Legal History and Comparative Law, a Pair of Bifocals

Jan Lokin*

A. Introduction

Not long ago I went to see the opera Rigoletto. The music was still Verdi's and nothing had been changed in the libretto, but the action was set in the present-day gangster world of Chicago. The Duke of Mantua was a Mafia godfather, his retinue carried Stenguns in violin cases, Rigoletto was a hanger-on who was punished horribly, Sparafucile was a modern hired murderer – a hit man – who ran a brothel with his sister Maddalena, etc. And of course Gilda sacrificed herself, now as one of the mob boss's conquests.

The modern setting was completely convincing and the audience had no difficulty at all connecting the nineteenth century music and words with the twenty-first century scenes. If they went on to read more about the background, they would have discovered that the connections went even further. Verdi set the action in Mantua in the sixteenth century, in other words three centuries before his own time, and thus in a completely different society from his own. He took the libretto from a play by Victor Hugo called *Le roi s'amuse*, which was about the amorous adventures, not of a duke, but of the French Renaissance king François I. Rigoletto was called Triboulet, Gilda was Blanche. Because of Austrian censoring the piece had to be changed. Why Austria? Because Verdi had written the work for La Fenice, the Venetian opera house, and at the time Venice was part of Austria. The Austrians thought it was unacceptable for a crowned ruler to be depicted as a lascivious seducer, and therefore the French king was downgraded to an Italian duke. Apparently, Austrian censorship permitted an Italian duke to behave in a way that was denied a French king. However, this did not affect the essence of the drama; and this is what the spectator understands immediately. Gilda stands for self-sacrifice, Maddalena for depravity, Sparafucile for vice. Sixteenth-century French king, Italian duke or twenty-first-century American Mafia boss – it is not difficult to compare them. The same words and music immediately make it clear that they are personifications of absolute, corrupting power and all three sing the eternal truth *La Donna è mobile*, the same sentiment expressed by Virgil when he wrote: *femina semper varium et mutabile.*

Why have I written at such length about a production of a Verdi opera? Because legal historians are faced with the same phenomenon, especially if they specialize – as I do – in Roman private law. Therefore for the rest of this paper I will take my examples from private law. While I am aware that this is a limiting factor, at

* Professor of Roman Law, Faculty of Law, University of Groningen.

European Journal of Law Reform, Vol. VIII, no. 1, pp 13-27.

the same time I know that, as Zweigert & Kötz put it, private law is "the heartland of all comparative law."[1] Romanists study texts which lay down standards. Most of these texts were definitely formulated in the third century AD, then modified and compiled during the sixth century AD and finally from the Middle Ages to the present time constantly placed in new contexts, while the words of the texts remained the same. I will give an exotic, but by no means untypical example.

In 1611, when the Low Countries were fighting the Spanish for their independence, the town of Leeuwarden in Friesland was protected against a possible Spanish attack. The house of Sierck Lieuwes stood in the way of fortifying the town and the States of Friesland ordered it to be burnt down in the public interest. Did poor Sierck Lieuwes have to bear the loss alone for something that would benefit everyone? "Yes", said the States of Friesland. "No", said Sierck and brought an action at the Court of Friesland. This Court decided in his favour, on the grounds of a regulation drawn up on the Greek island of Rhodes for a special case of maritime law, the *lex Rhodia de iactu*. If a ship at sea got into trouble, it was sometimes decided to throw some of the cargo overboard in order to make the ship lighter. Did the owner of the cargo, which was thrown overboard, have to bear the loss in the interest of everyone? "No", said the Rhodian law, all interested parties had to bear the costs proportionately, including the owner of the cargo in question, who thus received part of its value back. We know about this Rhodian maritime law because it was included in Justinian's Digests, and therefore used by the glossators and also, for example, by the *Reichskammergericht* of the Holy Roman Empire.[2] The rule thus became part of the Roman canonical *ius commune* and this was why the Court of Friesland decided in favour of Sierck Lieuwes.[3] An old Greek regulation was transplanted into Roman law and disseminated centuries later throughout various legal territories in Europe; a fine example of what Alan Watson has called a "legal transplant", just as the modern version of Rigoletto is a "cultural transplant."[4]

B. Two Souls of the Legal Historian

One has often asked the question what the main focus of a legal historian is: the text which has remained the same, or circumstances of time and place which differ? This dilemma touches the soul of the legal historian, or rather both his souls; for the legal historian has two souls, which make him a split personality. On the one hand he is a historian, and in this capacity he has the task of finding out 'what

---

[1] K. Zweigert & H. Kötz, An Introduction to Comparative Law 4 (1987). Literature in J. Smits, Europees Privaatrecht in wording. Naar een Ius Commune Europaeum als gemengd rechtsstelsel 287-302 (1999).

[2] A. Gaill, Practicae Observationes, II, Obs. XXII nos 4 and 5 (1690).

[3] For the precise legal reasoning, *see* J. H. A. Lokin, C. Jansen & F. Brandsma, Roman-Frisian Law of the 17th and 18th Century 252 *et seq.* (2003); and F. Brandsma in his congress paper *The Dutch Common Law Tradition*.

