of the most senior of them, Ankum. In his opinion, today's law should not determine the teaching of legal history, as legal history should most of all teach the student that law is a historical phenomenon always changing because of social, economic, religious and philosophical influences. Even the study of obsolete institutions, like slavery, is important, as it leads us to a better understanding of the phenomenon "law". Another point of criticism is that Zwolve's ideas are just

impracticable. Roman law is no longer in force, thus one cannot teach it as if it were. If one does, what one teaches is not Roman law, but a construct, which neither existed in the past (Zwolve having invented it), nor exists in our times (Roman law no longer being in force).

Strange as it may sound, both Zwolve and Ankum saw in Zimmermann's work an argument for their theories. The Dutch law review which published their articles therefore solicited a third article, in which Zimmermann, very courteously, stated that everyone had to be free to make his own choice. Yet, he makes clear that law students are not interested in the Roman law of antiquity and from the conclusion of his article and also from what he writes elsewhere, one can only derive that he agrees with Zwolve.

The importance of the Ankum-Zwolve debate is that too much in the current debate concerns science, not teaching. Although most scholars do not like to be reminded of this fact, unless one works at the Max-Planck in Frankfurt, a legal historian's heaven, no law school is willing to keep a chair in legal history in existence if its occupant is not teaching. Therefore, if one wants to survive, one has to take one's students into account, and on that score Zwolve is right. Recent evolution in his own Netherlands and Dutch-speaking Flanders (where the position of Roman law is of course influenced by what happens in the Netherlands) have shown that, whatever the rights or wrongs of Zwolve, at those universities where Roman law is not taught his way, it has either been abolished or is in danger of being abolished. Moreover, there is not much being done by historians to offer a refuge to displaced legal historians, who have so faithfully put history before law. Thus, even if one does not like the new *ius commune* at all, those who do not teach it will lose their chairs (or rather, their chairs will be abolished when they retire) and consequently any purely historical research will disappear. Would it then not be a better alternative, even for opponents, to teach it, to add one's own critical notes to it, and then do as one pleases in one's research? *Primum vivere, deinde philosophari*.

### **3 The German context: Comparative legal history as a Pyrrhic victory of the Romanists**

In the short run, comparative legal history will be a very good survival strategy, but there is also the long term to be considered and for that we should study the German context of this debate. Zimmermann himself has often referred to Savigny and more than once the comparison has been made between today's Europe and Savigny's Germany. Our debate about a new codification for Europe is like the 1814 debate between Savigny and Thibaut about a new

codification for Germany. Savigny and his idea of law, his historical school, were to dominate German law for the rest of the century. The losers and their pupils (Thibaut, Hugo, Feuerbach, Gans) had been advocates of a universal legal history, but Savigny's triumph meant another view of legal history triumphed, in which law, and thus by definition, legal history had to be national. If law is the product of the *Volksgeist*, the people's spirit, the historical experiences of a people, it can only be national. One should not exaggerate this, as Savigny was a very versatile scholar who does not easily fit into one category only. His *Das Römische Recht im Mittelalter* contains comparative elements. The national element was more present in the studies of his pupils. Once again, however, there are exceptions, like Warnkoenig, a cosmopolitan scholar, who was very influential in France and who may be seen as the first Belgian legal historian. Moreover, in itself the theory of the *Volksgeist* has an opening for comparative law. The history of any people shows time and again that its law has not developed in noble isolation (although English legal historians have long thought so about their common law), but through contact with others, peaceful or otherwise. In some cases this is so blatant that it is very hard to ignore. For example, Belgian legal historians have always been interested in French law, because under the French occupation by the revolutionary armies and later under Napoleon, their old local law was abolished and replaced by French law. Therefore, to a Belgian legal historian, French legal history may be even more important than his own.

Among the successors of Savigny the first to realise that legal history should include the study of foreign legal history were the Germanists. To a large extent this was out of necessity, because a lack of sources made it inevitable that a student of any Germanic law would turn to the texts about other Germanic laws and to the sources of Scandinavian law. Yet, the comparative element remained limited, as only Germanic laws (or at least laws perceived as such) were taken into account. The Romanists followed later, but they too turned to the study of non-Roman law in antiquity better to understand its influences upon ancient Roman law. In fact, the comparative aspect became so important that some Romanists left their field to become founding fathers of comparative law.

