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Legal History and Comparative Law: Just the Flip Side of the Same Coin?

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Legal History and Comparative Law: Just the Flip Side of the Same Coin?

Lutz-Christian Wolff*

The relationship between legal history and comparative law has always been subject to some debate. In recent years the topic has become even more controversial because comparatists have called for a broadening of the scope of comparative law to cover also legal history or even to regard legal history as a subset of comparative law. This article demonstrates that legal history and comparative law do indeed share many common features but also face the same identity crisis as it is difficult to pinpoint distinguishing features which make both areas separate disciplines. From a functional point of view legal history and comparative law are largely identical. The acknowledgement that legal history and comparative law are thus just the flip side of the same coin can eventually lead to the creation of significant synergies.

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I. Introduction

The relationship between legal history and comparative law has always been blurred and subject to some debate.¹ Now:

Comparative law and legal history are witnessing a remarkable moment of reorientation in their methods and perhaps even in their disciplinary identities. Historically linked to and emerging from a shared paradigm of historical jurisprudence, both disciplines have developed their own institutions, canons of knowledge, mechanisms of communication, and academic practices over the last century.²

The topic has become even more controversial in recent years when comparatists have called for a broadening of the scope of comparative law to cover also legal history³ or even to regard legal history as a subset of comparative law.⁴ This Article explores if these attempts stand on solid grounds. For this purpose, the notoriously difficult question of the scope and the distinguishing features of legal history on the one hand and comparative law on the other hand must be answered. It is important in this regard if legal history and comparative law do indeed qualify as independent disciplines and how they relate to each other. Acknowledging that legal historians are increasingly using comparative methods, it must also be asked if it is not rather comparative law which is to be regarded as a legal history sub-discipline.⁵

Based on a comprehensive literature review this Article discusses the relationship between legal history and comparative law by ultimately taking a functional approach. It demonstrates that legal history and comparative law have intriguingly similar characteristics which make it almost impossible to regard them as separate disciplines in modern times. The distinction between them rather seems a result of their historical origins. In other words, the relationship between legal history and comparative law is a matter of tradition rather than of taxonomic needs. It is the ultimate goal of this Article to draw attention to the difficulties to distinguish between legal history and comparative law in times when protagonists of both areas pursue similar goals, apply the same methods and are confronted with related identical identity crises.

The structure of this Article follows the above outline. It first discusses legal history as a discipline and explains the challenges when it comes to identify distinguishing features. In this context it also considers if legal history should be regarded as a law subject or a history subject, whether legal history is a legal discipline or a legal method, and the relevance of legal history in modern times. In its second part, this Article points to the intriguing fact that the same challenges which continue to haunt legal history are also issues for comparative law. Based on the findings of the first two parts, the main part of this Article then discusses the relationship between legal history and comparative law.

II. Legal History

1. General

Legal history originated in Europe where historical methods were used to identify and apply Roman law. “For many centuries, the study of law meant the study of Roman law – in particular the ‘case law’ of the Digest and the structure and contents of the student textbooks – and thus legal education became associated with the categories and concepts to be found in the ancient sources.”⁶ As is well-documented, medieval historians developed the so-called “scholastic method”, trying to create a logical system on the basis of texts which had been written by different Roman jurists over centuries.⁷ In contrast, during the

¹ See, e.g., JAAKO HUSA, A NEW INTRODUCTION TO COMPARATIVE LAW 343–36 (Bloomsbury 2015), 34–36; KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 8 (Tony Weir trans., 3d ed., Clarendon Press 1998); William F. Swindler, *Legal History – Unhappy Hybrid*, 55 LAW LIBR. J., 98, 106 (1962) (“[R]unning dispute between the historians (in law) and the comparativists (in law)”).

² Thomas Duve, *Preface*, 66 AM. J. COMP. L. 727, 727–31 (2018); see also Heikki Pihlajamäki, *Merging Comparative Law and Legal History: Towards an Integrated Discipline*, 66 AM. J. COMP. L. 733, 734 (2018).

³ Mathias Siems, *The Power of Comparative Law: What Types of Units Can Comparative Law Compare?*, 67 AM. J. COMP. L. 861, 868, 887 (2019).

⁴ Derek Roebuck, *A Return to That Other Country: Legal History as Comparative Law*, in SCHOLARSHIP, PRACTICE AND EDUCATION IN COMPARATIVE LAW: A Festschrift in Honor of Mary Hiscock 39, 40 (John H. Farrar, Vai Io Lo & Bee Chen Gok eds., 2019).

⁵ See Aniceto Masferrer et al., *The Emergence of Comparative Legal History*, in COMPARATIVE LEGAL HISTORY 1, 1–28 (Olivier Moréteau et al. eds., 2019).

⁶ Geoffrey Samuel, *Comparative Law as a Core Subject*, 21 LEGAL STUD. 444, 445 (2001); see also Mathias Reimann, *Historical Jurisprudence*, in THE OXFORD HANDBOOK OF LEGAL HISTORY 402, 406–07 (Markus D. Dubber & Christopher Tomlins eds. 2018); P.G. Monateri, *Everybody’s Talking: The Future of Comparative Law*, 21 HASTINGS INT’L & COMPAR. L. REV. 825, 835 (1998). For the influence of Roman law on the development of the English and American legal systems, see Reimann, *supra* note 6, at 407–10.

⁷ James Gordley, *Comparative Law and Legal History*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 754, 755–74 (2d ed., Oxford Mathias Reimann & Reinhard Zimmermann eds., 2019); see also Samuel, *supra* note 6, at 445.

Renaissance, humanists used the philological method to explore what Roman law texts meant for their original authors.⁸ In early modern times, the jurists of the *usus modernus pandectarum* did not regard Roman law texts as “unquestionable authoritative,”⁹ while natural law schools of the 16th century in Spain and of the 17th and 18th century in other parts of Europe saw Roman law (only) as representing broader philosophical principles.¹⁰ Finally, while most European countries codified their laws, in Germany the so-called “Pandektenschule” “wanted to preserve the Roman texts, to be faithful to their historical meaning, and yet tried to fit them into a conceptualist system that no Roman could have imagined.”¹¹ Throughout, “legal historians provided an important slice of the nationalistic narrative, explaining how history had led national states to the particular situations in law they found themselves in. . . . While positive law and legal scholarship became overwhelmingly nationally oriented counter movements arose.”¹²

Legal history seems to have lost much of its practical appeal in modern times.¹³ In fact, “[w]hile history has, for centuries, enjoyed a privileged place in the study of law, lawyers in the twenty-first century seem to have lost faith in history as a source of direct influence on the law.”¹⁴ Furthermore, legal history work was traditionally mono-jurisdictional, although it has also been stated that:

[L]egal historians have long before encompassed several or multiple jurisdictions in their work, for instance when working on the *ius commune* and how it evolved in different parts of Europe. Likewise, comparatists have long found the need to resort to historical developments to explain why several legal systems (taken individually or gathered in legal traditions or families) embrace similar solutions, using a variety of rules or institutions, and similar or different ways of thinking.¹⁵

In modern times, legal history is often criticized for preserving its Eurocentric focus. Calls for global legal history studies,¹⁶ for comparative legal history research¹⁷ or for legal history work that uses denominators such as colonial legal history¹⁸ have therefore become rather common over the past decades. Furthermore, groups of researchers with European and non-European backgrounds have created institutional structures which provide the organizational framework for collaborative work on distinct non-European themes in non-European settings,¹⁹ using approaches which go beyond traditional legal history scholarship.²⁰

⁸ See THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 7, at 755.

⁹ *Id.* at 756.

¹⁰ *Id.*

¹¹ *Id.* For the debate about the use of Roman law for a pan-European common law, see Paul du Plessis, *Legal History and Method(s)*, 16 FUNDAMINA 64, 67–72 (2010).

¹² Pihlajamäki, *supra* note 2, at 736; see also Samuel, *supra* note 6, at 445. For the fact that English legal history was “inaugurated” by Frederic William Maitland, see John H. Baker, *Why the History of English Law Has Not Been Finished* 59 CAMBRIDGE L.J. 62, 64 (2000); Reimann, *supra* note 6, at 408–09. According to Reiman, Maitland followed the “broadly generalizing and somewhat amateurish” approach of Henry Sumner Maine. Reimann, *supra* note 6, at 402. For American scholarship in legal history before World War II, see David M. Rabban, *Methodology in Legal History – From the History of Free Speech to the Role of History in Transatlantic Legal Thought*, in MAKING LEGAL HISTORY – APPROACHES AND METHODOLOGIES 85, 91 (Anthony Musson & Chantal Stebbings eds., 2012); David M. Rabban, *From Maine to Maitland via America*, 68 CAMBRIDGE L.J. 410 (2009).

¹³ See Russel Sandberg, *The Time for Legal History: Some Reflections on Maitland and Milsom Fifty Years On* 21 LAW & JUST. 21, 23–24 (2018) (noting the “current comatose state”).

¹⁴ du Plessis, *supra* note 11, at 71; see also Rabban, *supra* note 12, at 107.

¹⁵ Masferrer et al., *supra* note 5.

¹⁶ See Alessandro Somma, *Global Legal History, Legal Systemology, and the Genealogy of Law* 66 AM. J. COMP. L. 751 (2018).

¹⁷ See, e.g., Masferrer et al., *supra* note 5, at 5; Pihlajamäki, *supra* note 2, at 741 (“Comparative legal history, as a consistently used brand, is a creation of the past two decades.”); David Ibbetson, *Comparative Legal History – A Methodology*, in MAKING LEGAL HISTORY – APPROACHES AND METHODOLOGIES, *supra* note 12, at 131; DAVID S. CLARK, AMERICAN COMPARATIVE LAW: A HISTORY 2 (Oxford Univ. Press 2022) (“For Europeans, the value in comparative legal history has been evident since World War II with the desire of politicians and jurists in civil law nations to reduce nationalism and to promote a common legal tradition in the interest of peace and economic prosperity.”).