[4] A. Watson, Legal Transplants, An Approach to Comparative Law (1974); A. Watson, Legal Transplants and European Law (2000).

actually happened', *wie es eigentlich gewesen*. But however conscientiously the historian performs his task, in attaining his goal – a truthful depiction of the past – he is always obstructed by his own personality, the language he speaks, the time in which he lives, etc. Present-day views of Roman constitutional law are different from those of Mommsen who described it with Bismarck at the back of his mind. And to give a cultural example: however sincerely Viollet-le-Duc thought he was evoking mediaeval Gothic architecture, we immediately see the nineteenth century in his buildings. The subjective result of his historical work does not alter the fact that the historian has to try to depict the past as truthfully as possible.

On the other hand, the legal historian is also a lawyer. In this capacity he also works with historical texts – statutes, case law, literature – but puts them at the service of the present rather than of the past. As a result he approaches the text in a different way. He examines a tried and tested regulation to see whether it might offer a solution for a new problem, and to do this he must compare. He therefore selects his sources according to different criteria than the historian. With his knowledge of the past he looks for doctrines which can be compared with contemporary ones. In other words, he is a comparativist. All sorts of differences of time and place then vanish. To assess how useful this Rhodian maritime statute was in the sixteenth century it is not necessary to know what the constitution of Rhodes was like when the statute was developed, how ships were built at the time or how the cargo was tied down. The sole focus is the purpose of giving everyone his due and the legal path by which it may be attained. If a regulation is suitable for contemporary use, then it is transplanted. By far the majority of legal transplants comes into being as a result of the need for a *contemporary* regulation. A widely known example is the definition of the position of the vassal in the feudal system. What exactly were the powers the vassal had over his fief, and what rights could he claim to it? Feudal law was unknown to the Romans and that meant that mediaeval authors had to find an adequate term for the powers of the *vasallus*. Since these powers were to a large extent identical to those of the owner – he had the exclusive enjoyment of the property, could make use of it and had control over it – the vassal soon gained the title of *tamquam dominus* who could also *quasi vindicare* his land against every owner.[5] This 'fictitious' ownership was set against the *dominium directum* of the liege and thus a pair

[5] This observation may be found in Book 2 of the *Libri Feudorum*, the books of Longobardic feudal law which were part of the *ius commune*. According to the twelfth century glossator Pillius, the words *quasi vindicare* could only refer to the *reivindicatio utilis* given in Roman law to the superficiary or the leasehold tenant. An *actio utilis* was an action containing a fiction, in which, for example, someone was assumed to be a Roman citizen or an heir even though this was not actually the case: *acsi civis Romanus esset, acsi heres esset*. In this way an equitable owner who was in good faith completing the statutory prescription period was granted an action in which it was assumed that the prescription period had already passed (Gaius 4.36), in short a *reivindicatio utilis* which was called an *actio Publiciana*. Did the vassal now own 'something', *aliquod dominium*? This conclusion was bound to be drawn. The same Pillius referred to the *feodatarii vel similes* somewhere else (gloss to C.10.15) as *utiliter domini* and the ownership of the vassal as *dominium utile* (gloss to L.F. 2.3. and 2.34). For a more detailed discussion of this entire subject *see* R. Feenstra, *Les origines du dominium utile chez les glossateurs (avec un appendice concernant l'opinion des ultramontani)*,

of concepts developed which according to some exerted a salutary influence on legal history and according to others a disastrous one.[6]

C. An Example: the Juristic Act

I will give just one more example. It is a rare example because it did not arise as an answer to practical questions – such as how exactly to describe the powers of a vassal – but was an abstract product of the professor's workroom. I am referring to the successful dissemination of the concept of the juristic act (*acte juridique*), which was developed in the context of German Pandectism. It all started with Von Savigny who gave intention, and thus declaration of intention, *Willenserklärung*, a central place in his *System des heutigen römischen Rechts*. It was not Von Savigny who invented the concept, but it was he who developed it systematically. In his system the *Willenserklärung* was the nucleus of all private law and especially of contract law. This was in fact curious because Roman law, as laid down in Justinian's legislation, hardly paid any attention to intention and none at all to declaration of intention. The Romans concentrated much more on *consensus*, agreement between the parties and any obligation which might or might not proceed from this *consensus*. The key concept was the agreement, which was not further analyzed in terms of declarations of intention. In the national codes of law which were developed in the early nineteenth century, the concept is not mentioned. Von Savigny built up a system of private law which was based on the declaration of intention.[7] Was this systematic structure already visible in Roman law? "No", said Von Savigny, it was implicit in the Roman texts. By comparing the dogmas in these historical texts with each other, Roman casuistics could be transformed, *fortgebildet* as Von Savigny put it, into a system. This system was of supreme value to legal practice, and would restore the 'natural' unity between theory and practice. Historical knowledge of Roman law was therefore required and lawyers must independently interpret and think about the writings of the ancient Romans and select the texts by comparison, "*selbständig hinein lesen und denken.*"

Was Von Savigny engaged in legal history? No, say the historians, because he was not interested in reconstructing the past. This may be true, but it does not alter the fact that a thorough knowledge of the historical texts was and is required.

---

in Flores Legum H. J. Scheltema oblati 49-93 (1971); also published *in* Fata iuris romani 215 *et seq.* (1974).

[6] U. Venema & W. J. Zwalve, Common Law and Civil Law (2000), at 37 and 101; *cf. Dominium utile est chimaera; nouvelles réflexions sur le concept de propriété dans le droit savant, in* R. Feenstra (Ed.), Histoire du droit savant (17e-18e siècle), Doctrines et vulgarisation par incunables (2005).

