



NATIONAL, TRANSNATIONAL AND EUROPEAN LEGAL HISTORIES : PROBLEMS AND PARADIGMS. A SCOTTISH PERSPECTIVE

Résumé : Cet article considère les différentes méthodes qu'il est possible de mobiliser pour écrire l'histoire du droit, à partir du cas de l'historiographie écossaise. Quelques exemples spécifiques sont utilisés pour démontrer les avantages et inconvénients de chaque méthode. Les modalités de l'écriture d'une histoire du droit nationale, européenne et/ou transnationale sont ici discutées. La conclusion est que les meilleures histoires du droit adoptent presque toujours une perspective comparative ou transnationale.

Mots clefs: Histoire du droit ; études transnationales ; historiographie ; Écosse

Abstract : This article explores the different ways of writing legal history, using concrete examples to demonstrate the advantages and disadvantages of each. The possibilities of national, European and transnational legal histories are discussed, with a conclusion that most good legal history has always had a comparative or transnational aspect.

Key Words : Legal History ; Transnational Studies ; Historiography ; Scotland

1. “Breaking out of national frameworks in writing legal history” was the theme of the conference at which this article was first delivered as a paper. I think few, if any, would nowadays doubt the need to do so. Of course, the writing of purely “national” legal histories continues. Most law for most people still comes from the state, generally understood as a nation state. In a discipline that can spread in many directions, focusing on a “national” legal history is a way to keep a handle on the material and in a real sense each nation or state generally does have its own “exceptional” legal system. Yet, of course, even if in reality most such work is neither naive nor unsophisticated in its approach, exclusively national legal histories can potentially pose limitations and lead to misunderstandings. For example, such legal histories can be written as means to explain modern rules – even to justify the current state of affairs. They can also be ways of justifying the nation state. At the same time it is worth recalling that some modern histories of law in Europe have the overt or covert ideological aim of supporting (or opposing) the development of a more unified law in the European Union.

2. In this article I wish to examine the problems and advantages of various ways of approaching legal history. No prescription will be offered. My own views will become obvious; but it is important to consider some of the issues raised, and it seems best to do so by offering examples of the various problems and advantages that may arise from narrower or broader understandings of legal history.¹ To paraphrase Johnny Nash, there will be more questions than answers.

3. It is necessary to devote some preliminary attention to terminology. The remarks made here will be neither profound nor original, but will – I hope – be helpful. There will be no attempt to define meanings in any precise way, but rather an exploration of meanings.

4. First, “national”, which might initially seem straightforward, can be problematic, as it is usually linked in law with the idea of the state. There are states with many nationalities, which nationalities can have separate legal systems. Indeed within these states individuals may have multiple nationalities. This is a complexity relatively common in modern Europe.

5. Secondly, “European” is itself another highly ambiguous term. In the United Kingdom, for example, it is often used to refer to Continental Europe as something other than Great Britain and Ireland. All kind of

¹ A valuable general survey and discussion is to be found in Michael Lobban, “Introduction: The Tools and Tasks of the Legal Historian”, in Andrew Lewis and Michael Lobban, eds., *Law and History* [= *Current Legal Issues*, 6 (2003)], Oxford, Oxford University Press, 2004, 1-32. See also the thoughtful remarks in Serge Dauchy, “Ouverture: Histoire des cultures juridiques: circulations, connexions, et espaces transnationaux de droit”, *Clio@Themis. Revue électronique d'histoire du droit*, 3 (2009) (consultable en ligne).

questions are posed or obscured or avoided by the term. By “Europe” do we mean the countries of the modern European Union? Do we mean from Russia to Iceland, Norway to Gibraltar? Is Istanbul a European city? In law, do we class the legal systems of New York, New South Wales, Israel, Louisiana, Manitoba and Quebec as European? In one way of thinking they most definitely are. It is evident that, outside the discipline of physical geography, the term “European” refers to a complex and fluid mix of the geographical and the cultural that can only to be understood contextually. This of course makes it powerful, with ambiguities that scholars may find advantageous.

6. “Transnational” is an even more obviously difficult adjective. The *Oxford English Dictionary* provides an example from 1921 as its earliest use of the term². In U.S. usage, the word can be traced to 1916, when it was used by Randolph Bourne in an essay, where he stated that the United States of America was a “trans-nationality”³. Before the Second World War, the term was used mainly in the field of economics in discussions of economies and industry. It became popular in Anglophone legal circles after P. C. Jessup’s publication of *Transnational Law*, in which the American professor declared he would use the the term “to include all law which regulates actions or events that transcend national frontiers”⁴. The aim was to avoid confusion with “international law” in its specific sense of the regulation of affairs between states. In Germany, in 1862, the comparative linguist Georg Curtius used the word to explain that the origins of each language were “transnationales”⁵. This I think again demonstrates that we are dealing with a term that is complex, fluid, and broad, and again usefully ambiguous.