¹⁸ See HUSA, *supra* note 1, at 166–68.

¹⁹ See, e.g., About AHLA, ASIAN LEGAL HIST. ASS’N, <https://web.law.cuhk.edu.hk/ALHA> (last visited May 29, 2026); INT’L SOC’Y FOR CHINESE L. & LEGAL HIST., <https://www.chineselawandhistory.com/> (last visited May 29, 2026); About JALHA, JAPAN LEGAL HIST. ASS’N, https://www.jalha.org/about_2.htm (last visited May 29, 2026); Home, AUSTRALIAN AND NEW ZEALAND L. & HIST. SOC’Y, <https://anzlhz.org/> (last visited May 29, 2026); AM. SOC’Y OF LEGAL HIST., <https://aslh.net/> (last visited May 29, 2026); Welcome to the Osgoode Society for Canadian Legal History, THE OSGOODE SOC’Y <https://www.osgoodesociety.ca/> (last visited on Apr. 5 2026).

²⁰ Lawrence M. Friedman, *American Legal History: Past and Present*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER – HISTORICAL PERSPECTIVES 464, 472 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988).

In fact, over the past decades a vast body of research has emerged exploring the legal histories of Asia²¹, Africa,²² Australia²³ and of course, the Americas.²⁴

Prior to 1960, most American legal history was intellectual history, usually from the professional perspective of lawyers, conservative in nature. . . . Since 1960, a more academic tone to intellectual legal history appeared, especially related to constitutional history. In addition, social history – regularly concerned with law and social change – became more important in the 1960s and 1970s. By the twenty-first century legal history has blossomed in ways unimaginable 50 years earlier.²⁵

In general terms, legal history is nowadays regarded as a “branch of knowledge which results from inquiry into legal relations in the past.”²⁶ Broad definitions of this kind do, however, not help much when it comes to define the exact scope of the area covered and the methods adopted by legal historians. In fact, legal history seems to be about almost everything. *Per definitionem*, anything legal that happened even one second ago already qualifies as legal history.²⁷ Consequently, nobody has ever claimed that there should be any limit as to how far one must go back to call the study of a legal topic legal history work. To define the exact scope of legal history other aspects must be considered. Most importantly, one must ask if legal history is a legal or a history subject, if legal history is a legal discipline or (just) a legal method and what its practical significance is in modern times. These issues shall be explored in the following sections.

2. Legal History as a Law Subject or a History Subject?²⁸

The question if legal history is a history subject or a law subject depends on whether legal history should – in line with the first approach – pursue a “horizontal approach”, i.e. analyze the historical dimension of law in particular societies like the economic, cultural and political characteristics.²⁹ Law and legal institutions are studied as a facet of the society of a particular point of time. In contrast, the relationship with specific questions of modern law is not considered. Legal history is ranked at the same level as historical studies in other areas, and legal history would consequently have to be regarded as a historical discipline

²¹ See, e.g., JANOS JANY, *LEGAL TRADITIONS IN ASIA – HISTORY, CONCEPTS AND LAW* (Springer Nature 2020); Mitra Sharafi, *South Asian Legal History*, 11 ANN. REV. L. & SOC. SCI. 309 (2015); Hiroshi Oda, *The History of Modern Japanese Law*, in HIROSHI ODA, *JAPANESE LAW* 13–25 (3d ed. Oxford Univ. Press 2009); M.P. JAIN, *OUTLINES OF INDIAN LEGAL AND CONSTITUTIONAL HISTORY* (8th ed. LexisNexis India 2022); ZHANG TAIJU, *THE LAWS AND ECONOMICS OF CONFUCIANISM: KINSHIP AND PROPERTY IN PRE-INDUSTRIAL CHINA AND ENGLAND* (Cambridge Univ. Press 2017); ZHANG TAIJU, *THE IDEOLOGICAL FOUNDATION OF QING TAXATION: BELIEF SYSTEMS, POLITICS AND INSTITUTIONS* (Cambridge Univ. Press 2023); William P. Alford, *A Second Great Wall? China's Post-Cultural Revolution Project of Legal Construction* 11 CULTURAL DYNAMICS 193 (1999); William P. Alford, *Law, Law, What Law? Why Western Scholars of Chinese History and Society Have Not Had More to Say About Its Law* 23 MOD. CHINA 398 (1997).

²² See, e.g., Phillip J. Thomas, *Harmonising the Law in a Multilingual Environment with Different Legal Systems: Lessons to Be Drawn from the Legal History of South Africa* 14 FUNDAMINA 133 (2008); Jakob Zollmann, *African International Legal Histories – International Law in Africa: Perspectives and Possibilities* 31 LEIDEN J. INT'L L. 897 (2018); YUSHAU SODIQ, *A HISTORY OF THE APPLICATION OF ISLAMIC LAW IN NIGERIA* (Springer Int'l 2017).

²³ See, e.g., SARAH MCKIBBIN, LIBBY CONNORS & MARCUS HARMES, *A LEGAL HISTORY FOR AUSTRALIA* (Hart Publ'g 2021); THE CAMBRIDGE LEGAL HISTORY OF AUSTRALIA (Peter Cane, Lisa Ford & Mark McMillan eds., 2022);

²⁴ See, e.g., DAVID M. RABBAN, *LAW'S HISTORY – AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY* (Cambridge Univ. Press 2013); G. EDWARD WHITE, *AMERICAN LEGAL HISTORY: A VERY SHORT INTRODUCTION* (Oxford Univ. Press 2013); A COMPANION TO AMERICAN LEGAL HISTORY (Sally E. Hadden & Alfred L. Brophy eds., 2013); KERMIT L. HALL, PAUL FINKELMAN & JAMES W. ELY, JR., *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* (3d ed., Oxford Univ. Press 2005); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (3d ed. Oxford Univ. Press 2019); LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* (Yale Univ. Press 2002); FRIEDMAN, *supra* note 20; Lawrence M. Friedman & Grant M. Hayden, *The Background of American Law*, in *AMERICAN LAW: AN INTRODUCTION*, 35 (Lawrence M. Friedman & Grant M. Hayden eds., 2017); R.C.B. RISK, BLAINE G. BAKER & JIM PHILLIPS, *A HISTORY OF CANADIAN LEGAL THOUGHT: COLLECTED ESSAYS* (Univ. of Toronto Press 2006); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (Harvard Univ. Press 1977); Juan Wilson, *Legal History in the US and Latin America: Explaining a Methodological Divide*, 10 LATIN AM. LEGAL STUD. 7 (2022); MATTHEW C. MIROW, *LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN LATIN AMERICA* (Univ. of Tex. Press 2004); DIEGO ACOSTA, *THE NATIONAL VERSUS THE FOREIGNER IN SOUTH AMERICA: 200 YEARS OF MIGRATION AND CITIZENSHIP LAW* (Cambridge Univ. Press 2018); CHRISTIANO PAIXÃO & MASSIMO MECCARELLI, *COMPARING TRANSITIONS TO DEMOCRACY: LAW AND JUSTICE IN SOUTH AMERICA AND EUROPE* (Springer 2021).

²⁵ CLARK, *supra* note 17, at 6. For an American legal historiography, see *id.* at 12–44; for constitutional history, see *AMERICAN LAW AND THE CONSTITUTIONAL ORDER – HISTORICAL PERSPECTIVES*, *supra* note 20, 473 (“[S]till locked in the castle of conceptualism, guarded by fire-breathing. . . . Constitutional history is bound to wake from the dead.”).

²⁶ SCHOLARSHIP, PRACTICE AND EDUCATION IN COMPARATIVE LAW, *supra* note 4, at 41, 52; see also Swindler, *supra* note 1, 107.

²⁷ See FRIEDMAN, *supra* note 24, at vi.

²⁸ For the following, also see, e.g., Lutz-Christian Wolff, *Hongkonger Rechtsgeschichte – warum und wofür denn?* [Hong Kong Legal History – Why and for What?], in *ITINERARIA IURIS – VON ROM NACH CHINA – Festschrift für Ulrich Manthe zum 70. Geburtstag* 275, 281–82 (Peter Gröschler et al. eds. 2017); Pihlajamäki, *supra* note 2, at 734.

²⁹ See GEORGE MOUSOURAKIS & MATTEO NICOLINI, *TRaversing LEGAL TRADITIONS: PERSPECTIVES ON COMPARATIVE LAW AND LEGAL HISTORY* 18 (2d ed. Springer 2025) (“[T]he study of how law and legal systems have evolved over time and how they have shaped and been shaped by social, political, economic and cultural contexts.”).

rather than a legal discipline.³⁰ Legal systems are analysed as scholarly objects by legal historians as they are studied by sociologists, economists and political scientists.³¹

Or is a vertical approach preferable according to which – in line with the second view above – legal history work explores the genealogy and the development of law to understand the practical meaning of legal rules, concepts, systems and cultures in present times?³² The vertical approach implies that the analysis of past legal systems is in its own a distinctive scholarly method to understand current law.