[7] F. C. von Savigny, System des heutigen römischen Rechts, 3 (1840), at 104. Of all *juristische Thatsachen* [legal facts] the *freye Handlungen* [free actions] comprised the most important category, and in turn the most important exponents of these *freye Handlungen* were the *Willenserklärungen* [declarations of intention]. Finally, the agreement was "*unter allen Arten der Willenserklärung die wichtigste und umfassendste*" [the most important and most comprehensive of all sorts of declaration of intention].

Superficial knowledge, *wie sie im Institutionencompendium niedergelegt ist* [as it is recorded in the introductory textbook of Justinian], is not worthwhile, according to Von Savigny: meticulous study of all texts was necessary. With this knowledge, Von Savigny did in fact write essays which focused purely on legal history; they were included in the *Beylagen* of his system, for example his discourses on the *Schuldenfähigkeit einer filia familias*, on *capitis deminutio* (reduction in status), on *infamia* etc. No-one can deny that Von Savigny was a great (legal) historian.

Was Von Savigny engaged in comparative law? No, say some comparativists, because he was not comparing any related or unrelated legal systems or legal traditions or families of legal traditions. Well, perhaps not legal traditions, but he did compare cases from the different phases of the history of Roman law – which covers over a thousand years – and then tried to crystallize rules from them which were universally valid and could be applied in related but nevertheless different legal systems or traditions. It was not only in countries where Roman law was still in force that his method and its results were helpful.

> Even in the countries which have national legal codes of their own, due to the method of using Roman law presented here, theory will be perceived in a new light and be safeguarded against completely subjective and arbitrary errors. In particular it will be brought closer to practice again, which is always the most important concern. Of course a transformation of this kind is more difficult here than in common law countries, but it is not impossible. This is made particularly clear to us by the example of the more recent French lawyers, who often explain and supplement their legal code on the basis of Roman law in a very intelligent way.[8]

I have deliberately chosen the declaration of intention as an example because it was this concept which convinced Raymond Saleilles (1855-1912), one of the founders of comparativist studies, of the need for comparative law. He was deeply impressed by the *déclaration de la volonté*, especially after it had been included in the German Civil Code. For that is what happened after the universal acceptance of the declaration of intention among the followers of Von Savigny's Historical School, the pandectists. The concept evolved into the *Rechtsgeschäft*. Every pandectist had his own definition, so that Windscheid observed in his manual:

> There is no agreement among the authors as to the definition of the juristic act. Recently the concept of the juristic act has become a favourite theme of academic discourse; the literature is steadily growing.[9]

---

[8] F. C. Von Savigny, System 1, Vorrede XXVIII.

> Auch in den Ländern also, die mit einheimischen Gesetzbüchern versehen sind, wird durch die hier dargestellte Benutzungsweise des Römischen Rechts die Theorie theils neu belebt, theils vor ganz subjectiven und willkührlichen Abirrungen bewahrt, besonders aber der Praxis wieder näher gebracht werden, worauf überall das Meiste ankommt. Schwerer freylich ist hier eine solche Umwandlung als in den Ländern des gemeinen Rechts, aber unmöglich ist sie nicht. Das zeigt uns besonders das Beyspiel der neueren Französischen Juristen, die oft auf recht verständige Weise ihr Gesetzbuch aus dem Römischen Recht erläutern und ergänzen.

[9] B. Windscheid, Lehrbuch des Pandektenrechts 266 (1900), n. 1.

The concept was such a success that it was given a central place in the general part, *Allgemeiner Teil* of the German Civil Code (§ 104 to § 185). And this was not its only triumph: elsewhere in Europe, including countries where national legal codes had been adopted which made no mention of the declaration of intention, the effectiveness of the concept made such an impression that legal scholars introduced it into their doctrine and elaborated on it. In the Netherlands, for instance, this led to an ambivalent state of affairs in law, in which the civil code and case law leaned towards France, and the declaration of intention is not mentioned in the *Code civil*, while legal doctrine was influenced by pandectist Germany, where the *Rechtgeschäft* is the foundation of all contract law.[10] The Dutch authors drew up definitions of their own which they compared with the German ones and tried to connect doctrines which were dealt with in Dutch law under agreements with the help of the declaration of intention. For example, the legal concepts of duress, error and fraud were grouped under the common denominator of 'defects of the will', whereas previously they had always been linked to 'consensus'. It could be said that they were transplanted to form a new set of concepts. The final triumph came in 1992 when the juristic act was given legal status in the Netherlands.[11]

In France, too, the *déclaration de la volonté* made a deep impression. Saleilles in particular called on French legal scholars to compare the system of German law intensively with that of the French Civil Code. He himself set the example. Saleilles was the first professor to occupy the chair of comparative law set up by himself and founded in 1900 the Studies of Comparative Law. He devoted his academic life to the comparison of German and French private law. His main focus was *la déclaration de la volonté*, on which he wrote a substantial book in 1901. The preface of this book is interesting and shows what great expectations Saleilles had of comparative law. His treatise on the *acte juridique*, he says, is not merely an *étude juridique*, but *une thèse scientifique, qui domine toute la conception de l'acte juridique et tout le domaine des transactions d'ordre économique* [an academic argument which governs the whole concept of the juristic act and the whole domain of economic transactions]. Saleilles wanted to incorporate the findings of this academic comparison of legal systems into French law. In his opinion, a complete transformation of French law might result from it.[12] Should this transformation be successful, he continued with typical

> Ueber die Definition des Rechtsgeschäfts herrscht kein Einverständniß unter den Schriftstellern. Der Begriff des Rechtsgeschäfts ist in der neueren Zeit ein Lieblingsthema der wissenschaftlichen Verhandlung geworden; die Literatur wächst immer mehr.