7. Explicitly “transnational” approaches to history have become popular. There was an important Forum on the topic in the *American Historical Review* in 1991⁶. There is now the recently published *Palgrave Dictionary of Transnational History* (2009)⁷: the kind of work that indicates a discipline is coming of age. It is clear, of course, that there have been many works of transnational history without the term being used: one thinks, for

² *Oxford English Dictionary (OED)*, s.v. “transnational”

³ Randolph Bourne, “Trans-National America”, *Atlantic Monthly* 118, July (1916), 86-97. See Pierre-Yves Saunier, “Learning by Doing: Notes About the Making of the *Palgrave Dictionary of Transnational History*”, *Journal of Modern European History*, 6 (2008), 159-180, at 165.

⁴ C. Jessup, *Transnational Law*, New Haven, Yale University Press, 1956, vol. 1, 2. See *OED*, s.v. “transnational”; Saunier, “Learning by Doing”, 165.

⁵ Saunier, “Learning by Doing”, 165.

⁶ Ian Tyrrell, “Exceptionalism in an Age of International History”, *American Historical Review*, 96 (1991), 1031-1055; Michael McGerr, “The Price of the ‘New Transnational History’”, *American Historical Review*, 96 (1991), 1056-1067; Ian Tyrrell, “Ian Tyrrell Responds”, *American Historical Review*, 96 (1991), 1068-1072.

⁷ *The Palgrave Dictionary of Transnational History: From the Mid-Nineteenth Century to the Present Day*, ed. by Akira Irive and Yves-Pierre Saunier, Basingstoke, Palgrave Macmillan, 2009.

example, of Fernand Braudel's *Méditerranée*⁸ or of studies of plague. It obviously includes histories of circulations and connections. These include not just movements of peoples (or diaspora studies, as they are now increasingly called), but also of movements of ideas and practices such as political liberalism, terrorism, and the like.

8. A transnational legal history would be one that involved study of the transfer of legal ideas and concepts. Indeed, one could consider studies of the reception of Roman law as exercises in transnational legal history.

I. National legal histories

9. Most scholars would probably express a view along the lines that modern history descends from developments in the nineteenth century, and would relate these to conscious development of the nation state. In this era the surviving formal historical records were used to construct national identities. At the same time, the type of universal philosophical histories associated with Enlightenment writers were replaced by historical emphases on the determinations of individuals by time and place, in short by the type of history associated with Leopold von Ranke⁹. It is often associated with "scientific" use of national and public records, and indeed the creation of modern national archives and record offices, organised not just for the purposes of government but also for historical research. Modern legal history has been seen as starting as a version of this national history.

10. One can quarrel with aspects of this. It is difficult to deny that some national identities go back to the Middle Ages: for example, those of the English, the French and the Scots. This point aside, there is, however, much in favour of such a way of writing legal history. One of the things these modern nation states did was acquire monopolies of legislation and decision-making in courts within a geographically-defined territory. In the continuing debate that is scholarship, this approach has created a lot of knowledge. There have been outstanding results, such as the new Oxford History of English law¹⁰. There have been excellent individual studies of topics such as patents or wonderful monographs such as the late Bernard Rudden's study of the New River¹¹. It has also facilitated comparative historical studies. Indeed, some type of narrative in this fashion may be necessary for traditional comparisons. And most inhabitants of the world

⁸ Fernand Braudel, *La Méditerranée et le Monde Méditerranéen à l'époque de Philippe II*, Paris, Colin, 1949.

⁹ See David Thelen, "The Nation and Beyond: Transnational Perspectives on United States History", *Journal of American History*, 86 (1999), 965-975, at 966-967.

¹⁰ *The Oxford History of the Laws of England*, Oxford, Oxford University Press, 2003.

¹¹ Bernard Rudden, *The New River: A Legal History*, Oxford, Clarendon Press, 1985.

live in a nation state of some sort, even if it be unstable or one that persecutes its citizens.

11. But problems can arise with a tendency to project modern developments backwards and to write a legal history as one tracing the development of national structures, what in Britain is called “Whig” history, especially in the sense of seeing history as improvement or progress¹². Thus, focusing on the development of institutions and doctrines in this way can deny aspects of legal history. Parts that do not form aspects of this grand narrative may be ignored.