For lawyers the past is primarily a source of authority – if we interpret it correctly, it will tell us how to conduct ourselves now. History is not only a source of authority but of legitimacy: It reassures us that what we do now flows continuously out of our past, out precedents, traditions, fidelity to statutory and Constitutional texts and meanings.³³

Both approaches have their own merits in certain circumstances and – depending on the goals – their specific role to play. “The historian, like the lawyer, has to find something above and beyond the sources – a story, a changing institution, or an evolving idea.”³⁴ It has been pointed out that if legal history is understood as a historical discipline, it may find much broader acceptance compared with attempts to force legal history into the nowadays rather practice-oriented legal sciences.³⁵

Arguably, American legal history scholarship favours the horizontal approach³⁶ and the self-conception of those engaged in legal history research in the US consequently appears to be that of historians in the first place.³⁷ Law is seen as an “object” of historical exploration,³⁸ rather than emphasizing the study of the historical roots of legal systems as a tool to interpret and thus apply law in present times. Legal history is regarded as striving “to free the present from the grasp of the past. Its role is that of critique.”³⁹

US legal history has been practiced with the purpose of demystifying and denaturalizing legal rules, showing them as contingent product of particular economic interests, political inclinations, or social hierarchies. The historians that participated in *Critical Legal Studies* movement, for all their criticism of Marxist functionalism, did not fundamentally deviate from that goal.⁴⁰

Nevertheless, US legal history scholarship is not limited to a descriptive function. By contrast, it aims to draw general lessons for and critique as well as inspire the present thus contributing “to contemporary policy debates by enabling readers to assess the merits and preconditions of policies pursued in other

³⁰ See Charles Donahue Jr., *Whither Legal History*, in TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: ESSAYS IN HONOR OF PROFESSOR MORTON J. HORWITZ 334 (Daniel W. Hamilton & Alfred L. Brophy eds., Harvard Univ. Press 2009).

³¹ See FRIEDMAN, *supra* note 24, at xviii–xix.

³² L.J. Downer, *Legal History – Is It Human?*, 4 MELB. U. L. REV. 1, 2–3 (1963); see also Pihlajamäki, *supra* note 2, at 742; Reimann, *supra* note 6, at 397 (“[F]or historical jurisprudence . . . history was not merely the background of the status quo; instead, it was an integral part of its present state. . . . [L]egal history was not an end in itself; instead, it was the principal means through which even present-day law must be understood.”); *id.* at 405; Wilson, *supra* note 24, at 37 (commenting that legal history has survived as “a sort of reactionary discipline, constantly tying the meaning of present statutes to the authority of past texts. . . . Legal texts from the past periods are supposed to give us the key to the meaning of contemporary legal institutions, but it is never quite clear exactly what that key is”).

³³ Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1023 (1997).

³⁴ John Baker, *Reflections on ‘Doing’ Legal History*, in MAKING LEGAL HISTORY, *supra* note 12, at 2, 16.

³⁵ See *supra* Part II.4 (offering a different view); see also Pihlajamäki, *supra* note 2, at 742.

³⁶ AMERICAN LAW AND THE CONSTITUTIONAL ORDER – HISTORICAL PERSPECTIVES, *supra* note 20, at 473. For the origins of the “contemporary shape” of legal history in the US from Oliver Wendell Holmes with his famous statement that “[t]he life of the law has not been logic: it has been experience.” see OLIVER WENDELL HOLMES, JR. & G. EDWARD WHITE, *THE COMMON LAW* 3 (Harvard Univ. Press 2009), and his legal pragmatism which “positioned him in opposition to neo-Kantian legal philosophers – who tried to explain the law in terms of a system – and conservative legal scholars who stressed historical continuity as the basis of law”, to James Willard Hurst and the Wisconsin “Law and Society School” of legal history. See Wilson, *supra* note 24, at 45–46 (“[T]he pragmatist framework . . . provided US legal history with a critical tool to understand the law in terms of interests, policy, and biases, and thus to reflect on the reciprocal relationship between ‘law’ and ‘society[.]’”); RABBAN, *supra* note 24, at 48–51; CLARK, *supra* note 17, at 499.

³⁷ See Wilson, *supra* note 24, at 45 (pointing to the fact that in the US many legal historians are not non-lawyers); cf. Gordon, *supra* note 33, at 1024–25 (“Lawyers are monists, historians are pluralists – i.e., lawyers want to recover a single authoritative meaning from a past act or practice, while historians look for plural, contested, or ambiguous meanings. Lawyers are overly presentist: They want to bring past practices into the present to serve present purposes, whereas historians regard naked presentism as a sin. . . . Lawyers are concerned to find continuities between past and present, while historians employing . . . ‘contextual’ or ‘structuralist’ approaches will emphasize discontinuous breaks, great epistemic shifts in the ways in which social actors construct their words.”).

³⁸ Morton J. Horwitz, *History and Theory*, 96 YALE L.J. 1825, 1825 (1987) (noting it is “divorced from questions of legal and political theory”).

³⁹ Wilson, *supra* note 24, at 47.

⁴⁰ *Id.* at 36. For the critical legal studies movement, see, e.g., Duncan Kennedy & Karl E. Klare, *The Bibliography of Critical Legal Studies*, 94 YALE L.J. 464 (1984); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983); John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84 (1995); Günter Frankenberg, *Down by Law: Irony, Seriousness, and Reason*, 83 NW. U. L. REV. 360, 383 (1989).

societies[.]”⁴¹ liberate “the political imagination by revealing suppressed alternatives[.]”⁴² and “[e]xpose injustice and inspire indignation and commitment.”⁴³ At the same time, as Morton J. Horwitz has pointedly explained:

[A]nalytical jurisprudence since Austin have been thought to require ignoring both the historical and the empirical. . . . This pattern of screening out historical or social context was designed to demonstrate the possibility of creating a neutral and apolitical mode of legal discourse, which lay the foundation of what H.L.A Hart called “Austin’s important conception of an autonomous analytical jurisprudence.”⁴⁴

While the horizontal approach appears to be prevailing in US legal history scholarship, the vertical approach has an important role to play in day-to-day legal practice, although a rather tacit one.⁴⁵ The reference to legislative history and historical context for the interpretation of regulations are important parts of any US lawyers’ methodological toolbox not least because the historical approach is *per se* embedded in the *stare decisis* doctrine.⁴⁶

The historical dimension of practical legal work is probably most visible in constitutional law.⁴⁷ For example, in *New York Rifle & Pistol Association, Inc. v. Bruen*,⁴⁸ the Supreme Court expressly referred to historical developments when deciding that it is unconstitutional for New York to require that an applicant for an unrestricted license to “have and carry” a concealed pistol or revolver must prove “a special need for self-protection distinguishable from that of the general community”.⁴⁹ Similarly, in *District of Columbia v. Heller*⁵⁰ the Supreme Court decided that private citizens have the constitutional right to possess an ordinary weapon and use it lawfully in historically defined situations.

These observations suggest that legal history is dual natured. On the one hand, there is academia with its emphasis on the vicinity to history and social science aiming at exploring past legal structures in their societal context. While this will also facilitate the understanding that the “mysterious operation” of present law and legal institutions “as the result of concrete decisions made by flesh-and-bone human beings, people with particular agendas, powers, and limitations”⁵¹, the main goal is not to support current law in action. On the other hand, practical legal work must obviously consider the past to interpret present law without conceding a “dominance of the present by the past.”⁵² Both approaches are not dichotomic but rather supplement each other although this is hardly acknowledged.

Arguably, the dual nature of legal history is also evidenced by the fact that in the US legal history programs are offered by history departments as well as by law schools often with a strong emphasis on the area’s cross-disciplinary character.⁵³ For example, at Harvard, the legal history program is situated within the History Department which, however, stresses that “[l]egal history sits at the cross-roads between

⁴¹ William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 29 STAN. L. REV. 1065, 1096 (1997).

⁴² Robert W. Gordon, *An Exchange on Critical Legal Studies between Robert W. Gordon and William Nelson – Letter to William Nelson from Robert W. Gordon*, 6 LAW & HIST. REV. 139, 178 (1988).

⁴³ Fisher III, *supra* note 41, at 1101.

⁴⁴ Morton J. Horwitz, *Why is Anglo-American Jurisprudence Unhistorical?*, 17 OXFORD J. LEGAL STUD., 551, 564–65 (1997).

⁴⁵ For similar tacit knowledge in comparative law, see Vivian Grosswald Curran, *Dealing in Difference: Comparative Law’s Potential for Broadening Legal Perspectives*, 46 AM. J. COMP. L. 657, 658 (1998); Ugo Mattei, *An Opportunity Not to Be Missed: The Future of Comparative Law in the United States*, 46 AM. J. COMP. L. 709, 717 (1998).

⁴⁶ See JOHN H. BAKER, *THE COMMON LAW TRADITION: LAWYERS, BOOKS AND THE LAW* 164 (Hambledon Press 2000); John Phillip Reid, *The Jurisprudence of Liberty: The Ancient Constitution in the Legal Historiography of the Seventeenth and Eighteenth Centuries*, in *THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW* 147, 167 (Ellis Sandoz ed., 1993) (“The ‘forensic’ historian . . . searches the past for material applicable to a current issue. The purpose of the advocate, unlike that of the historian, is to use the past for the elucidation of the present, to solve some contemporary problem or, most often, to carry an argument. It is the past put in the service of winning a case at bar.”); see also Michael Kirby, *Living with Legal History in the Courts*, 7 AUSTL. J. LEGAL HIST. 17, 19, 26–27 (2003) (“To be a lawyer in Australia is, in a sense, to be a legal to be a legal historian. . . . To be a judge in our legal tradition, is thus to be a privileged participant in the making of this form of legal history.”).

⁴⁷ Fisher III, *supra* note 41, at 1103 (identifying as one goal of legal history work to “assist contemporary judges in construing constitutional texts”); cf. Horwitz, *supra* note 24, at xii (warning against the “excessive equation of constitutional law with ‘law’”).

⁴⁸ 597 U.S. 1 (2022).

⁴⁹ *Id.* at 70. For the reference to the legislative history in statutory interpretation, see, e.g., FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 59–82 (Stanford Law Books 2009); YULE KIM, *STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS* 29–34 (Nova Science Publishers 2009).

⁵⁰ 554 U.S. 570 (2008).

⁵¹ Wilson, *supra* note 24, at 53.

⁵² *Id.*, at 54.