[10] J. H. A. Lokin, *Zwischen Code und Pandekten, Der Einfluß der Pandektistik auf die Werke von Diephuis und Opzoomer*, *in* R. Schulze (Ed.), Rheinisches Recht und Europäische Rechtsgeschichte 253-266 (1998).

[11] Article 3.33 of the Dutch Civil Code describes it as follows: a juristic act requires an intention which is focused on a legal consequence and which has revealed itself through a declaration. Thus over one and a half centuries after its invention an academic concept devised by the German pandectists and referred to by Heinrich Dernburg as *ein Erzeugnis der modernen Systematik* was awarded a prominent place in the Dutch legal code.

[12] R. Saleilles, De la déclaration de volonté. Contribution à l'étude de l'acte juridique dans le

French chauvinism, then 'French law would maintain its place at the forefront of universal legal advancement.'[13]

Did Saleilles achieve his goal? Did the German *Rechtsgeschäft* gain a place in French law? Yes and no. Yes, because it became an established concept in French legal education, French legal doctrine and French case law. The *Encyclopédie juridique Dalloz* contains the following passage by Claude Brenner:

> Aujourd'hui, la notion d'acte juridique est unanimement reçue en droit privé.
> [Today the notion of the juristic act is unanimously accepted in private law]

Nevertheless, the concept never acquired legal status, except for the amended Articles 1321 and 1348 of the Civil Code. Nothing came of attempts to draft a new Civil Code after the Second World War, partly because of endless discussions about the correct definition of the *acte juridique* which was supposed to be the foundation of the new French private law.[14] But more important than the success of the *acte juridique* was the founding of the Studies of Comparative Law it brought about.[15]

D. Three Views

After this example it is expedient to repeat the question we asked ourselves. Must legal historians who examine these and other legal constructions restrict themselves to mere descriptions, to nothing more than a chronological summary of the legal results, or may they compare one construction with another in a systematic way? For example, may a legal historian compare the present-day regulation of ownership with the Justinian *dominium*, while ignoring the intervening development of the doctrine? Is it even possible to do so? There is an eternal difference of opinion on this subject. Roughly speaking, there are three views and they correspond with three types of legal historians. The extremists among the legal historians and legal comparativists totally deny the possibility of comparing legal forms with each other or writing a sound historical description

---

code civil allemand (1901), préface, at viii: "Sur tous ces points, par conséquent, il n'y a que profit à retirer des données du droit comparé. Je ne veux pas dire, à coup sûr, qu'elles doivent se faire accepter, d'emblée, et en bloc; je dis simplement qu'il n'est pas permis de les ignorer. Et je suis persuadé, d'autre part, quand on les aura analysées, discutées, et qu'on se les sera appropriées, qu'il pourra ressortir de là toute une mise au point et toute une transformation de notre droit français."

[13] *Id.*, at ix: "La matière des actes juridiques est de celles qui sont à peine du domaine de la loi. C'est à la doctrine à prendre la tête du mouvement; la jurisprudence suivra. Or, il s'agit de savoir aujourd'hui si, en face de certaines idées vers lesquelles toutes les législations paraissent s'orienter, le droit français saura garder son rôle à la tête du progrès juridique universel, ou s'il passera l'hégémonie à d'autres.»

[14] *See* J. H. A. Lokin, *De Vergeefse Poging tot Wettelijke Erkenning van de Acte Juridique*, *in* Groninger Opmerkingen en Mededelingen, Magazijn voor Leerstellige Rechtsvergelijking op Historische Grondslag 63-84 (2004).

[15] Saleilles ends the preface to his book in this way: "Je mets donc ces simples notes sous le patronage de tous ceux qui ont été les promoteurs du Congrès de droit comparé de 1900, M. Georges Picot, président du Congrès, et avec lui tous les Maîtres ou practiciens, français et étrangers, qui ont bien voulu s'unir, en vue de constituer une science définitive du droit comparé."

of them. One of the spokesmen of this group is Pierre Legrand, who has written a whole stream of articles in which he emphatically denies the possibility of 'legal transplants'. If I understand correctly the gist of his not always comprehensible texts, there are two arguments against any meaningful comparison. The cultural backgrounds of the regulations to be compared are so different that no similarity could ever be identified. This is more or less the thrust of an article which bears the title *Iurem* (sic!) *temperat cultura.*[16] And in another book *Le droit comparé* in the series *Que sais je*[17] the conclusion was: "*La comparaison des droits sera CULTURELLE ou ne sera pas.*"

The second argument is the inadequacy of language. Any translation of any word – Legrand gives the example of the French word *pain* which has completely different connotations than the German word *Brot* – is treacherous.[18] Alan Watson has given excellent responses to these objections,[19] so that I do not need to go into this somewhat fruitless discussion. I would just like to say one thing about language.

The observation that a translated word has different connotations is obvious and no-one will dispute its truth. To put it even more strongly: not a single word has just one meaning, even in its own language. Each individual has his or her own interpretation of a particular word. In the authoritative interpretations of legal texts which are produced in courts by the judges this becomes even clearer. The same legal texts in the Belgian and French Civil Codes have been interpreted differently by the courts of the two nations.[20] The same thing happened in the French *ancien régime*, in which the *parlements* had sovereign power. They led Voltaire to say: "*Un homme qui court la poste en France change de lois plus souvent qu'il ne change de chevaux!*" [A stagecoach driver in France changes laws more frequently than he changes horses].[21] In order to prevent these varieties of law and to guarantee a unity of law, the French revolution created the *Cour de cassation* which had jurisdiction over the whole of France. Imagine for a moment that Europe would have one single legal code which was in force in all the sovereign national states of the Union: there would be just as many different interpretations, and therefore different varieties of law as there were sovereign legal territories. Every Supreme Court would have its own case law relating to the same text, which might vary considerably from court to court.