12. To take an example from my own research, the formal sources examined by lawyers reveal that, in 1778, in *Knight v. Wedderburn* the Scottish courts decided that a man or woman could not be held as a slave in Scotland¹³. This can be treated as a triumph of liberalism in a narrative of abolitionism and the moves towards the democratic nation state; it can be seen as demonstrating that human beings cannot be owned in Scotland and so on¹⁴. But if this is the approach, it means that a complex legal history is denied, one that involves British colonialism and the enthusiastic participation of Scots within it and indeed the violence involved in that colonial history¹⁵. Comparison helps here. We can refer to the English case of *Somerset v. Stewart*, decided eight years earlier¹⁶. To do so is interesting; but it is better, for example, to widen the study and, examine how, France, to pick a country, dealt with enslaved individuals brought back from the colonies¹⁷. Indeed, we can also see *Knight’s* case as part of a pattern whereby all European colonising and slave-trading countries dealt with the issue of enslaved Africans brought to Europe. To do so, focusing on the differences and similarities can help develop a greater explanatory schema. This is

¹² The term comes from Herbert Butterfield, *The Whig Interpretation of History*, London, G. Bell and Sons, 1931. Whig history was memorably parodied by W. C. Sellar and R. J. Yeatman in *1066 and All That: A Memorable History of England*, London, Methuen, 1930; repr. 2009.

¹³ *Knight v. Wedderburn* Mor. 14545 (1778). See, e.g., J. W. Cairns, “*Knight v. Wedderburn*” in *The Oxford Companion to Black British History*, ed. David Dabydeen, John Gilmore and Cecily Jones, Oxford, Oxford University Press, 2007, 244-246.

¹⁴ For a nuanced account of abolitionism in Scotland, see Iain Whyte, *Scotland and the Abolition of Black Slavery, 1756-1838*, Edinburgh, Edinburgh University Press, 2006.

¹⁵ George McGilvary, *East India Patronage and the British State: The Scottish Elite and Politics in the Eighteenth Century*, London, Tauris Academic Studies, 205; T. M. Devine, *Scotland’s Empire, 1600-1815*, London, Allen Lane, 2003, 221-270; Michael Fry, *The Scottish Empire*, Phantassie, Tuckwell Press, 2001, 83-95; A. L. Karras, *Sojourners in the Sun: Scottish Migrants in Jamaica and the Chesapeake, 1740-1800*, Ithaca, Cornell University Press, 1992, 46-80; Douglas J. Hamilton, *Scotland, the Caribbean and the Atlantic World, 1750-1820*, Manchester, Manchester University Press, 2005, 55-139.

¹⁶ *Somerset v. Stewart* [R. v. Knowles, ex parte Somerset] 1 Lofft 1. The literature is considerable: See, e.g., James Oldham, *English Common Law in the Age of Mansfield*, Chapel Hill, University of North Carolina Press, 2004, 305-323.

¹⁷ See Sue Peabody, “*There Are No Slaves in France*”: *The Political Culture of Race and Slavery in the Ancien Régime*, New York, Oxford University Press, 1996.

definitely some type of transnational approach, chasing connections and similarities across the world.

13. Comparison may be useful in achieving better historical understanding, but it can also hold dangers, depending on how it is used. It is easy to bring forward examples arising out of comparison of Scottish legal history with that of England – an obvious, very tempting, but not always appropriate comparison.

14. In early nineteenth-century Scotland, because the records did not seem to fit how it was thought Parliament, royal council and central courts should have developed, scholars rearranged the Council Records to reflect what they thought they ought to have been. Fortunately modern scholars have been able to work out how they were before¹⁸.

15. In the twelfth and thirteenth centuries, the Kings of Scots reconstructed the Lowland parts of their kingdom on models copied from Anglo-Norman England. There already were in the Lothians – that is the South-East - some institutions similar to those of northern England, coming from Anglian settlement. Crucial in the development of Scots law in the early Middle Ages was the introduction of feudal tenures on the Anglo-Norman model¹⁹. By 1286, we find *colloquia* of the great men of the land – the great ecclesiastical and secular lords - meeting with the king to deal with issues of justice and politics. In the next century, burgesses were called to such meetings, basically to justify taxing them. Of course, these are by now called Parliaments, though Scots tended to talk about them as meetings of the Estates, or indeed the Three Estates²⁰.

16. In the past there was a temptation to “read” the development of the Scottish Parliament against that of England, and to see it as somehow a failed version of the English Parliament, again “reading” it against a “Whig” understanding of that of England - a tendency going back to Scottish Whigs in the eighteenth-century, and well explained by Colin Kidd²¹.