⁵³ In contrast to critical of the development in Latin America, see *id.* at 37, 39 (“Unlike US Legal History, Latin American legal history has suffered from some significant institutional constraints which have hindered its theoretical and methodological evolution. The most salient one is that the discipline has been cultivated almost exclusively by lawyers, inside law schools, and with future lawyers in mind. This has burdened legal history with a narrow and very technical understanding of the law and a limited view of the function of legal institutions. . . . Modern legal history scholarship is today virtually non-existent within history departments in Latin America.”).

disciplines. Its study enriches our understanding of both past societies and our own.”⁵⁴ Harvard Law School offers within its J.D. program “Law and History” studies.⁵⁵ At Yale University, a legal history program is operated by the Law School. Yale Law School’s website emphasizes that “[t]he history of law offers indispensable insights into the character of our legal systems. Historical materials appear throughout the Law School’s curriculum with specialized courses addressing topics in the history of legal systems around the world.”⁵⁶ At Stanford, the Law School and the History Department run two joint degree programmes, i.e. a joint J.D./Ph.D program and a joint J.D./M.A. program.⁵⁷ In addition, the Stanford Center for Law and History is “devoted to examining the interrelationships between law and history, without geographic, temporal, or other subject-area limitations”⁵⁸ thus emphasizing the interdisciplinary nature. The University of Chicago Law School’s “legal history program”⁵⁹ comprises legal history courses offered by faculty from the Law School and the History Department.⁶⁰

3. Legal History as a Legal Discipline or a Legal Method?

From the perspective of the vertical approach, i.e. if legal history work is understood as a tool to explore the practical meaning of current law, it could be argued that legal history is not a discipline in itself, but (just) a legal method.

In a legal context, the term “method” is usually employed to refer to the “path” or the “way” from an existing source of law to the decision on a particular legal issue in a given situation. Understood in this sense, it concerns the application and the interpretation of the law and is synonym for the expression “legal reasoning” that is more frequently used in common law systems.⁶¹

In the horizontal approach context “method” can have a slightly different connotation. Here, it is a scholarly approach to analyse the legal status quo at a particular point of time. In other words, the method is a research tool to gain knowledge which can be applied to address questions of a more general nature.⁶² Finally, a method can also describe a teaching approach, i.e. from the perspective of the topic of this Article, the use of legal history as an educational technique.⁶³

If legal history was just a method, one may question if it is justifiable to regard legal history as a separate discipline.⁶⁴

[T]he division of knowledge into different branches can be traced to antiquity, the institutional inscription necessary for these divisions to become disciplines is generally attributed to the arrival of the medieval universities. The current division of intellectual activity in disciplinary fields reflected in the institutional structures not only on teaching, but also of research and knowledge dissemination is probably most closely associated with educational reforms in Germany in the nineteenth century.⁶⁵

According to an “internal,” formalist viewpoint, which is nowadays often implicitly adopted, the “defining characteristic of disciplines is either a discrete object or area of study, a distinct methodology, or

⁵⁴ Program Overview, HARV. HIST. DEP’T, <https://history.fas.harvard.edu/legalhistory> (last visited May 29, 2026).

⁵⁵ J.D. Program, HARVARD L. SCH., <https://hls.harvard.edu/academics/degree-programs/jd-program/> (last visited May 29, 2026).

⁵⁶ Studying Legal History, YALE L. SCH., <https://law.yale.edu/studying-law-yale/areas-study/legal-history> (last visited May 29, 2026).

⁵⁷ Law and History, SLS, <https://law.stanford.edu/education/degrees/joint-degrees-within-stanford-university/law-and-history/#slsnav-overview> (last visited May 29, 2026); see also Donahue Jr., *supra* note 30, 340.

⁵⁸ Stanford Center for Law and History, <https://law.stanford.edu/stanford-center-for-law-and-history/> (last visited May 29, 2026).

⁵⁹ Legal History Program, UNIV. OF CHI. L. SCH., <https://www.law.uchicago.edu/legalhistory> (last visited May 29, 2026).

⁶⁰ Legal History Courses, UNIV. OF CHI. L. SCH., <https://www.law.uchicago.edu/prospective/historycourses> (last visited May 29, 2026).

⁶¹ Stefan Vogenauer, *Sources of Law and Legal Method in Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 7, at 878, 890; see also Marcel Senn, *The methodological debates in German-speaking Europe (1960-1990)*, in MAKING LEGAL HISTORY, *supra* note 12, at 102–10, 108.

⁶² See Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974); see also Daniel Klerman, *Statistical and Economic Approaches to Legal History*, 4 U. ILL. L. REV. 1167–76 (2003) (advocating the use of economic and statistical methods by legal historians); AMERICAN LAW AND THE CONSTITUTIONAL ORDER – HISTORICAL PERSPECTIVES, *supra* note 20, at 469, 471.

⁶³ *Id.*

⁶⁴ See Geoffrey Samuel, *Does One Need an Understanding of Methodology in Law Before One Can Understand Methodology in Comparative Law?*, in METHODOLOGIES OF LEGAL RESEARCH: WHICH KIND OF RESEARCH FOR WHAT KIND OF DISCIPLINE? 177, 183 (Mark Van Hoecke ed., 2011) (explaining the comparative law point of view).

⁶⁵ Finn Makela, *Is Law an Academic Discipline?*, 50 REV. JURIDIQUE THÉMIS DE L’U. DE MONTRÉAL 433, 439 (2016).

some combination of the two.”⁶⁶ According to an “external” viewpoint, a discipline requires “institutional recognition and thus the authority to generate a legitimizing discourse about itself that serves both to trace boundaries of inclusion and exclusion and to further reinforce its power.”⁶⁷

It appears that according to both viewpoints legal history can be and actually must be recognized as a discipline.⁶⁸ It is a separate area of study⁶⁹ and there are of course distinct legal history methods,⁷⁰ although legal historians do also apply other methods which are not genuinely historical, including comparative and empirical methods.⁷¹ Legal history is also institutionally acknowledged as evidenced in the US by the broad recognition which of the American Society for Legal History⁷² enjoys globally and the number of legal history journals published in the US.⁷³

4. Relevance of Legal History?⁷⁴

When attempting to delineate legal history as a discipline the issue of relevance must be addressed.⁷⁵ European voices have claimed that nowadays, “[t]o a majority of lawyers and law professors in most countries of the world, . . . legal history [remains] some nostalgic and largely useless activity[.]”⁷⁶

In the US, as far as legal scholarship is concerned, legal history has arguably never fully recovered from Roscoe Pound’s⁷⁷ shift from historical jurisprudence⁷⁸ to sociology.

Just as there was a transatlantic turn to historical explanation in many fields during the nineteenth century, there was a transatlantic turn away from it around the beginning of the twentieth. Like Pound many scholars on both sides of the Atlantic focused on the social problems they associated with the excessive individualism of industrial capitalism. . . . [M]any looked to the emerging social sciences for collective solutions to those problems. They often treated history, particularly the evolutionary study of origins and development that was popular during the nineteenth century, as irrelevant or even counterproductive to this project. . . . As the emerging social sciences separated themselves from history, focusing on factors that influence and could reform contemporary society, the growing number of people interested in combining scholarship with social activism often decided to become social scientists rather than historians.⁷⁹

⁶⁶ *Id.* at 437.

⁶⁷ *Id.* at 444.

⁶⁸ *But see* Reimann, *supra* note 6, at 406 (“[I]n the closing decades of the nineteenth, and especially in the early twentieth, century historical research and writing increasingly sought to acquire knowledge (of the legal past) for its own sake. As such, it was no longer part of historical jurisprudence proper but turned into legal history as discipline in its own right.”).

⁶⁹ For the US the discussion in the previous section, *see* Part II. 2.

⁷⁰ *See* Jenni Parrish, *A Guide to American Legal History Methodology with an Example of Research in Progress*, 86 LAW LIBR. J. 105 (1994).

⁷¹ Anthony Musson & Chantal Stebbings, *Introduction*, in MAKING LEGAL HISTORY, *supra* note 12, at 11 (“[A]dopting methodologies from the social sciences, linguistics, anthropology and other cognate disciplines to interrogate their sources in the pursuit of alternative perspectives.”); Dirk Heirbaut, *Exploring the Law of Medieval Minds – The Duty of the Legal Historian to Write Books of Non-Written Law*, in MAKING LEGAL HISTORY 111; Fisher III, *supra* note 41, at 1073–86; Daniel Klorman, *Statistical and Economic Approaches to Legal History*, 4 U. ILL. L. REV. 1167, 1167–76; ECONOMICS OF LEGAL HISTORY (Daniel Klorman ed., 2015); *cf.* AMERICAN LAW AND THE CONSTITUTIONAL ORDER – HISTORICAL PERSPECTIVES, *supra* note 20, at 469, 471.

⁷² AM. SOC’Y FOR LEGAL HIST., <https://aslh.net/> (last visited May 29, 2026).

⁷³ *W&L Law Journal Rankings*, W&L L., <https://managementtools4.wlu.edu/LawJournals/> (last visited May 29, 2026) (listing seven legal history journals published in the US); *see also* CLARK, *supra* note 17, at 36 (dedicating a whole chapter of his book on the history of US comparative law the “The Rise of American Legal History as a Distinct Discipline”).

⁷⁴ Wolff, *supra* note 28, at 282–85.

⁷⁵ *See* du Plessis, *supra* note 11, at 64.

⁷⁶ Masferrer et al., *supra* note 5, at 12.

⁷⁷ 1870–1964; *see* CLARK, *supra* note 17, at 24–27, 321–23.