Although the Germanists were the first to enter the comparative arena, comparative legal history is nowadays mainly seen as a Romanist undertaking. There is a link between legal history and comparative law because today's European codifications have a common origin in Roman law. That comparative legal history is so Romanist in outlook can be explained by the general evolution of the Germanist-Romanist debate. Already in the nineteenth century

the Germanists and Romanists were fighting about what the new private law of the unified Germany should be. The final result, the *Bürgerliches Gesetzbuch*, was a clear victory for the Romanists, but the Germanists were later to gain the upper hand since the Nazi's, whom the Germanists eagerly supported, were against Roman and for Germanic law. As long as Hitler was in power, this worked, but the German defeat in World War II also meant the end of the Germanists, as only one great Germanist had remained aloof from the Nazi's. Thus, the day had come for the Romanists and they did not wait very long. Already in 1947, Koschaker published his *Europa und das Römische Recht*, with this central message: Europe had one law in the past, the *ius commune* which was based upon Roman law, and therefore there is only one law which can unify Europe again: Roman law. It took some time for this message to be heard, but Koschaker's book is now the source of inspiration of Zimmermann, Zwalve and others.

Comparative legal history thus belongs in a wider Romanist context and that is visible in discussions about it in which Roman law and legal history are at times used interchangeably. However, they are not interchangeable. There is more to legal history than Roman law. One may even say that Roman law is the least important element of European legal history, because before 1500 the *ius commune* (apart from the canon law of matrimony of course) was mainly a Mediterranean phenomenon and even thereafter, in many parts of Europe, Roman law was secondary. Customary law dominated the rules regulating the possession and inheritance of land, and these were of overwhelming importance in a society in which land was the main source of wealth and inheritance the normal way of acquiring it. As movable property and contracts were less important, they, the crumbs of the table, could be left to Roman law. The Romanist vision has become even less defensible now that countries which were never part of the *ius commune* have joined the European Union. How do they fit into the story? Another problem is that recently the view has been defended by Lupoi that there was a common law of Europe even before the *ius commune*. If this is true, why not also take this "*ius commune* before the *ius commune*" into account? Yet another possible objection against the Romanist perspective is that it reduces legal history to the history of private law, thus ignoring public and criminal law. Last but not least, whatever else it may be, Roman law is old law and, although many legal rules are old, not all of them are. For example, the Roman jurists never wrote anything about downloading music files from the internet and neither did the glossators, commentators, humanists, natural lawyers or Pandectists.

The latter objection is the most easily countered. The *ius commune* was very flexible, constantly adapting to find new answers to new problems, as it did when it developed international private law to deal with the multitude of legal systems in politically atomised medieval Italy. It is this attitude more than anything else we should copy. Zimmermann pleads not for the old *ius commune* as such, but for a *usus hodiernus Pandectarum*, a contemporary use of Roman law. The other objections, that many things are not studied, can also be countered. Zimmermann himself has stressed that one should avoid the error of only looking at Roman law and its development. He pleads for research that would bring these other aspects to light. One may blame him for not making this call more often and more explicitly. However, we should blame ourselves even more for not writing counterparts to his "big blue book" about customary law, the history of criminal law in Europe, the influence of Byzantine law and so many other great themes, showing that there are common origins other than Roman law or maybe showing that sometimes there are no common origins. If we do not, the Romanists will indeed triumph, but more because of a lack of opposition than for any other reason.

Once again, in this discussion, we must turn to practical matters and consider what this triumph will mean in the end. Suppose Zimmermann is followed, what will this mean? At first, it will only have positive results, the comparative legal historian will become the new star of the law faculties, but his success will sow the seeds for his defeat. If a common European legal science will rise again, over time this will lead to new codifications or leading cases, not only uniting legal culture, but also legal rules. Once this legal unification has become a reality, who will have need of legal history? Will it be discarded, relegated again to the backrooms of academic life? Here, one has a historical analogy of the last great triumph of the Romanists which ended in disaster. In 1900 the *Bürgerliches Gesetzbuch*, enshrining Roman law, came into force in Germany. Windscheid thought this would free Roman law which no longer had to be useful and thus could be studied for its own sake. He envisioned lecture halls becoming filled with more students than ever before, as they now would have a chance to really get to know the beauty of Roman law. Alas, instead, students and law practitioners in general turned away from it. In the short run, the new *ius commune* is a good survival strategy, but in the long run it may be a dead end. However, already in sixteenth century France there were authors looking to unify French law, and their dream was only realised more than two hundred years later. The Dutch started the work on their *Nieuw Burgerlijk Wetboek*

(*New Civil Code*) in 1947, and only finished in 2002.<sup>3</sup> The short run may in terms of human lives be so very long that, for several generations, this will be of no real consequence.