¹⁸ See A. L. Murray, “Introduction” and “Appendix”, in *Acts of the Lords of Council. Vol. III. 1501-1503*, ed. by A. B. Calderwood, Edinburgh, Her Majesty’s Stationery Office, 1993, viii-xliv.

¹⁹ See, e.g., J. W. Cairns, “Historical Introduction”, in Kenneth Reid and Reinhard Zimmermann, eds., *A History of Private Law in Scotland: Volume I. Introduction and Property*, Oxford, Oxford University Press, 2000, 14-184 at 19-21.

²⁰ Ibid., 38-39; K. M. Brown and R. J. Tanner, “Introduction: Parliament and Politics in Scotland, 1235-1560”, in K. M. Brown and R. J. Tanner, eds., *The History of the Scottish Parliament Volume 1: Parliament and Politics in Scotland, 1235-1560*, Edinburgh, Edinburgh University Press, 2004, 1-28.

²¹ Colin Kidd, *Subverting Scotland’s Past: Scottish Whig Historians and the Creation of an Anglo-British Identity, 1689-c.1830*, Cambridge, Cambridge University Press, 1993, 130-144.

17. The great student of the development of the College of Justice, or Court of Session, in Scotland was R. K. Hannay in the first half of the twentieth century²². He was an excellent record scholar, though not perhaps at his most adept when he raised his head from the details and surveyed the horizon²³. Though brilliant and insightful, he was definitely an examiner of the trees rather than of the wood. In researching the men who are found pleading before the Lords of Session, or Senators of the College of Justice, he noticed that, after admission, some of them gave a lecture in the Edinburgh Tolbooth (or Townhouse), where the Court sat. It would have been tempting to look south and draw a parallel with readings at the Inns of Court²⁴. Of course, Hannay himself was too good and careful a record scholar to do so. But this was once suggested to me at a conference. In fact, there was neither link nor indeed parallel development. The Scots were developing a procedure for admission as an advocate similar to that for taking a university degree in civil and canon law, which is indeed what around two-thirds of the men admitted as advocates in fact possessed²⁵. Indeed in the Scottish archives we can find David McGill's diploma for a licentiate in civil law signed in Bourges by, among others, Jacques Cujas (McGill was already a bachelor in civil law)²⁶.

18. The English comparison could not be used to explain and understand the Scottish position. Indeed, the Scottish legal profession, with its advocates, procurators, notaries, and writers, largely originated in those who had practised before the ecclesiastical courts, just as the College of Justice used a version of Romano-Canonical procedure²⁷. What the English

²² His important work was R. K. Hannay, *The College of Justice: Essays on the Institution and Development of the Court of Session*, Edinburgh, Hodge, 1933. This was reprinted with other essays in a volume edited by H. L. MacQueen, R. K. Hannay, *College of Justice*, Stair Society, Supplementary Volume, Edinburgh, Scottish Academic Press for the Stair Society, 1990.

²³ H. W. Meikle, "Hannay, Robert Kerr (1867–1940)", rev. H. C. G. Matthew, *Oxford Dictionary of National Biography*, Oxford University Press, 2004 [<http://www.oxforddnb.com/view/article/33687>, accessed 7 Oct 2010].

²⁴ Hannay, *College of Justice*, 143.

²⁵ J. W. Cairns, "Advocates' Hats, Roman Law, and Admission to the Scots Bar", *Journal of Legal History*, 20, no. 2 (1999), 24–61, esp. at 34–38; Hannay, *College of Justice*, 145.

²⁶ See M.-C. Tucker, *Maîtres et étudiants écossais à la Faculté de Droit de l'Université de Bourges (1480-1703)*, Paris, Honoré Champion, 2001, 261–262.

²⁷ See John Finlay, *Men of Law in Pre-Reformation Scotland*, Edinburgh, East Linton, Tuckwell Press, 2000; John Finlay, "The History of the Notary in Scotland", in Mathias Schmoeckel and Werner Schubert, eds., *Handbuch zur Geschichte des Notariats der europäischen Traditionen*, Baden-Baden, Nomos, 2009 [= *Rheinische Schriften zur Rechtsgeschichte* 12], 375–428; A. M. Godfrey, *Civil Justice in Renaissance Scotland: The Origins of a Central Court*, Leiden, Brill, 2009. For insights into the background of the development of a legal profession in Scotland, see J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, Chicago, University of Chicago Press, 2008.

comparisons should be used for is to increase understanding through demonstration of differences, not to fill in gaps²⁸.