⁷⁸ The historical jurisprudence movement had its golden time between 1880–1920. It started in Germany under the leadership of Friedrich Carl von Savigny (1779–1861). *see, e.g.*, Monateri, *supra* note 6, at 830–832; John Henry Merryman, *Comparative Law Scholarship*, 21 HASTINGS INT’L & COMP. L. REV. 771, 774 (1998); RABBAN, *supra* note 24, at 94–101. It was pursued also in England with its main representatives being Henry Sumner Maine (1822–1888) *id.* at 115–35, and Frederic William Maitland (1850–1906) *id.* at 383–90, 405–09, and in other countries, Reimann, *supra* note 6, at 398. In the US, historical jurisprudence was mainly driven by Herbert Baxter Adams (1850–1901). *See* RABBAN, *supra* note 24, 89–91. The historical jurisprudence movement reacted against earlier and contemporary approaches which regarded law either as a timeless and logical system (natural law) or simply a command of the sovereign (analytical jurisprudence); it defined itself not only by turning to historical research but also by turning against both the discussion of abstract logic and the search for legislative will, *id.* at 402. For the reasons of the historical jurisprudence movement’s demise by 1920, *id.* at 415–16 (“With the backward looking conception of law, historical jurisprudence was fundamentally at odds with the forward looking reform agendas of the twentieth-century regulatory state; legal history simply did not provide solutions for the problems of industrialization, labour-conflict, and urbanization. . . . And with its claim that law as a science belonged in the hands of trained legal experts, historical jurisprudence was essentially undemocratic.”).

⁷⁹ *Id.* at 520–21.

While traditional historical jurisprudence was consequently no longer regarded as a distinct school of thought that could help solving societal issues,⁸⁰ in the mid-20th century Willard Hurst⁸¹ and his followers aimed to follow up on Pound's call for a sociological jurisprudence by developing a "sociological legal history" within the emerging Law and Society school.⁸² The Critical Legal Studies movement of the 1970s criticized these attempts for having misinterpreted American legal history and for ignoring the relative autonomy of law from society.⁸³

The general view seems to be more optimistic in modern times. As early as in 1988, Lawrence M. Friedman saw the area as "booming" and being "in excellent health" in the US.⁸⁴

In the law schools this growth owes something to a general loss of faith in classical legal scholarship. Old-fashioned doctrinal research is out of fashion. This has led law professors to ask: What do we do now? . . . In all honesty, the demands of the academic career do help explain the modest vogue of legal history: it fills a gap and a need. And it is, after all, *interesting*, which is more than can be said for some other aspects of legal scholarship.⁸⁵

Nevertheless, in his analysis of the development of legal history as a discipline in England and the US, David M. Rabban acknowledged that despite a:

[D]ramatic recent revival of scholarship in legal history in both countries . . . legal scholars in both countries typically do not approach their research historically. Historical analysis today is only one of many methodologies, and legal historians are only a small fraction of the legal professoriate. . . . After the eclipse of historical explanation in the early twentieth century, it never regained its prominence within legal scholarship generally.⁸⁶

In fact, despite the efforts of leading US law schools as reported above,⁸⁷ legal history does not feature prominently in modern law school curricula.⁸⁸ While "[t]here has been something of a legal history renaissance of late in law schools,"⁸⁹ "law professors, in the nineteenth century no less than today, have always faced pressures to conform to the practice-oriented 'law reform' model."⁹⁰ In most parts of the world there is an obvious trend to regard legal education as predominantly aimed to prepare students for practice.⁹¹ The:

[D]istinction between law as an academic discipline and law as an object of training for future professionals set the stage for an ongoing struggle for legitimacy between universities and the profession[.] . . . [T]he debate is invariably structured around the

⁸⁰ *Id.* at 522–23 ("The conception of law as an organic evolutionary process . . . became outmoded in the early twentieth century, in law as in other disciplines, including history itself. . . . For the progressive early twentieth-century scholars, the study of history, particularly its organic evolution over long periods, diverted attention from the urgent social problems they wanted their scholarship to address."). For the problems of legal history teaching in the US especially in the late 1960s and 70s, see Donahue Jr., *supra* note 30, at 327; AMERICAN LAW AND THE CONSTITUTIONAL ORDER – HISTORICAL PERSPECTIVES, *supra* note 20, at 464 ("The field, practically speaking, did not exist.").

⁸¹ 1910–1997; see also CLARK, *supra* note 17, at 31–33.

⁸² See Willard Hurst, *Legal History: A Research Program*, 1942 WIS. L. REV. 323, 325 (1942); see also Lawrence M. Friedman, *American Legal History: Past and Present*, 34 J. LEGAL EDUC. 567 (1984); AMERICAN LAW AND THE CONSTITUTIONAL ORDER – HISTORICAL PERSPECTIVES, *supra* note 20, at 469 ("This not only downgrades the importance of law in society, it eliminates law altogether as an independent entity with any kind of meaningful boundaries. It denies that there is a special quality to law and legal institutions. . . . [T]his was not Hurst's idea, but other people took the ball and ran."); Horwitz, *supra* note 24, at xiii.

⁸³ See Rabban, *supra* note 12, at 532 w(referencing Michael Grossberg's, *Social History Update: Fighting Faiths and the Challenges of Legal History*, 25 J. SOC. HIST. 191 (1991)). For the Critical Legal Studies movement, see *supra* note 40 accompanying sources.

⁸⁴ AMERICAN LAW AND THE CONSTITUTIONAL ORDER – HISTORICAL PERSPECTIVES, *supra* note 20, at 468.

⁸⁵ *Id.*

⁸⁶ RABBAN, *supra* note 24, at 534–35 ("There has not been any counterpart in the United States to the resurgence of histories of doctrine written by leading English legal historians").

⁸⁷ See *supra* Part II.2.

⁸⁸ Cf. Joan Sidney Howland, *A History of Legal History Courses Offered in American Law Schools*, in TEACHING LEGAL HISTORY 1 (Robert M. Jarvis ed.), (reporting that in 2013 "[o]f the 202 law schools presently approved by the American Bar Association ("ABA") to grant the degree of Juris Doctor ("JD"), 177 offer at least one, if not several, legal history courses.").

⁸⁹ Matthew Titolo, *Law's History: American Legal Thought and the Transatlantic Turn to History*, 9 LAW, CULTURE & HUMAN. 491, 492 (2013); see also Howland, *supra* note 88, at 15 ("Reflecting on the reasons that legal history is now taught in almost all American law schools, the most compelling is the groundbreaking work of a large corpus of stellar scholars since 1990. In addition, the emphasis on cross-disciplinary scholarship throughout the legal academy, especially at law schools connected to larger research universities, has served as a positive force in energizing legal history scholars and in incentivizing law school administrators to support these scholars' efforts.").

⁹⁰ Titolo, *id.* note 88, at 492.

⁹¹ LUTZ-CHRISTIAN WOLFF, THE ART OF LAW TEACHING 8–9 (Springer 2021); du Plessis, *supra* note 11, at 72.

tension between legal scholarship and legal practice. This tension is lived by many legal academics as an existential malaise and even a crisis of identity.⁹²

In the US, it was the appointment of Christopher Columbus Landell⁹³ as Harvard Law School dean in 1870 and the distinctiveness of the case method which he introduced, that changed the previous practice to use apprenticeships to prepare for legal practice⁹⁴ and rather let law schools take charge of legal education.⁹⁵ And yet, in the US, arguably even more than in other jurisdictions, the focus is again on practical legal training rather than on academic discourse. Legal history does not seem to have a place in this kind of machinery that focuses on the production of legal manpower. Accordingly, it has been argued that career-oriented law students and practitioners are not and should not be interested in legal history⁹⁶ because legal history cannot add much to the often emphasized legal skills.⁹⁷ It has also been pointed out that many law schools lack resources such as books and access to archives, which allow for serious legal history studies.⁹⁸ Not least, (re-)focusing legal education on legal history may require substantive curricula changes in many law schools.⁹⁹ Commentators have also claimed that substantive law, as well as the law of procedure, can be understood and applied perfectly well without reference to the past.¹⁰⁰ “The fact is that the technique of the practicing lawyer is very different from that which is demanded of the medieval historian.”¹⁰¹ Others have even concluded that the application of law will be fairer without reference to the past.¹⁰²

While it is not the goal of this Article to defend the value of or promote legal history as a discipline, the claims cited above cannot be left unchallenged.¹⁰³ The most basic argument in favor of strengthening legal history is that legal history is significant because history is significant. “We must search the past to understand it, and arguably ourselves, better.”¹⁰⁴ In fact, the contextual parameters of societal developments are as important for modern law as they are for other societal institutions.¹⁰⁵ Contrary to the viewpoints quoted above, it is therefore generally acknowledged that modern law and its application in practice cannot be understood without knowledge of its past development.¹⁰⁶

Moreover, law is not only an expression of societal developments during different historical phases. Law itself can be a driver of historical developments or law can be the reason for the absence of such development. Legal scholarship and teaching must show this impact of law as this has – or at least can have – significant practical consequences.¹⁰⁷ Furthermore, if legal education is to be regarded as an academic course of study which aims to produce critical, innovative and self-confident legal thinkers,¹⁰⁸ legal history can and should have a role in this project simply because historical dimensions are important to understand law in the past, present and future. A sharpened grasp of the historical context of law supports the development of a sense of responsibility for the impact of law and its application:¹⁰⁹ “If engaged in the practice of our profession, we shall escape being made its slave; if about to enter it, we shall be laying a broad foundation, which will aid us in grappling with its details, because the historic clue will be in our hands.”¹¹⁰

It is also incorrect to assume that historical work is not important for legal practice. As pointed out above,¹¹¹ the historical analysis is an important tool for the interpretation of legal rules. In particular,

⁹² Makela, *supra* note 65, at 437, 441; Samuel, *supra* note 6, at 446.

⁹³ 1801-1889; see also CLARK, *supra* note 17, at 231-33.

⁹⁴ For the traditional approach in England where “the common law was taught in Inns of Court and university teaching of law was restricted to Roman and Canon law until the mid-18th century”, see Makela, *supra* note 65, at 441.

⁹⁵ *Id.* at 442; CLARK, *supra* note 17, at 8. For the German influence on American legal education during “the century following 1815”, see *id.* at 229-31, 240-44.

⁹⁶ See Downer, *supra* note 32, at 7.

⁹⁷ *Id.* at 4.