#### **4 The context of legal history: The fight about the soul of legal history between applicative and contemplative legal history**

Although Reinhard Zimmermann is extensively read and discussed by comparative lawyers and legal historians alike, one should keep in mind that he is not interested in comparative law, or legal history as such, but in modern legal scholarship. He wants to bring about a re-europeanisation of legal scholarship by showing the common roots of today's European legal systems. Therefore, his comparative legal history is not about comparative law or legal history. Even so, his work has spawned a huge debate, or rather a bitter fight, about what one might call the "soul" of legal history, and it is to this aspect that we have to turn next.

A starting point may be found in an article by Kötz entitled "Was erwartet die Rechtsvergleichung von der Rechtsgeschichte?" The question itself seems to determine the answer, namely that legal history should do something useful for comparative law by helping comparative lawyers in restoring Europe's legal unity, by showing the common roots of today's national legal systems in the old *ius commune*. This call of Kötz upon legal historians to contribute to creating a new legal history led to a huge debate. Those who were willing to ally themselves with comparative law defended the view that codification had been a tragedy for legal history. Roman law no longer had to be useful for contemporary law and could finally be studied for its own sake, that is, "classical" Roman law in its historical context of ancient civilisation. However, this emancipation of Roman law has led to the isolation of legal history and contemporary law from one another, the contemporary lawyer no longer being interested in legal history and the legal historian writing about things which were completely irrelevant to his colleagues of contemporary law. This emancipated legal history was and is called neo-humanist history. Because the old humanists were among the most erudite scholars the world has ever seen, in part this term was a compliment to the new study of Roman law, honouring the great achievements the neo-humanists had made. However, its main goal

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3 Officially 1992, but one part only came into force in 2002. One may forgive the Dutch who had to wait so long for referring to 1992.

was to tar the scholars thus labelled. Like the humanists of old, they produce an excellent legal science which is completely removed from practical concerns.

However, the comparison with the old humanists should allow us to see this as a simplification. True, the humanists wanted to study Roman law in antiquity and some of them were living in ivory towers, but many of them were the legal equivalent of Dr. Jekyll and Mr. Hyde, studying ancient Roman law at the university on the one hand, and applying their legal skills in the courtroom on the other. Many humanists were "split personalities" and one should take this into account when talking about the new humanism. The already-mentioned Ankum-Zwolve debate was about teaching, which should, according to Zwolve, not be neo-humanist. Unfortunately, the disappearance of neo-humanists teaching in the Netherlands seems to prove that he may have a point. (Unfortunately, because even Zwolve would not mind being wrong if this would mean more chairs in Roman law surviving.) However, research and teaching are two different worlds and one can easily imagine a scholar writing neo-humanist articles, but teaching his students something else.

Once teaching and research have been shown to be different, and the problem of teaching already having been addressed, one has to focus on the question of the direction research should take. Before one does so, it would be best to get rid of the neo-humanist label, which is too much a Romanist term, while the question whether legal history should or should not be useful is a much more general problem. Instead, one should use other labels: Applicative versus contemplative legal history, the former wanting to be useful, the latter stating that legal history should be studied for its own sake. These attitudes have once been summarised as "Dienstmagd oder Nichtsnutz" ("servant or a good for nothing"), a translation which does no justice to the force of the negative images the original German evokes), but that would be unfair to either of them. In fact, it would be better to say that for applicative legal historians legal history is a part of legal science, and consequently has to be written with one eye on the concerns of contemporary law. For contemplative legal historians legal history is history, it should be an autonomous science which takes no account at all of the needs of contemporary law. In fact, doing so should be an anathema, because then one would sin against the dictates of modern science. This last idea has important consequences, because it means that for contemplative legal historians their view of legal history is exclusive, it is the only right way of doing things. In their opinion, applicative legal history has no right to exist at all. In contrast, applicative legal historians have no problem with the coexistence of applicative and contemplative legal history, leaving every

legal historian free to choose what pleases him most. Kötz goes even further, saying that scholars should first of all study what offers them the most satisfaction, any practical use of the research being only secondary.