II. European legal histories

19. The wider European comparison helps to explain the Scottish developments²⁹. This indicates some of the problems arising from comparative studies; it is a truism, but a necessary one, that in comparative studies, you have to choose very carefully what is compared with what. There is no point in comparing cabbages with kings. The work of Alan Watson has shown that the most fruitful approach to comparison, certainly for legal history, is through the idea of legal transplants³⁰. Scotland may have been influenced by Anglo-Norman administrative procedures, but by the end of the Middle Ages it was now experiencing a reception of Roman law and other types of institutions. Comparison shows that the College of Justice was in many ways analogous to other northern European conciliar courts, such as the Grand Conseil de Malines, which had developed out of the Council of the Dukes of Burgundy³¹.

20. If placing national legal systems in a European context helps develop understanding, it is unsurprising that European legal histories have become very popular in recent years. Of course, there are many earlier precedents. One could perhaps even claim Savigny's *History of the Roman Law in the Middle Ages*, as a founding study of this type of history of law in Europe³². But it was the cataclysm of the Second World War that produced two such works of outstanding importance: those of Franz Wieacker (1952) and Paul

²⁸ For a brilliant demonstration of how to use Scots and English legal histories to illuminate each other, see H. L. MacQueen, *Common Law and Feudal Society in Medieval Scotland*, Edinburgh, Edinburgh University Press, 1993.

²⁹ No one doubts this now.

³⁰ Alan Watson, *Legal Transplants*, 2nd ed., Athens, Ga., University of Georgia Press, 1993. See Michele Graziadei, "Comparative Law as the Study of Transplants and Receptions", in Matthias Reimann and Reinhard Zimmermann, eds., *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, 441-475.

³¹ See J. W. Cairns, "Revisiting the Foundation of the College of Justice", in H. L. MacQueen, ed., *Miscellany Five*, Stair Society vol. 52, Edinburgh, 2006, 27-50; Randall Lesaffer, *European Legal History: A Cultural and Historical Perspective*, Cambridge, Cambridge University Press, 2009, 363-364. In English legal history, conciliar courts have generally been seen as a "Bad Thing", to quote Sellar and Yeatman, *1066 and All That*, 19, 24, 39, 56, 87, 113.

³² F. K. von Savigny, *Geschichte des Römischen Rechts im Mittelalter*, 6 vols. Heidelberg, Mohr and Zimmer, 1815-1831; one of the later editions has been reprinted, 7 vols. Aalen, Scientia, 1986.

Koschaker (1947)³³. Both focused on Roman law in European history. Perhaps because of the generational difference between the two men that of Wieacker has undoubtedly been the more influential, with a second edition in 1967, and a translation into English as recently as 1995³⁴. He presented an already familiar history of schools of jurists leading to the German Code of 1900. What I find most interesting in Wieacker's book is not his version of the old *translatio studii*, but what most readers seem to ignore, the despairing final chapter where he wonders what went wrong in the twentieth century, so that the liberal tradition which he saw embodied in European legal history was perverted after the Great War³⁵.

21. There can be little doubt but that many of the recent studies of European legal history reflect the development of the European Union, and have an overt agenda of arguing for – or against - unification of private law in Europe in some way. Fair enough. Whether this means they are good histories or not is another issue. They do raise interesting comparisons, but they tend still to follow the kind of paradigm set by Wieacker, though Randall Lesaffer's recent book attempts a broader approach³⁶. Of course, there are problems. Douglas Osler raises many interesting and valuable points in his rightly sceptical articles on European legal history³⁷. It all depends, of course, on what one means by the term.

22. But if one traces connections, links, and influences, one can write meaningful European legal histories. Before the creation of the University of Leuven in 1425, most Dutch jurists were educated at the Law School at Orléans; this meant its teaching and doctrines were influential in the Low Countries³⁸. Many Scots also studied law at Orléans and will also have come under the influence of its doctrines; indeed the Scots were very much

³³ Franz Wieacker, *Privatrechtsgeschichte der Neuzeit: unter besonderer Berücksichtigung der deutschen Entwicklung*, Göttingen, Vandenhoeck und Ruprecht, 1952; Paul Koschaker, *Europa und das römische Recht*, Munich, Biederstein, 1947.

³⁴ Franz Wieacker, *History of Private Law in Europe with Particular Reference to Germany*, trans. by Tony Weir, Oxford, Clarendon Press, 1995.

³⁵ *Ibid.*, 484-488. See also, 409-483.

³⁶ Lesaffer, *European Legal History*.