The fact is that the language we must use is a limitation we have to accept. It means that authors have an obligation to express themselves as clearly as possible and it makes legal historians conscious of the fact that a historical description of a

[16] P. Legrand, *Iurem Temperat Cultura*, *in* Fragments on Law-as-Culture (1999).

[17] P. Legrand, Que sais je 119 (1999).

[18] For an example from legal history *see* P. L. Nève, *Ius Commune Oftewel "Gemeen Recht"; Traduttore Traditore?*, *in* Tertium Datur, Drie Opstellen Aangeboden aan Prof. mr. J. A. Ankum 3-59 (1995).

[19] A. Watson, *Legal Transplants and European Private Law*, 4(4) Electronic Journal of Comparative Law (2000).

[20] Cf. J. H. A. Lokin, *Lex Semper Loquitur*, *in* Tekst en Uitleg, Opstellen over Codificatie en Interpretatie naar Aanleiding van de Invoering van het Nieuwe Burgerlijk Wetboek 1-38 (1993).

[21] Voltaire, Oeuvres complètes XV, at 427 (1878).

concept such as ownership, for example, will always be couched in contemporary, and therefore anachronistic, terms. Legal historian Van den Bergh struggled with this problem when he wrote a book about ownership.

> If we take familiar concepts as a starting point when describing past or foreign cultures, it is indeed all too easy to lapse into preconceived ideas and anachronistic representations. But the truth is that we cannot ever completely dispense with them. If I want to tell you something about the law of the ancient Germans or of the Papuans, I have to use concepts and terms which are familiar to you. If I want to compare ancient Germanic and ancient Roman law with each other – and a large proportion of historiography consists of comparison – I need terms as a frame of reference. We think according to the paths and schemes fixed in our language. In order to understand, explain and compare history we have to make use of concepts which are not taken from history itself, anachronistic concepts. Nor can the problem be completely solved by devising concepts of our own. The only remedy is always to give as critical an account as possible of the concepts we use.[22]

Apart from this extremist view, a second group is composed of those legal historians who believe it is possible to compare the present and the past, but only if the complete historical development of the doctrine or the legal object is described. *These are the historians among legal historians.* According to them, the line of development of, for example, the concept of ownership may not be broken; no missing links are allowed. Of course this is impossible, in the sense that an author cannot mention, let alone classify, everything ever said about ownership by all authors and courts at all times and places. If these legal historians are asked to review a broad essay on or an overview of comparative law, they will be sure to point out how incomplete it is; in their view every gap is an omission. What a shame the author writing about the law of obligations forgot to mention what Simon Vicentinus said on the subject, unforgiveable that the author neglected to mention the contribution of canon law to the *ius commune*, why does the essay start with Justinian law rather than with classical, pre-classical, Athenian, Babylonian law, etc. Usually they themselves describe only one link of the chain, restricting themselves to an area which they can fully oversee. Often the results of their research are preceded by lengthy warnings about the limitations of the sources, the narrow boundaries of time and place, the provisional nature of their conclusions, etc. They are very much aware of their limitations and constantly feel the need to share this awareness with their readers. Their emphasis on historical aspects, on the past, makes these scholars cautious, sometimes even fearful legal historians. Nevertheless, the tree of legal history has them to thank for some very fine fruits.

The fear of incompleteness has disappeared among the third group of legal historians who allow legal comparisons just as often as they can serve to clarify the answer to a particular problem. *They are the comparativists among the legal historians.*[23] Usually – though not always – their point of departure is a

---

[22] G. C. J. J. van den Bergh, Eigendom. Grepen uit de geschiedenis van een omstreden begrip (1e ed. 1979) (2nd ed. 1988), at 5.

[23] For the Netherlands *cf.* G. Steenhoff, *The Place of Legal History in the Teaching of Law and in Comparatists Formation, in* E. M. Hondius (Ed.), Netherlands Reports, International Academy of

contemporary problem, and they search for analogous problems and solutions in the past. This can be any past, as long as it can be compared. In the choice of comparisons a certain natural selection takes place. In general it is easier to compare Dutch private law with French rather than English private law, with Roman rather than Germanic law, and within Roman law some subjects are better suited to comparison than others. Reinhard Zimmermann makes this clear in the preface to his *Law of Obligations*:

> The present book is therefore not in the nature of a comprehensive reference work which would meticulously list and soberly, if somewhat tediously, describe all conceivable particulars of the Roman law of obligations. I have rather selected what I consider to be its most characteristic and important facets and tried to deal with them more thoroughly than would otherwise have been possible. The selection, again, has largely been determined by the contribution which a specific legal institution has made to the modern law of obligations. Thus, to mention one example, discussion of the contract litteris has been reduced to a mere footnote. [...]
>
> Or, to put the matter slightly more pointedly: suretyship transactions in Babylonian law are a matter for the specialist; 'alterum non laedere', 'ex nudo consensu oritur actio' or 'neminem ex alterius detrimento locupletiorem facere', on the other hand, do not concern only the professional legal historian, but every modern lawyer.[24]