Unlike applicative legal historians, contemplative legal historians are not willing to coexist. They are more radical and this blinds them to any nuances. For example, contemplative legal historians tend to label their opponents as neo-Pandectists. In itself this is wrong because, like the term "neo-humanist", this label should be rejected as it applies only to legal historians who study Roman law, and ignores that applicative legal history may be practised also outside Roman law. Another problem is that neo-Pandectism is used to lump together scholars with very different ideas, like Zimmermann and Knütel. The Pandectists considered Roman law to be *ratio scripta*, written reason, and thus superior to any law. They may rightly be criticised for presenting as Roman law their own abstract concepts which were far removed from the casuistic world of Roman lawyers. Knütel, who still sees Roman law, or rather the current interpretation of it, as *ratio scripta*, which should be used to correct contemporary law, may deserve to be called a neo-Pandectist, but not Zimmermann. The latter expressly warns against the errors of looking at Roman law only and of thinking that a solution is right because the Romans defended it. Once again, the criticism of Zimmermann is directed against the wrong person.

Even so, a fundamental question needs to be answered: Is applicative legal history in itself wrong, not scientific? If contemplative legal historians take their own claim that legal history is a part of history seriously, then they cannot object to turning to the literature of historians about this subject. Post-modern theoretical history has led to a bewildering flood of publications, but it is interesting that there is general agreement that there is not one voice of history, but several. There is also agreement that a value-free historiography is not possible, that objective history is a myth and that every historian should realise that he only tells his story of the past, as determined by his own views. Therefore, he should have the honesty of expressly stating these. By this yardstick, Zimmermann, who has made no secret of his goals, could be seen as a better historian than some of his opponents.

Of course, this does not have to mean that all applicative history is justified. If the historian has views which are a danger to the "Rechtsstaat" and human rights, his use of legal history to further these views is an abuse, as in the case of a negationist writing about the holocaust. Applicative history in itself is not bad or wrong, but the goals it serves may be and, therefore, one should

scrutinize what Zimmermann's goals are. A common mistake is to think that his goal is unification of European law. However, this is not completely true. European legal unification is happening with or without Zimmermann. His contribution shows that, left alone, without any input by legal historians, European legal unification will be the work of bureaucrats in Brussels, which will ultimately lead to an unpopular (in both senses of the word) law. To avoid this, legal historians have to advance the legal tradition, thus ensuring that it be taken into account in creating a new common law for Europe, which will not be seen as a foreign body and will be more readily accepted. If legal history can help in creating a more democratic law, what would prevent legal historians from participating in such a process?

The latter argument may not convince contemplative legal historians, but certainly in Germany, legal historians should wonder if it is always the right thing to stand on the sideline. The career of Heinrich Mitteis (not to be confused with his father Ludwig), could serve as a warning. As was sometimes evident in his publications, he was the only leading Germanist not to follow Hitler. The other Germanists in the Hitler era developed the myth of the "Germanische Treue": Like the followers in the early medieval Germanic warband had been faithful to their leader, thus the German people had to be faithful to the "Führer", the leader of the German people. Heinrich Mitteis had a more historically correct view of things. Being "Treu", faithful, was not the same as being obedient. At times one even had to be disobedient, because when the lord, that is the ruler, acted against a higher norm, the vassal not only had a right, but also a duty to resist actively. Mitteis, who wrote this in 1933, did not pertinently point out the practical consequences for his own times and even toned down this idea in a 1940 publication. Thus, the historian is left to wonder what would have happened had he been more active. Many German army officers later justified their cooperation with the Nazi's by pointing out that they had sworn an oath to be faithful to Hitler and that, in good conscience, they could not act against it. Had Mitteis's ideas been more widespread, would they have ensured that the conspirators who tried to eliminate Hitler in World War II would have found more support? Any answer will have to remain speculation, but one may keep wondering.

## **5 The context of comparative law: "De-europeanising" comparative law**

Zimmermann once deplored the fact that legal historians do not read journals of comparative law. There are some notable exceptions, but, in general, he is right. This is rather ironic because his critics, by not taking his advice to read

more about contemporary law, have largely remained unaware of some current evolution which favours their views. For example, there are now also comparative lawyers who propagate the view that comparative law should direct itself more towards the social sciences, and be less oriented towards the needs of legal practitioners. However, apart from showing that the applicative versus contemplative debate is not limited to legal history, this has not much relevance for legal historians.