³⁷ D. J. Osler, "The Myth of European Legal History", *Rechtshistorisches Journal*, 16 (1997), 393-410; D. J. Osler, "The Fantasy Men", *Rechtsgeschichte*, 10 (2007), 169-192.

³⁸ See the remarks of Kees Bezemer in his *Pierre de Belleperche: Portrait of a Legal Puritan*, Frankfurt am Main, Vittorio Klostermann, 2005, 2. See also Laurent Waelkens, *La théorie de la coutume chez Jacques de Révigny. Édition et analyse de sa répétition sur la loi De quibus (D. 1,3,32)*, Leiden, E. J. Brill/Universitaire Pers Leiden, 1984; Kees Bezemer, *Les répétitions de Jacques de Révigny*, Leiden, E. J. Brill/Universitaire Pers Leiden, 1987, and What Jacques Saw, Frankfurt am Main, Vittorio Klostermann, 1997; L. J. van Soest-Zuurdeeg, *La Lectura sur le titre De actionibus (Inst. 4,6) de Jacques de Révigny*, E. J. Brill/Universitaire Pers Leiden, 1989; Marguerite Duynstee, *L'enseignement du droit civil à l'université d'Orléans du début de la guerre de Cent ans (1337) au siège de la ville (1428)*, Frankfurt am Main, Vittorio Klostermann, 2010.

affected by French legal education more generally³⁹. This raises interesting reflections about a possible extra dimension to the study of the later impact of Dutch legal education on the Scots⁴⁰. But what all this certainly shows is that one can consider the circulation of ideas about law through education, travel, books, correspondence and so on. Networks of influence spread through Europe in the medieval and early modern periods⁴¹.

23. Of course, there is the interesting reflection that the modern Dutch concern with the School of Orléans is because the history of that School is in some way Dutch legal history⁴². It is also Scots legal history⁴³. The study of Roman law is also part of the study of the legal history of all three.

³⁹ See, e.g., John Kirkpatrick, “The Scottish Nation in the University of Orleans, 1336-1538”, in *Miscellany of the Scottish History Society. Second Volume*, Edinburgh, Scottish History Society, 1904, 47-102. Utilising the medieval and Renaissance *topos of translatio studii*, the influence of French legal thinking on Scots legal thinking is a major theme in J. D. Ford, *Law and Opinion in Scotland in the Seventeenth Century*, Oxford, Hart Publishing, 2007.

⁴⁰ See, e.g., Robert Feenstra, “Scottish-Dutch Legal Relations in the Seventeenth and Eighteenth Centuries”, in Robert Feenstra, *Legal Scholarship and Doctrines of Private Law, 13th-18th Centuries*, Aldershot, variorum Re 1996, XVI [= Hilde De Ridder-Symoens and J. M. Fletcher, eds., *Academic Relations between the Low Countries and the British Isles 1450-1700: Proceedings of the First Conference of Belgian, British and Dutch Historians of Universities. Held in Ghent September 30-October 2 1987* (= *Studia Historica Gandensia: Uit de seminaries voor Geschiedenis van de Rijksuniversiteit te Gent*, 273) (Ghent, 1989), 25-45]; Kees van Strien and Margreet Ahsman, “Scottish Law Students in Leiden at the End of the Seventeenth Century. The Correspondence of John Clerk, 1694-1697”, *Lias*, 19 (1992), 271-330; J. W. Cairns, “Importing our Lawyers from Holland: Netherlands’ Influences on Scots Law and Lawyers in the Eighteenth Century”, in G. G. Simpson, ed., *Scotland and the Low Countries, 1124-1994*, East Linton, John Donald, 1996, 136-153; J. W. Cairns, “Legal Study in Utrecht in the late 1740s: The Legal Education of Sir David Dalrymple, Lord Hailes”, in Rena van den Bergh, ed., *Summa Eloquentia: Essays in Honour of Margaret Hewett*, Pretoria, University of South Africa, 2002 [= *Fundamina: A Journal of Legal History*, (2002)], 30-74.

⁴¹ For such an example of links between Scotland, England, France, Italy, Germany and the Netherlands, see J. W. Cairns, “Alexander Cunningham’s Proposed Edition of the Digest: An Episode in the History of the Dutch Elegant School of Roman Law”, 69 (2001), *Tijdschrift voor Rechtsgeschiedenis*, (Part I) 81-117 (Part II), 307-359.