Recently the German Byzantinist Dieter Simon reflected on the question: Why study Byzantine Law? He wrote in the same sense:

> The interested scholar in Byzantine Law wants to know how legal rules function in a society, how they are dealt with, whether they bring freedom or restraint, whether one can deviate from them or whether they bring about a change. Of course it is possible for the legal historian to study these questions with success comparing the Law of Madagascar or Eskimo Law. But in as much he is a humanist and a European, it seems to me just and fair to study first the law of his kinsmen, his relatives.[25]

Comparative Law 1 *et seq.* (1998); W. J. Zwalve, *Teaching Roman Law in the Netherlands*, 1997 Zeitschrift für Europäisches Privatrecht 393-304; J. H. A. Lokin, *Prooemium Protorum*, *in* Prota, Vermogensrechtelijke leerstukken aan de hand van romeinsrechtelijke teksten uitgelegd (7th ed. 2006); J. H. A. Lokin, *Het pit en de kern*, 153 Rechtsgeleerd Magazijn Themis 305-307 (1992).

[24] R. Zimmermann, The Law of Obligations, Roman Foundations of the Civilian Tradition (1996), at VIII and IX. Also R. Zimmermann, *Europa und das römische Recht*, 202 Archiv für die civilistische Praxis, 248-249 (2002). For a recent study of 'comparative engineering' *see* J. Gordley, Foundations of Private Law (2006). He attempts to explain the great private law doctrines such as property, tort, contract and unjustified enrichment, and in particular to connect the Roman Law and Common Law traditions, according to basic principles derived from philosophy.

[25] D. Simon, *Wozu*, *in* L. Burgmann (Ed.), Fontes minores XI, Forschungen zur byzantinischen Rechtsgeschichte 4 (2005).

> Theoretisch interessierte Rechtswissenschaftler wollen wissen, welche Funktionen Normen in der Gesellschaft haben; wie mit ihnen umgegangen wird; was sie an Freiheit und Unfreiheit bringen; ob man ihnen ausweichen kann und wie sie uns verändern. Solche komparativen Fragen nach den Bedingungen und Folgen seiner eigenen Rechtskultur könnte des Rechtshistoriker gewiss auch am Recht von Madagaskar oder bei den Eskimos mit Erfolg studieren. Aber soweit er Humanist und Europäer ist, scheint es nur recht und billig, zuerst die nächsten Verwandten zu befragen.

This 'natural selection' also applies not only to legal systems but also to writers who have expressed an opinion on the subject in the past. If one is writing about declaration of intention, it is impossible to avoid Von Savigny, for questions pertaining to error one consults Pothier, for ownership Bartolus de Saxoferrato, etc. Because they select in this way, legal historians are actually engaged in comparative law, which demands a sound knowledge of the past but has the present as its point of departure. Max Kaser's authoritative manual discusses classical Roman law from the point of view of the present-day European private law system, a system which was foreign to classical Roman law. No legal historian can escape from this form of comparison, not even those who put full emphasis on the historical aspects of their research. Or as Zweigert & Kötz say in their Introduction to Comparative Law:

> All legal history uses the comparative method: the legal historian cannot help bringing to the study of his chosen system, say Roman Law, the various preconceptions of his own modern system; thus he is bound to make comparisons, consciously if he is alert, unconsciously if he is not. [...]
>
> If one bears in mind that the founders of modern comparative law were nearly all great legal historians, that without a sense of history even modern comparativists cannot understand foreign solutions, then the differences between legal history and comparative law nearly disappear, and amount quite simply to a practical division between those comparativists who look more to the past and those who look more to the present and the future.[26]

E. The Wedding Night of Tobias and Sarah

To conclude I would briefly like to discuss a case which occurred this year in the Netherlands. The legal questions raised by this case have to do with original modes of acquisition of ownership. The case can be directly compared with similar cases in Roman law, even without taking the intervening development into account, because the question to be compared is a doctrinal one. What was the story? In February 2006 Secretary of State Medy van der Laan decided to return the paintings, which at the beginning of World War II had belonged to the Jewish art dealer Jacques Goudstikker, to his heirs. In 1940 the collection had been sold to Hermann Göring and after the war it had devolved to the Dutch state as enemy assets. There was an unusual problem with one particular painting. This was a biblical scene called *The Wedding Night of Tobias and Sarah*, painted by Jan Steen.[27] In the 19th century the painting had been damaged by fire and as a result it had been cut into two pieces. One piece shows Tobias and Sarah and the other, somewhat smaller piece shows the archangel Raphael fending off the devil. From that point onwards the two canvases led separate lives and were soon regarded as separate paintings. The picture of Raphael came into the possession

---

[26] K. Zweigert & H. Kötz, An Introduction to Comparative Law 8-9 (1987).

[27] *Cf.* F. A. J. van der Ven, *'De Huwelijksnacht van Tobias en Sarah', Ofwel enige Opmerkingen over Natrekking, Zaaksvorming en Vermenging*, 167 Rechtsgeleerd Magazijn Themis 85-95 (2006).

of the city of The Hague, while Goudstikker acquired the picture of Tobias and Sarah. After it was discovered during a restoration in the 1960s that the canvases belonged together, they were joined together again in 1996 and exhibited in Museum Bredius in The Hague. The simple question was: should this restored painting be returned to the Goudstikker heirs? This depends on the even simpler question: who was the owner of the reunited painting? Any legal historian reading this case will immediately think of comparisons with Roman law. Three 'original modes of acquisition of ownership' deriving from Roman law may be considered eligible: accession or *accessio*, confusion or commixtion and specification. It is easy to compare the Dutch articles which regulate these doctrines in law, Articles 5.14 (accession), 5.15 (confusion) and 5.16 (specification), with analogous texts in Roman law without explaining the entire historical development of the concepts.