This may not be said of another new trend, namely the de-europeanisation of comparative law. Zimmermann's or Kötz's comparative law is thoroughly European. Its goal is to find a new common law for Europe. This European bias may be found in all the classic handbooks on comparative law, in which the major legal families of the world are all European and the rest of the world is relegated to a few pages at the back. This approach is, however, now coming under attack, most of all in the United States. The great comparative lawyers there used to be German emigrants, or their students, who developed a comparative law determined by European viewpoints, and which the émigré lawyers had been unable to shake off. It was made for Europeans and did not fit Americans, and does so even less today. Therefore, American lawyers are now looking for a new model which corresponds better to American realities. Other scholars go even further and are trying to develop a new comparative law which fits global needs. There is no consensus about the new paradigm yet, but its contours are becoming clearer, and one element is that European law is gradually being seen as just one legal culture/tradition/family (the latter term depending upon the author). In this new order, Zimmermann's comparative legal history is a comparative legal history of Europe only, or even worse, an instrument for bringing about European legal imperialism.

When one looks at the task of the comparative lawyer, it also becomes clear that Zimmermann's comparative legal history belongs to a certain stage in the history of comparative law which was directed at European concerns. For a long time this comparative legal history was focused on finding differences. The post World War II European comparatists looked for similarities and Kötz and Zimmermann fit well into that pattern. Nowadays, in Europe, the dominating tendency is still to look for similarities, to look for what we have in common, and it has become almost politically incorrect to look for differences. However, outside Europe the winds seem to have turned again. The idea that law is culture has become a cornerstone and as such any perceived similarities or convergence of legal systems are only superficial (a view which, in Europe, has found a staunch defender in Legrand, a Canadian working in Europe). Therefore, the comparative lawyer should be a friend of diversity, not of unity.

It needs to be stressed that a new comparative law is still in the making. Nevertheless one cannot deny that Zimmermann's programme belongs to a European view of comparative law which is no longer unchallenged. In fact it would be more accurate to call his project a "European comparative legal history", as it serves only those comparative lawyers who work within the European legal culture.

## **6 Turning the tables: What can comparative law do for legal history?**

If one looks at the contexts of Zimmermann's ideas, as outlined above, it becomes clear that even though he wants to unite comparative law and legal history, his work is better at home in legal history than in comparative law, as if legal history has something to offer to comparative law, but there is little the latter can offer in return. One should therefore ask: What can comparative law do for legal history? Any scholar looking into this soon finds out that most publications about the relationship between comparative law and legal history go one way: What can legal history do for comparative law? There are few publications going the other way round. Moreover, they are not always helpful. Graziadei, for example, claims that comparative law can help the legal historian to a better awareness of two facts, that he is himself part of a national legal tradition and that many legal rules come from elsewhere. However, to prove this he refers mainly to comparative lawyers who are legal historians, like Watson, Gordley and Zimmermann. Any student of legal history who has a good teacher (or if not, who reads handbooks like the ones written by Koschaker, Wieacker, Van Caenegem, Tamm, Stein, Hamza and so on) will not need comparative law to know that he is part of a national legal tradition which has been formed by outside influences.

If one wants to find out what comparative law can contribute to legal history, one should look at the methodology of comparative lawyers. At first sight, this looks to be very promising. All the major handbooks, except for the overrated David-Brierley, contain a lengthy introduction which deals in detail with the methodology of comparative law. To young law students this may seem impressive, but to any trained legal historian the methodology of comparative law is rather shallow. A quote from a recent article about it in what is now the leading law review in the field ends with this remark: "The foregoing nine principles comprise, I believe, the basic elements of the comparative method for studying law. The method is not complicated. In fact, it is so simple that I for

long have hesitated to dignify it with the term 'method'.<sup>4</sup> The comparative method is still in its infancy (some comparative lawyers are not even sure whether comparative law is a method or a science) and legal historians are better advised to take their methodology from the original texts of social scientists than to learn them second hand from comparative lawyers. Besides, at times the latter's theories may only lead legal historians astray. Cordes has critically analysed the idea of Zweigert and Kötz that, in doing comparative research, there is a *praesumptio similitudinis*, a presumption that although legal systems may be different, the practical results are the same. A legal historian accepting this point of view starts his research with a prejudice, and may well ignore certain historical realities, like the fact that a problem which exists nowadays did not exist in the past, and vice versa. For legal history, the *praesumptio dissimilitudinis* would be much better, starting from the assumption that the past is not like the present. With Cordes, one can only be disappointed about what comparative law has to offer: Almost nothing. Even those who write a comparative legal history can do little with comparative law. Gilissen's work, mentioned at the beginning of this article, owes more to Max Weber (who, himself, had been trained as a Romanist) than to the methodology of comparative law as such.