⁴² This stems from the work of W. M. d’Ablaing (1851-1889) and E. M. Meijers (1880-1954): Bezemer, *Pierre de Belleperche*, 2-3. See also Robert Feenstra, “L’enseignement du droit à Orléans: état des recherches menées depuis Meijers”, in Robert Feenstra and C. M. Ridderikhoff, eds., *Études Néerlandaises de droit et d’histoire présentées à l’Université d’Orléans pour le 750^e anniversaire des enseignements juridiques* [= *Bulletin de la Société Archéologique et Historique de l’Orléanais*, n.s. 9 (1985)], Orléans, Société Archéologique et Historique de l’Orléanais, 1985, 13-29.

⁴³ See John Durkan, “The French Connection in the Sixteenth and Early Seventeenth Centuries”, in T. C. Smout, ed., *Scotland and Europe, 1200-1850*, Edinburgh, John Donald, 1986, 19-44.

III. Transnational legal histories

24. Under this heading I shall deal with only two topics, both concerning understanding of the term “transnational”. The first is presented by Reinhard Zimmermann’s well-known book, *The Law of Obligations: Roman Foundations of the Civilian Tradition*⁴⁴. While primarily an account of the Roman law, this also examines some relevant early-modern and nineteenth-century European law, as well as taking into account South African Law. The main focus of the work is legal doctrine, rather than a more rounded type of legal history (which would be impossible given its scope); but it is undoubtedly a powerful work. As *Dogmengeschichte*, however, is it to be classed as a work of European legal history, or of comparative legal history, or of transnational legal history? This tends to indicate the difficulties inherent about being too rigid in classification⁴⁵.

25. The second topic is suggested the complex legal history of Louisiana. This provides further interesting examples and questions. Although the law in Louisiana prior to the Purchase was basically Spanish colonial law, *The Digest of the Civil Laws Now in Force in the Territory of Orleans* (popularly known as the Louisiana Code) of 1808 was based mainly on the French Code of 1804 and its *projet* of 1800.⁴⁶ But as well as having French origins, Spanish and English sources exerted influence on this Code⁴⁷. After the purchase, Anglo-American law had a decided impact in Louisiana⁴⁸. Is study of Louisiana legal history that of state, national, European or transnational legal history? Again it is difficult to pin this down. Obviously, aspects of the study of Louisiana legal history relate to European colonisation, to Atlantic history, and to the history of the United States. The main drafter of the *Digest* of 1808 was from St Domingue, and had been

⁴⁴ Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Cape Town, Juta 1990; Oxford, Clarendon Press, 1996.

⁴⁵ For a sensitive critique, see Paul du Plessis, “Legal History and Method(s)”, in Rena van den Bergh, Gardiol van Niekerk, and Liezl Wildenboer, eds., *Libellus ad Thomasium : Essays in Roman Law, Roman-Dutch Law and Legal history in Honours of Philip J. Thomas [= Fundamina (Editio Specialis) 16 (2010)]*, Pretoria, Unisa Press, 2010, 64-72.

⁴⁶ See Rodolfo Batiza, “The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance”, *Tulane Law Review*, 46 (1971), 4-165. On the “Pascal/Batiza Debate”, see J. W. Cairns, “The de la Vergne Volume and the Digest of 1808”, *Tulane European and Civil Law Forum*, 24 (2009), 31-81 at 35-38.

⁴⁷ Vernon Valentine Palmer, *The Louisiana Civilian Experience: Critiques of Codification in a Mixed Jurisdiction*, Durham, NC, Carolina Academic Press, 2005, 51-100; J. W. Cairns, *The 1808 Digest of Orleans and 1866 Civil Code of Lower Canada: An Historical Study of Legal Change*, University of Edinburgh, Unpublished Ph.D. thesis, 1980, 557-561; Batiza, “Sources of the 1808 Civil Code”, 51, 61-62.

⁴⁸ See George Dargo, *Jefferson’s Louisiana: Politics and the Clash of Legal Traditions*, 2nd ed., Clark, NJ, Lawbook Exchange Ltd., 2009.

educated in law in Paris before the Revolution of 1789⁴⁹. Thus part of its history is also the history of the emigration of refugees from St Domingue to Louisiana, an emigration which took place mainly after US acquisition of Louisiana, and which had a profound impact on the newly acquired territory⁵⁰. It thus can also be seen as a Caribbean history.

26. The Louisiana Code in its turn had a significant impact on other codes in Latin America. But it is important to note that so did the French code itself. This means that French law becomes part of the legal history of Central and South America⁵¹. When the law in Quebec was codified, the Louisiana Code of 1825 also exercised some influence⁵².

27. Both these examples indicate the complex interconnectedness of much of the legal histories of Europe. Both indicate that a broad approach is advantageous.