In this case, of the three 'original modes of acquisition of ownership', confusion is the least appropriate. Confusion takes place when movable goods belonging to different owners are fused or intermingled in such a way that they can no longer be separated from each other. The examples given by the Romans all refer to generic items, such as wine or grain that has been blended or lumps of silver or gold that have been melted. Parliamentary history also gives a few examples of generic items, which are classified according to size, number or weight. The rule in Roman law is that these cases result in co-ownership; in Dutch law the rules pertaining to accession apply.[28] I will come back to this point later. In the case of the restored Jan Steen there is no question of confusion; no matter how inseparably the two canvases have been joined together, the two halves can be regarded as separate entities and this will always remain so.

Might this be a case of specification? Specification applies when a *new* object has come into being, for example when a sculptor makes a sculpture out of a piece of marble.[29] Specification is like painting a picture on somebody else's wood or writing on somebody else's paper. In antiquity the picture and the manuscript were not regarded as new objects.[30] The examples of *specificatio* – i.e. the creation of a *new* object – are summed up in Justinian's *Institutes*. The new object has to have acquired a different identity.

> If an object has been made out of material belonging to another, one may ask which of the two, according to natural reasoning, is the owner: the person who made it or the owner of the material; for example, if someone has produced wine, oil or grain from someone else's grapes, olives or ears of wheat, or made a vase out of someone else's gold, silver or bronze, or mingled someone else's wine and honey to make mead, or made a plaster or ointment out of someone else's medicaments, or a garment out of someone else's wool, or a ship or a cabinet or a bench out of someone else's lumber.[31]

---

[28] Art. 5:15 BW: "If movable items which belong to different owners have been combined to form one item through confusion, the previous Article applies by analogy."

[29] A. Pitlo-Reehuis, Goederenrecht (2001), no. 519.

[30] Unlike Wichers, who for Dutch law designates a painted masterpiece or a manuscript as a new item. J. Wichers, Natrekking, vermenging en zaaksvorming 195 (2002), n. 5.

[31] Inst. 2, 1, 25:

In modern Dutch law, an object is also considered to be a *new* object if it has a different identity from that of its component parts,[32] and with respect to the restored Jan Steen this is not the case. On the contrary: originally it was one object, and the original state of affairs has simply been restored. In its use, function and intention, in fact in all its capacities, the object has remained the same. What has come into being is not a *new* object, but an *old* object.

The only choice left is *accessio*, which according to Article 5:14 of the Dutch Civil Code and Justinian applies when a movable object becomes part of another movable object which can be regarded as the principal object. The owner of the principal object then becomes the owner. If none of the components can be designated as the principal object, co-ownership results. The question is therefore what should be regarded as the principal object and what as a component part. Article 5.14 § 3 mentions the value as the first criterion and then goes on to say that everything depends on the circumstances. The crucial question is of course: which circumstances? What are these circumstances? Detailed answers may be found in the Roman texts. In their examples, the Roman legal scholars gave various precise criteria. For example, following Servius and Labeo, Paulus says that objects should be regarded as components if they take on the quality of the principal object when they are added to it, so that the whole object is, as it were, suffused with one spirit, *uno spiritu*:

> If you have attached the arm of someone else's statue to my statue, it cannot be said that this arm belongs to you, since the whole statue is bound together by one spirit.[33]

Florentinus says that everything depends on the appearance and use of the object. According to Sabinus the size of the object is a factor, and Pomponius considers not only the size but also the value to be criteria.

If we apply these criteria to 'our' Jan Steen, it seems to me that the canvas showing the archangel Raphael has become a component part of the picture of Tobias and Sarah, which is a bigger and more valuable canvas. Besides, in relation to Tobias and Sarah the archangel has a subservient role. According to the biblical story, Raphael was going to fend off the demon to prevent Tobias suffering the same fate as his seven predecessors, who all perished on their wedding night.

> Cum ex aliena materia species aliqua facta sit ab aliquo, quaeri solet, quis eorum naturali ratione dominus sit, utrum is qui fecerit, an ille potius qui materiae dominus fuerit: ut ecce si quis ex alienis uvis aut olivis aut spicis vinum aut oleum aut frumentum fecerit, aut ex alieno auro vel argento vel aere vas aliquod fecerit, vel ex alieno vino et melle mulsum miscuerit, vel ex alienis medicamentis emplastrum aut collyrium composuerit, vel ex aliena lana vestimentum fecerit, vel ex alienis tabulis navem vel armarium vel subsellium fabricaverit.

Article 5:16 of the Dutch Civil Code applies a different rule: it stipulates that the owners of the material are co-owners of the new item, unless someone puts considerable effort into forming a new object out of or partly out of material belonging to someone else. In this last case the maker becomes the owner.

[32] Pitlo-Reehuis, *supra* note 29, no. 515, n. 5.

[33] D. 6, 1, 23, 5: "Si statuae meae bracchium alienae statuae addideris, non posse dici bracchium tuum esse, quia tota statua uno spiritu continetur." *cf.* D. 6, 1, 23, 3.