⁹⁸ Swindler, *supra* note 1, at 110; see also AMERICAN LAW AND THE CONSTITUTIONAL ORDER – HISTORICAL PERSPECTIVES, *supra* note 20, at 473 (“The future is bright.”); Donahue Jr., *supra* note 30, at 339 (drawing attention to the fact that “[t]he legal historian . . . has to be both an historian and a lawyer. To the extent that he or she tries to be one and dabble in the other, the result is likely to be at best incomplete and at worst as disaster”).

⁹⁹ Downer, *supra* note 32, at 9.

¹⁰⁰ See *id.* at 2, 5.

¹⁰¹ *Id.* at 4; but see Wilfrid Prest, *Lay Legal History*, in MAKING LEGAL HISTORY, *supra* note 12, at 196, 210.

¹⁰² See Calvin Woodard, *History, Legal History and Legal Education*, 53 VA. L. REV. 89, 91 (1967).

¹⁰³ See for the following Lutz-Christian Wolff, *Shanghai in the 1930s, the German Civil Code and the Tragic Story of a Brilliant Legal Mind*, 16 NOTRE DAME J. INT’L & COMP. L. (2026 - forthcoming), at 4.2.2. (2026).

¹⁰⁴ Patrick Donlan, *Comparative? Legal? History? Crossing Boundaries*, in COMPARATIVE LEGAL HISTORY, *supra* note 5, at 90; see also H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 54 (5th ed. 2014).

¹⁰⁵ See John Bell, *Legal Research and the Distinctiveness of Comparative Law*, in METHODOLOGIES OF LEGAL RESEARCH, *supra* note 64, at 155, 170.

¹⁰⁶ See HUSA, *supra* note 1, at 36; see also Sandberg, *supra* note 13, at 23-24.

¹⁰⁷ Montague Crackanthorpe, *The Uses of Legal History*, 48 L.Q. REV. 337, 350 (1896).

¹⁰⁸ Wolff 2021, *supra* note 91, at 9; cf. Swindler, *supra* note 1, at 108 (“[C]haracteristically pragmatic and usually short-sighted attitude of many practitioners and all too many law schools.”).

¹⁰⁹ See generally Logan Everett Sawyer, *Legal History in Context*, 53 AM. J. LEGAL HIST. 397 (2013); see also Sandberg, *supra* note 13, at 30.

¹¹⁰ Crackanthorpe, *supra* note 107, at 349; see also Sandberg, *supra* note 13, at 35.

¹¹¹ See *supra* Part II.2.

reference to past developments is embedded in the *stare decisis* doctrine.¹¹² In jurisdictions with a different legal tradition the historical development of legal rules, principles and institutions is of equal practical importance, e.g., for the interpretation of norms.¹¹³ Furthermore, every jurisdiction has its own very specific legal issues which cannot be addressed without historical research.¹¹⁴ Because of this practical significance, it is rather obvious that legal history must be given corresponding recognition in legal education.¹¹⁵

Finally, the value of legal history as a discipline cannot be assessed only based on its actual or potential practical usability. Legal research, including legal history research, rather aims to understand the nature of law as such to generate new insights (“Erkenntnisgewinn”), which in itself is valuable.¹¹⁶

[W]e should study history to learn more about realizing life’s possibilities. History itself will teach us not to hold a naïve faith that men readily learn from history. Moreover, . . . there is no need to apologize for studying history partly because there is pleasure in the effort; the enjoyment lies precisely in man’s nature, for life consists most distinctively in his consciousness. But writing and reading history are more than aesthetic experiences. They are themselves kinds of activity that constitute man’s distinctive being, which consists in his response to and rebellion against the challenges of an impersonal universe. It is in this sense that legal history research and writing stand under the functional command to serve the growth of our philosophy.¹¹⁷

5. Distinguishing Features?

The previous sections have attempted to highlight core features of legal history. But are these features really distinguishing ones? In scholarship and legal education, the historical approach is one among others. In the modern world, practical legal work that regularly relates to the past and historical (vertical) approaches to interpret and apply legal rules are at best tacit knowledge.¹¹⁸ Consequently, any distinctiveness of legal history as a discipline seems to derive mainly from its historical evolution and the identity of the community of legal historians. This is something that legal history shares with comparative law, as discussed in the next section.

III. Comparative Law

1. General

Many commentators have pointed out that comparative law work can be traced back to very ancient times.¹¹⁹ However, modern comparative law began in Europe “early in the nineteenth century as a response to practical legislative needs, as ‘comparative legislation’. Some of the internationally minded German scholars also reacted against the national emphasis of Savigny’s Historical School. . . . For these liberal jurists, law was a vehicle of progress in Europe and a tool to civilise colonies.”¹²⁰ The year of 1900 is “the date usually ascribed to the birth of comparative law in its modern form at the World Exhibition in Paris, when the International Congress for Comparative Law was founded.”¹²¹

¹¹² See Crackanthorpe, *supra* note 107, at 349; see also Reimann, *supra* note 6, at 416.

¹¹³ See Sandberg, *supra* note 13, at 37 (“We are all legal historians now.”); see also Reimann, *supra* note 6, at 416–17.

¹¹⁴ Wolff 2017, *supra* note 28, at 286–95.

¹¹⁵ See Pihlajamäki, *supra* note 2, at 734; Jim Phillips, *Why Legal History Matters*, 41 VICT. UNIV. WELLINGTON L. REV. 293, 315 (2010).

¹¹⁶ Sandberg, *supra* note 13, at 37.

¹¹⁷ Willard Hurst, *The Law in United States History*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER, *supra* note 20, at 3, 12.

¹¹⁸ See *supra* Part II.2.

¹¹⁹ See, e.g., MATHIAS SIEMS, COMPARATIVE LAW 13 (2d ed. 2018); Masferrer et al., *supra* note 5, at 1. The first chair in comparative law was founded in Oxford in 1869 and first held by Sir Henry Maine. See HUSA, *supra* note 1, at 7. For early comparative law developments in the United States during the “formative era” after the Declaration of Independence (1776–1791), when foreign law was studied to establish the constitutional framework at federal and state level, see CLARK, *supra* note 17, at 85–144. The “formative era” from 1791 to 1865 which marked a shift from public to private law, *id.* at 145–222, was followed by a period during which many US jurists embraced the ideas of the German Historical Jurisprudence but also Roman and Civil Law, *id.* at 224–72.

¹²⁰ SIEMS, *id.*, at 73; Masferrer et al., *supra* note 5, at 2. For Roscoe Pound’s criticism of the historical jurisprudence, see Rabban, *supra* note 12, at 94, 434–35.

¹²¹ SCHOLARSHIP, PRACTICE AND EDUCATION IN COMPARATIVE LAW, *supra* note 4, at 43; but see Pihlajamäki, *supra* note 2, at 736–37 (“The conferences of the *Société internationale de droit comparé* in Paris and the Hague (1932) were turning points in the history of modern comparative law.”); ZWIEGERT & KÖTZ, *supra* note 1, at 2; THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 7, at 759; CLARK, *supra* note 17, at 269–72.

Organized American comparative law began in earnest with the 1904 St. Louis Universal Congress of Lawyers and Jurists. The American Bar Association (ABA) created the Comparative Law Bureau in 1907, with annual meetings and a *Bulletin* from 1908 until 1914, when World War I disrupted cross-Atlantic connections, then continued with special Bureau issues of the ABA Journal through 1929. Comparatists developed teaching materials; set up graduate law degree programs that included comparative law, many completed by foreign lawyers; and supported expanded law libraries.¹²²

In the 1930s, US comparative law gained some impetus from a small number of scholars who fled Nazi terror in Germany to the US and found their new academic homes at US law schools.¹²³

During the early post-World War II period, comparative law experienced its re-establishment as an “academic discipline”¹²⁴ with scholarly interests now turning also to specialized areas, such legal harmonization and unification as well as comparative legal sociology. In the US, there was also a shift from comparative studies and related conceptualization to a focus on the analyses of particular foreign legal systems triggered by a trend to reject the idea of legal convergence and universalism and rather focussing on the differences of legal systems and their impact.¹²⁵ The study of Soviet,¹²⁶ Japanese,¹²⁷ Chinese¹²⁸ and Latin American¹²⁹ law was notable in this regard.¹³⁰ Furthermore, research into the significance of legal cultures¹³¹ and the “contextual interdisciplinary treatment of legal issues and institutions” moved into the center of attention.¹³² The collapse of the USSR and the end of the cold war as well as the economic reforms in the People’s Republic of China (PRC) after the end of the Cultural Revolution were game-changing political events during the 1980s.¹³³ Scholarly comparatists in the US and elsewhere responded with an increased focus on post-socialist legal systems, globalization and interdisciplinary approaches to research.¹³⁴ The professional comparative law sector saw an emergence of globalized law firms with offices in multiple jurisdictions and legal work which involved cross-border issues as well as dealings with foreign law as a routine matter.¹³⁵

The examination of “the feasibility of legal change in foreign nations toward adoption of American legal institutions, processes and rules” has been described as a special feature of practical comparative law efforts in the US.¹³⁶ This outbound direction of comparative law action, which is nowadays not unique to

¹²² CLARK, *supra* note 17, at 9, 284–310.

¹²³ *See id.* at 9, 331–32. Ernst Rabel was the last and arguably most notable German Jewish professor who reached the United States in 1939 where he obtained a position as research associate at Michigan Law School. *Id.* at 333. The difficulty for refugees from Germany was to find a host country. At the so-called Evian Conference held in July 1938 in the French city of Evian, 32 countries, including the US, Great Britain, France, Canada and Australia had considered solutions for the global refugee crisis caused by Nazi Germany’s and - after it had come under German rule - Austria’s attempt to force all Jewish people to leave so that Germany would be “judenfrei” (= free of Jews). All countries found excuses not to accept more refugees in addition to existing quotas. *See* Gordon F. Sander, *Inside America’s Failed, Forgotten Conference to Save Jews from Hitler*, WASH. POST (July 15, 2023), <https://www.washingtonpost.com/history/2023/07/15/holocaust-hitler-fdr-jewish-evian-conference/>; *see also* Avraham Altman & Irene Eber, *Flight to Shanghai, 1938–1940: The Larger Setting*, 28 YAD VASHEM STUD. 1, 15–16 (2000), <https://www.yadvashem.org/articles/academic/flight-to-shanghai-the-larger-setting.html>.