Nevertheless, sometimes comparative law can be useful as a source. Comparative literature of the past, like the writings of French lawyers who compared Northern French customs, the German "Differentienliteratur" or old editions of David or Zweigert and Kötz which mention the now defunct socialist legal family, form a good starting point for any research of past legal differences, but then they are useful only in the way that any book – once it is outdated – becomes a historian's source.

It seems as if there is nothing comparative law can offer legal history, but one exception should be made. Comparative lawyers have been very active in developing taxonomies, classifications which are useful tools in orienting one's research. Best-known are the so-called legal families, groups of legal systems which share common characteristics because they all originate with one parent legal system. The comparative lawyer can limit himself to studying the parent legal systems, knowing that others are less important. There has been a lot of criticism of the concept of legal families and even Zweigert and Kötz who have been the great champions of it, have criticised it. However, the criticism is directed against the popular taxonomy which is outdated (too Eurocentric,

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4 John C. Reitz, "How to do Comparative Law", *American Journal of Comparative Law*, XLVI, 1998, 635.

reflecting a cold war ideology with the special family of socialist law, neglecting too much the element of culture, and so on), and not against the principle of taxonomy itself.

Legal historians have bothered less with taxonomy, in many cases copying the taxonomies of comparative lawyers. This is not a problem for the period after 1800, where one can still work with the old legal families, but it would be useful to develop taxonomies for the periods of pre-1800 history, for example, one which would, for the early modern period, express the division existing in the *ius commune* between Catholic and Protestant countries. This would be even more important for customary law. One should try to find out more about which clusters of customary law existed. Examples to be followed are the studies of Belgian, Dutch and French historians about inheritance and matrimonial property law in the Southern Netherlands and Northern France. There were hundreds of local customs, which made it hard to study them. The French scholar Yver (who also studied Western French customary law) was able to distinguish two groups of customs, the Flemish and Picard-Walloon customs. Though he could have chosen better names and the distinctions were less sharp and more fluctuating than he assumed, Yver's work was a breakthrough because it now became possible to look for explanations for these differences. Though these distinctions have not always been convincing, they have greatly stimulated research about customary law in the Southern Netherlands and Northern France. As this example shows, legal historians can develop taxonomies of legal systems without the aid of comparative lawyers, but still comparative lawyers may be helpful in this endeavour, because they have written a lot about the taxonomy of legal systems.

## **7 Conclusion: A one-sided relationship**

Comparative law has almost nothing to offer to legal history, but the opposite is not true. Comparative lawyers are great consumers of legal history. In fact, many leading comparatists started out as legal historians, but there are no comparative lawyers who later in their careers became legal historians and herein lies the true danger of Zimmermann's plea for a comparative legal history. If legal history and comparative law were to be joined, the legal historians will give and the comparative lawyers will take, resulting in a very unequal and unhappy marriage, and, as we all know, such marriages end in a divorce. The problem then, is who will take the assets, and as things stand now, chances are great that it will be the comparative lawyers who may claim to be more useful. The idea of joint chairs in comparative law and legal history as Zimmermann proposes is in itself good, but the danger is that legal history

and comparative law will be on an equal footing only if the scholar holding such a chair is a legal historian, because it is very easy for the legal historian to master the comparative method. In contrast, if the chair of legal history and comparative law is in the hands of a comparative lawyer who knows nothing of legal history, then it will soon become a chair of comparative law only. Here we need to do more thinking. Zimmermann is right in that an alliance with comparative law can infuse new blood into legal history, but we should also demand that comparative lawyers do their part of what is claimed to be a common effort. An autonomous legal history in an ivory tower is uncalled for, but so is a legal history that will end up as the abused and discarded handmaid of comparative law.