The *unus spiritus*, which according to Paulus unites the whole object, resides in the canvas showing Tobias and Sarah; this canvas may be therefore be regarded as the principal object and in my opinion the owner of this canvas has therefore become the owner of the whole painting by accession.[34]

The texts which are written more than 1500 years ago are 'modern' texts which can help us finding an answer to this 'modern' case. These texts do not describe the technique of painting in Roman times in order to compare it to the technique used in the era of Jan Steen, nor do they say anything about the social position of Roman and 17th century painters. As the question is a doctrinal one, the comparativist has to combine legal and historical perspectives of the case and as such he can make a direct comparison without taking into account the intervening development of the ways of acquiring ownership. Of course he must have sufficient knowledge of Roman legal doctrines but having this, he automatically will make a doctrinal comparison. Just as in Rigoletto the spectator sees immediately the similarities and the differences between the Roman and the modern Dutch cases.

F. Conclusion

When Hein Kötz was asked by a legal history journal to write an essay on *Was erwartet die Rechtsvergleichung von der Rechtsgeschichte?* he refused the request on the following grounds:

> In the first place I think it is dubious that this question seems to draw a dividing line between legal history and comparative law. But in truth legal history and comparative law are cast in the same mould. They are twin sisters, and if there be some dispute as to which of the two is the fairer, it cannot be denied that all research into legal history operates by the comparative method and that vice versa comparative law, in so far as it wants to offer more than mere stocktaking, must also always bear in mind the historical conditions under which the institutions, proceedings, working methods and techniques being compared developed. The question of what separates historical research from comparative research, where one ends and the other begins, where the legal historian can still say something and the legal comparativist must remain silent, is therefore pointless, and it is just as pointless to ask what comparativists can 'expect' from their colleagues the legal historians.[35]

---

[34] A. A. van Velten, *Juridische verwikkelingen rond de voormalige collectie Goudstikker*, 2005 WPNR 6659, n. 1, has a different view. Without giving specific grounds, he sees in the restored painting a *new* object which belongs to both owners resulting from confusion.

[35] H. Kötz in *Juristen Zeitung* 1992, at 20-21.

> Bedenklich finde ich zunächst, daß die gestellte Frage zwischen Rechtsgeschichte und Rechtsvergleichung eine Trennlinie zu ziehen scheint. Rechtsgeschichte und Rechtsvergleichung sind aber in Wahrheit Holz vom gleichen Stamm. Sie sind Zwillingsschwestern, und wenn man auch darüber streiten mag, welche der beiden die Schönere sei, so kann man doch nicht bestreiten, daß alle rechtsgeschichtliche Forschung ein Operieren mit der vergleichenden Methode ist und daß umgekehrt Rechtsvergleichung, sofern sie mehr bieten will als bloße Bestandsaufnahmen, stets auch die historischen Bedingungen bedenken muß, unter denen sich die

I could not agree more with Kötz, but my endorsement leads to a sobering conclusion. It is pointless to speak of legal history and comparative law as two separate entities. They are two sides of one coin and while, at times, one may seem brighter than the other, they always remain inseparably connected. Academically sound studies in comparative law, i.e. studies which do not consist merely of descriptions or enumerations, but discuss why a legal regulation has been included in one system and not in the other, cannot do without the help of legal history. It is at this point that I would like to warn of threats to legal history and especially Roman Law. Because the teaching of legal history has been cut down to a minimum in the curriculum of most universities and because the legal historians often work on their own without a substantial staff, it becomes more and more difficult to train students in the basic techniques of legal history, to teach them Latin and Greek, to have them read manuscripts, and to teach them how to gain access to all sorts of legal sources. In the Netherlands and, if I am not mistaken, in Germany too, it is more and more arduous to find successors for the chairs of Roman Law. If the historical training is neglected, legal history becomes worthless as a valuable discipline. It runs the risk of being reduced to an obligatory first page or chapter in a book saying that even the Romans had thought about the subject, similar to communist times where a compulsory introduction would state that Marx and Lenin had thought very profoundly about the subject.

I am convinced that profound legal history is not only helpful but necessary for the academic level of the study of Comparative Law. Anyone who wants to find an answer to the simple question *why* a regulation is as it is, has to take a step into the past, and – here I am paraphrasing the words of E. M. Meijers, who has practised comparative legal history all his life – the only question is how far back into the past we want to go. Meijers believed that the indisputable answer to this question is that it is always appropriate to use historical comparative law if it can help to give reasonable meaning to a regulation or legal concept which would not be available without it.[36]

The conclusion is therefore very simple, even banal. Like the modern spectator of Rigoletto the legal historian looks through *one* pair of glasses, but being a historian and a lawyer he has to look through a pair of *bifocal* glasses.

---

verglichenen Institutionen, Verfahren, Arbeitsstile und Techniken entwickelt haben. Die Frage, was die historische Forschung von der vergleichenden unterscheidet, wo die eine endet und die andere beginnt, wo der Rechtshistoriker noch reden darf und der Rechtsvergleicher schon schweigen muß, ist deshalb sinnlos, und ebenso sinnlos ist es auch zu fragen, was die Rechtsvergleicher von den rechtshistorischen Kollegen 'erwarten' sollten.

[36] E. M. Meijers, *Wetsuitleg en historisch onderzoek*, 76 Rechtsgeleerd Magazijn 273 *et seq.* (1915). Also V. J. A. Sütö, Nieuw Vermogensrecht en rechtsvergelijking – reconstructie van een wetgevingsproces (1947-1961) (2004).