IV. Conclusion

28. If there are still more questions than answers, I hope that perhaps we can see more clearly now. It is probably the case that most good legal history has always been at some level transnational or comparative. Maitland, for example, was very aware of this. He was conscious of the dangers of a narrow, anachronistic focus and favoured comparative approaches⁵³.

29. In Scotland, it has always been necessary to approach legal history in a transnational or comparative way. Indeed Scottish legal history has largely been constructed as a history of borrowings – from England, from Roman

⁴⁹ Alain Levasseur, *Moreau Lislet: The Man Behind the Digest of 1808*, 2nd ed. with assistance of Vicenç Feliú, Baton Rouge, Claitor's Publishing Division, 2008, 95.

⁵⁰ See, e.g., Nathalie Dessens, *From St Domingue to New Orleans: Migration and Influences*, Gainesville, University Press of Florida, 2007. Moreau Lislet is discussed in various contexts at, 26, 71, 88, 121-122, 128-130, 146, 186 note 62.

⁵¹ Agustín Parise, *Historia de la codificación civil del estado de la Luisiana y su influencia en el código civil argentino*, Universidad de Buenos Aires, unpublished LL.D. thesis, 2010; Rolf Knütel, "Influences of the Louisiana Civil Code in Latin America", *Tulane Law Review*, 70 (1996), 1445-1480; Jorge Sánchez Cordero, "The Reception of Legal Systems in the Americas: Diversities and Convergences", *Tulane European and Civil Law Forum*, 24 (2009), 231-263 at 254-256. See more generally, Agustín Parise, "The Place of the Louisiana Civil Code in the Hispanic Civil Codifications: The Comments to the Spanish Civil Code Project of 1851", (2008) 68 *Louisiana Law Review*, 823-929.

⁵² See J. Richert and E. S. Richert, "The Impact of the Civil Code of Louisiana upon the Civil Code of Quebec of 1866", (1973) 8 *Revue juridique Thémis de l'Université de Montréal*, 501-520.

⁵³ J. G. H. Hudson, *F. W. Maitland and the Englishness of English Law*, London, Selden Society, 2007, 9-16.

law and so on – and has been understood through a process of comparisons with Celtic Ireland, Anglo-Norman and Angevin England, and continental Europe. Perhaps this has been overdone. It has certainly led to puzzlement when the history of Scots law has not been perceived to conform to some other pattern supposedly found elsewhere which has been generalised as a norm.

30. Certainly the history of Scots law used always to be compared to that of England, resulting in either nationalistic self-satisfaction about some supposed superiority or breast-beating about how Scots law lagged behind that of England. Now there is a tendency to place it in a broader European framework, which is helpful, and does not prevent useful comparison with England and elsewhere, but which allows exploration of broader themes of influence and connection.

31. A transnational approach permits consideration of Scots law and the Empire, Scots law and the Atlantic world. This would allow one to think of the examination of certain Scots works in drafting the Civil Code of Lower Canada of 1866 and the use of “the terms of the Scotch law” to translate the French legal terminology for the same Code⁵⁴; or the impact on Scots law of the Empire, in a whole variety of ways. One could explore the role of Scots as judges or law officers in supposedly “civilian” areas of the Empire⁵⁵; one could consider their role as professors in colonial universities⁵⁶. Legal histories may continue to tend to be located within nations; but nations have to be located in a transnational context, and to be understood in a rounded way.

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⁵⁴ For example, the redactors looked at, inter alia, Bell’s Commentaries on the Laws of Scotland, various editions: see Thomas McCord, *The Civil Code of Lower Canada Together with a Synopsis of Changes in the Law, References to the Reports of the Commissioners, the Authorities as Reported by the Commissioners, etc.*, Montreal, Dawson Brothers, 1867, 368 (art. 2311); 369 (art. 2317); 370 (2326), etc. The quotation about terminology is from *ibid.*, ix; see also XI.

⁵⁵ See, e.g., S. D. Girvin, “An Evaluation of the Career of a Scots Colonial Judge: John Dove Wilson of Natal”, *Juridical Review* (1990), 31-51; S. D. Girvin, “William Menzies of Edinburgh, Judge at the Cape, 1827-1850”, *Juridical Review* (1993), 279-293.

⁵⁶ Such as F. Walton at McGill and later in Cairo: J. W. Cairns, “Development of Comparative Law in Great Britain”, in Mathias Reimann and Reinhard Zimmermann, eds., *The Oxford Handbook of Comparative Law*, 131-173 at 144-146.