¹²⁴ CLARK, *supra* note 17, at 379.

¹²⁵ *Id.* at 11.

¹²⁶ *See, e.g.*, IGOR I. KAVASS, *SOVIET LAW IN ENGLISH: RESEARCH GUIDE AND BIBLIOGRAPHY 1970–1987* (William S. Hein & Co. 1988); *CONTEMPORARY SOVIET LAW: ESSAYS IN HONOR OF JOHN N. HAZARD* (Donald D. Barry, William E. Butler & George Ginsburgs eds., 1974); VLADIMIR GSOVSKI & HESSEL E. YNTEMA, *SOVIET CIVIL LAW: PRIVATE RIGHTS AND THEIR BACKGROUND UNDER THE SOVIET REGIME* (Univ. of Mich. Law Sch. 1948); JOHN N. HAZARD, WILLIAM E. BUTLER & PETER B. MAGGS, *THE SOVIET LEGAL SYSTEM: THE LAW IN THE 1980s* (Oceana Publ’ns 1984); ANDREY YANUARYEVICH VYSHINSKII & HUGH W. BABB, *THE LAW OF THE SOVIET STATE* (Macmillan Co. 1948).

¹²⁷ *See, e.g.*, REX COLEMAN & JOHN OWEN HALEY, *INDEX OF JAPANESE LAW: A BIBLIOGRAPHY OF WESTERN MATERIALS* (Univ. of Tokyo Press 1975); DAN FENNO HENDERSON, *CONCILIATION AND JAPANESE LAW: TOKUGAWA AND MODERN* (University of Washington Press & University of Tokyo Press 1965); For modern Japanese law, *see, e.g.*, CURTIS J. MILHAUPT, J. MARK RAMSEYER & MARK D. WEST, *THE JAPANESE LEGAL SYSTEM: CASES, CODES, AND COMMENTARY* (2ded. 2012); ERIC A. FELDMAN, *THE RITUAL OF RIGHTS IN JAPAN: LAW, SOCIETY AND HEALTH POLICY* (Cambridge Univ. Press 2000); ERIC A. FELDMAN, *The Landscape of Japanese Tobacco Policy: Law, Smoking, and Social Change*, 49 AM. J. COMP. L. 679 (2001).

¹²⁸ *See, e.g.*, Jerome A. Cohen, *China’s Changing Constitution*, 76 CHINA Q. 794 (1978); Jerome A. Cohen, *The Party and the Courts: 1949–1959*, 38 CHINA Q. 120 (1969); JEROME A. COHEN, *CHINA: LEGAL SYSTEM, INTERNATIONAL RELATIONS AND FOREIGN TRADE* (Inst. of Continuing Legal Educ. 1973).

¹²⁹ *See, e.g.*, STOJAN ALBERT BAYTCH, *LATIN AMERICA: A BIBLIOGRAPHICAL GUIDE TO ECONOMY, HISTORY, LAW, POLITICS AND SOCIETY* (Univ. of Miami Press 1961); JOHN HENRY MERRYMAN, DAVID S. CLARK & LAWRENCE M. FRIEDMAN, *LAW AND SOCIAL CHANGE IN MEDITERRANEAN EUROPE AND LATIN AMERICA: A HANDBOOK OF LEGAL AND SOCIAL INDICATORS FOR COMPARATIVE STUDY* (Oceana Publications 1979).

¹³⁰ CLARK, *supra* note 17, at 10.

¹³¹ *See id.* 463–67; *see also* LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICA AND LATIN EUROPE (Lawrence M. Friedman & Rogelio Pérez-Perdomo eds., 2003).

¹³² *Id.* at 11.

¹³³ For the PRC’s economic and corresponding legal reforms from 1979, as well as the special role of Chinese investment law, *see* Lutz-Christian Wolff, *The History of China’s Investment Law System: Lessons from the Past for the (Brighter) Future?*, 56 INT’L LAW. 141 (2023).

¹³⁴ *See* CLARK, *supra* note 17, at 456.

¹³⁵ *Id.* at 457.

¹³⁶ *See id.* at 2;

the US,¹³⁷ saw its first heydays during the Wilson presidency in the late 19th and early 20th century when American jurists “worked with American foundations, professional associations, universities, or the U.S. government to support foreign legal reform, including in China after it became a republic in 1912” and the Philippines after “the Treaty of Paris had ceded sovereignty over the Philippines to the United States.”¹³⁸ Post-World War I, these initiatives were re-started, e.g., in Germany, Japan and Korea.¹³⁹ In the 1960s efforts to promote legal modernization in developing countries became particularly visible.¹⁴⁰ Efforts to export legal rules and institutions to Eastern Europe, Asia and Latin America receded during the first decade of the new millennium.¹⁴¹

Like legal history, also comparative law has developed in and traditionally focused on Western jurisdictions and has therefore been criticized as being Eurocentric or ethnocentric.¹⁴² Having said that, important comparative law research is nowadays conducted outside Europe covering a great variety of non-European themes.¹⁴³ And again, like for legal history, it is difficult to determine the exact scope of comparative law.¹⁴⁴ Often, comparative law is described in terms like “the study and analysis of different legal systems, legal traditions and legal cultures or aspects thereof with a view to obtaining knowledge that may be used for a variety of theoretical and practical purposes.”¹⁴⁵ Definitions of this kind do not point to a particular subject area such as contract, tort or family law.¹⁴⁶ Otto Kahn-Freund has consequently concluded that comparative law “has by common consent the somewhat unusual characteristic that it does not exist.”¹⁴⁷ Derek Roebuck has similarly stated that:

The English phrase ‘comparative law’ does not tell us much. . . . [I]ts category within that larger study is not defined by dividing off for it a topic or area of law. Rather it distinguishes by its approach. It studies law by comparing the ways in which different legal systems do their law jobs.¹⁴⁸

Traditionally comparative law implied the benchmarking of domestic law, rules, legal institutions and cultures against foreign systems. In addition, comparatists have focused on three other aspects, i.e. first

¹³⁷ See Christopher Stephens, *An Evolving Role for Law and Lawyers in Development*, WORLD BANK BLOGS – VOICES (Nov. 6, 2023), <https://blogs.worldbank.org/en/voices/evolving-role-law-and-lawyers-development>; see also DAVID M. TRUBEK & ALVARO SANTOS, THE “RULE OF LAW” IN DEVELOPMENT ASSISTANCE: PAST, PRESENT, FUTURE (Cambridge Univ. Press 2010). For the PRC’s legal development aid, see Samuli Seppanen, *Chinese Legal Development Assistance: Which Rule of Law? Whose Pragmatism*, 51 VAND. J. TRANSNAT’L L. 101 (2021); James Q. Whitman, *Western Legal Imperialism: Thinking About the Deep Historical Roots*, 10 THEORETICAL INQUIRIES L. 305, 306, 331 (2009) (“We live in an age of massive efforts to transplant Western institutions into every corner of the world. . . . The Westerners at work in the world today see themselves as the inheritors of some universal truth.”).

¹³⁸ CLARK, *supra* note 17, at 9, 277–84.

¹³⁹ *Id.* at 11, 349–79.

¹⁴⁰ *Id.* at 10.

¹⁴¹ *Id.* at 12.

¹⁴² SIEMS 2018, *supra* note 119, at 42–44; see also Somma, *supra* note 16, at 752; Pihlajamäki, *supra* note 2, at 739; HUSA, *supra* note 1, at 9; Vogenauer, *supra* note 61, at 900.

¹⁴³ For comparative constitutional law, see, e.g., Ngoc Son Bui, Mara Malagodi & Christopher Roberts eds., ASIAN COMPARATIVE CONSTITUTIONAL LAW vols. 1–3 (Ngoc Son Bui, Mara Malagodi & Christopher Roberts eds., 2022, 2024, 2025); DAVID S. LAW, THE OXFORD HANDBOOK OF CONSTITUTIONAL LAW IN ASIA (Holning Lau & Alex Schwartz eds., 2023); COMPARATIVE LAW IN ASIA: ESSAYS IN HONOR OF ANDREW HARDING (Ngoc Son Bui & Munin Pongsapan eds., 2025); COMPARATIVE CONSTITUTIONAL LAW IN LATIN AMERICA (Rosalind Dixon & Tom Ginsburg eds., 2017); DURGA DAS BASU, COMPARATIVE CONSTITUTIONAL LAW (2d ed., 2008); D. JOTHI JAGARAJAN, COMPARATIVE CONSTITUTIONAL LAW (New Academic Publishers 2011); COMPARATIVE CONSTITUTIONAL LAW IN AFRICA (Rosalind Dixon, Tom Ginsburg & Adem Kassie Abebe eds., 2022); VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW (Foundation Press 2014); William Rich, *Converging Constitutions: A Comparative Analysis of Constitutional Law in the U.S. and Australia*, 21 FED. L. REV. 202 (1993); LUCIO PEGORARO & ANGELO RINELLA, COSTITUZIONI E FONTI DEL DIRITTO (Giappichelli 2018); ADAM CHILTON & MILA VERSTEEG, WHEN CONSTITUTIONAL RIGHTS MATTER (Oxford Univ. Press 2020); DENIS J. GALLIGAN & MILA VERSTEEG eds., SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS (Cambridge Univ. Press 2013); RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW (Oxford Univ. Press 2014); Ran Hirschl, *From Comparative Constitutional Law to Comparative Constitutional Studies*, 11 INT’L J. CONST. L. 1 (2013).

¹⁴⁴ Samuel, *supra* note 6, at 444.

¹⁴⁵ MOUSOURAKIS & NICOLINI, *supra* note 29, at 4; see also Mattei, *supra* note 45, at 715.

¹⁴⁶ HAROLD COOKE GUTTERIDGE, COMPARATIVE LAW: AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY AND RESEARCH ix (Cambridge Univ. Press 1949); see also SIEMS, *supra* note 116, at 6 (quoting Gutteridge).

¹⁴⁷ Otto Kahn-Freund, *Comparative Law as an Academic Subject*, 82 L.Q. REV. 40, 41 (1966); see also Rudolf B. Schlesinger, *The Past and Future of Comparative Law*, 43 AM. J. COMP. L. 477 (1995).

¹⁴⁸ SCHOLARSHIP, PRACTICE AND EDUCATION IN COMPARATIVE LAW, *supra* note 4, at 42; see also Samuel, *supra* note 6, at 448 (“The term ‘comparative law’ is fairly meaningless. . . .”).

the analysis of foreign law¹⁴⁹ and foreign legal culture,¹⁵⁰ second taxonomical work, i.e. the classification of legal traditions (i.e. legal families),¹⁵¹ and third the analysis of legal transplants¹⁵² including aspects of legal harmonization and unification.¹⁵³ In more modern times, methodological and theoretical aspects of comparative law have also gained importance.¹⁵⁴

However, from a purely functional point this description of the coverage of comparative law work may be too wide and too narrow at the same time. It may on the one hand be too wide because the traditional scope of comparative law does in fact not always involve comparisons. This is particularly true for the (pure) analysis of foreign law. On the other hand, the traditional scope of comparative law seems to be too narrow when requiring a foreign law element. Why should mono-jurisdictional (horizontal and vertical) comparisons not qualify as comparative law work?¹⁵⁵ In fact, extremely valuable insights can often be drawn from the comparison of laws, rules, legal institutions and even legal cultures from one and the same jurisdictions.

As pointed out above,¹⁵⁶ practical legal work almost always involves legal history work. It is intriguing to note that when adopting this functional point of view the same can be said and has in fact been said about comparative law.¹⁵⁷ “Nearly any claim we make as lawyers, as well as every distinction we draw, will implicitly or explicitly be set against another situation. . . . Comparing, in other words, is a fundamental principle of legal research[.]”¹⁵⁸ John Henry Merryman has therefore concluded that “[p]rofessional comparative law, whether in the form of advice and expertise on specific problems or for more general edification in published books and articles, needs little further comment.”¹⁵⁹

Along the same lines, Vivian Grosswald Curran, one of the two editors-in-chief of The American Journal of Comparative Law and former president of the American Society of Comparative Law (ASCL), has observed that:

Contemporary legal and societal issues, as well as contemporary scholarly developments, share with comparative law a focus on the different, the other. Consequently, the instructive potential of comparative legal analysis to those areas is manifest. The comparative act has even broader instructive capacity, however, inasmuch as it is fundamental to all legal analysis. Modern cognitive sciences increasingly confirm the centrality of comparison in the processes of shaping understanding.¹⁶⁰

Not least, comparison stands at the center of the system of precedent which is again a feature shared with legal history.¹⁶¹

Comparison is part and parcel of our apothegm: *like cases should be treated alike*. Comparison is a key component of legal reasoning. We move from like to like within the system of precedent. Whenever we apply or distinguish a case, we are doing comparison. Law conceals its comparisons. Whenever law talks of “reasonableness”, it speaks of comparison. . . . Comparison is also important for legal, moral and logical consistency. The

¹⁴⁹ See, e.g., the “legal classic” by George Ernest Glos, *COMPARATIVE LAW* (Fred B. Rothman & Co. 1979) (introducing different legal systems of the world) Siems, *supra* note 3, at 868; Vogenauer, *supra* note 61, at 879; Samuel, *supra* note 6, at 447. Interestingly, in some jurisdictions of the Global South major systematic research was and sometimes still is conducted by non-local researchers. This was e.g. true for the PRC during the 1980s and 1990s, i.e. during the first two post-reform decades. *But see* Alford, *supra* note 21; *see also* William P. Alford, *Second Lawyers, First Principles—Lawyers, Rice-roots Legal Workers, and the Battle Over Legal Professionalism in China*, in *PROSPECTS OF PROFESSIONS IN CHINA* (William P. Alford, William Kirby & Kenneth Winston eds., 2010); WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* (Stanford Univ. Press 1995). For Latin America, *see* Wilson, *supra* note 24, at 45 (“This scholarship is therefore not the result of methodological evolution in Latin American legal thought. They have proliferated outside legal academia, influenced by a tradition of US legal history in constant dialogue with other social sciences.”)

¹⁵⁰ Siems 2019, *supra* note 3, at 878.

¹⁵¹ See, e.g., Daniel Oto-Peralías & Diego Romero-Ávila, *The Distribution of Legal Traditions around the World: A Contribution to the Legal-Origins Theory*, 57 J.L. & ECON. 561 (2014); Jany, *supra* note 21.

¹⁵² See Kahn-Freund, *supra* note 62, at 27 (“[W]e cannot take for granted that rules or institutions are transplantable.”).

¹⁵³ Pihlajamäki, *supra* note 2, at 739; *see also* Toby S. Goldbach, “Why Legal Transplants?”, 15 ANN. REV. L. & SOC. SCI. 583 (2019); Mattei, *supra* note 45, at 715.

¹⁵⁴ See, e.g., *THE METHOD AND CULTURE OF COMPARATIVE LAW: ESSAYS IN HONOUR OF MARK VAN HOECKE* (Maurice Adams & Dirk Heirbaut eds., 2014); *METHODS OF COMPARATIVE LAW* (Pier Giuseppe Montaneri ed., 2012); *COMPARATIVE LAW METHODOLOGY* vols. 1–2 (Maurice Adams et al. eds., 2017); Mattei, *supra* note 45, at 715 (highlighting “a resurgence of methodological discussion in the social sciences”).

¹⁵⁵ See Roscoe Pound, *Comparative Law in Space and Time*, 4 AM. J. COMP. L. 70, 83 (1955).

¹⁵⁶ See *supra* Part II.2..

¹⁵⁷ See Siems 2019, *supra* note 3, at 862; Samuel, *supra* note 6, at 448.

¹⁵⁸ Maurice Adams, *Doing What Doesn’t Come Naturally: On the Distinctiveness of Comparative Law*, in *METHODOLOGIES OF LEGAL RESEARCH*, *supra* note 64, at 299; *see also* Samuel, *supra* note 62, at 183.

¹⁵⁹ Merryman, *supra* note 76, at 772.

¹⁶⁰ Grosswald Curran, *supra* note 45, at 658.

¹⁶¹ See *supra* Parts II.2, II.4.

law could not function without comparison; and yet, the legal world has not quite given comparison the attention it deserves.¹⁶²

Like legal history, also comparative law is therefore dual natured, i.e. academic on the hand and practical on the other.¹⁶³ Practical comparative law implies:

[T]he sort of work that is principally of interest and value to lawyers, judges and legislators professionally engaged in dealing with concrete legal questions. Academic scholarship can be divided into humanistic and scientific. Humanistic scholarship is in the tradition of philosophical, historical, and literary description, narrative, interpretation, analysis, and criticism. . . . (S)cientific . . . scholarship . . . seeks to educe generalizations that can be used as the basis for explanations of and predictions about social-legal behaviour. These are categories of convenience and are not mutually exclusive[.]¹⁶⁴

2. Comparative Law as a Legal Discipline or a Legal Method?

Do the acknowledgements in the previous section mean that “[c]omparative law might just as well disappear from the curriculum . . . (*unless it goes*) beyond any functionally-driven dialectical process in which the objective is to induce a higher level solution”?¹⁶⁵ Is comparative law (just) a legal method¹⁶⁶ or does comparative law qualify as a distinct legal discipline which enjoys (or: should enjoy) a separate status within the broader area of law? Is there any practical significance of comparative law in addition to serving as a tool to analyze existing law and to develop it further?

Like legal history, comparative law could also be, and has been regarded, as both a discipline and a legal method.¹⁶⁷ In fact, the comparative approach is a distinct methodology,¹⁶⁸ or a set of methodologies as some claim.¹⁶⁹ Comparative law is certainly also recognized as a discipline in the sense that it has generated a legitimizing discourse about itself.¹⁷⁰ Nevertheless, comparatists have struggled not just to distinguish their discipline from legal history, but to explain what the special features of their field are.¹⁷¹ “[I]n major respects, comparative law is an instance of the more general form of legal research. The way in which it attempts to reconstruct both the foreign and the researcher’s own legal systems is similar to general legal research on either of those systems.”¹⁷²

Adams has suggested that what is special about comparative law is the fact that comparatists have to deal with foreign law and thus “strange legal systems”.¹⁷³ “Engaging in comparative law can be considered distinctive because comparative legal researchers have to be able to reconstruct the meaning of legal rules that are foreign to them.”¹⁷⁴ Adams has also drawn attention to the challenges arising in the context of attempts to understand foreign systems for the purpose of comparative work.¹⁷⁵ He argues that comparatists normally understand their own legal system better than foreign legal systems. This, however, does of course

¹⁶² Ida Petretta, *The Question of Comparison*, 68 AM. J. COMP. L. 893, 906–07 (2020) (emphasis in original); see also Pound, *supra* note 155, at 83. For the increasingly important role of cross-jurisdictional comparison in the US in constitutional law decisions of the Supreme Court, *Atkins v. Virginia*, 536 U.S. 304 (2002), where the decision that executing individuals with intellectual disabilities violates the Eighth Amendment’s prohibition on cruel and unusual punishment was based on a cross-state comparison while it was also held that “if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant” cross-state comparison concerning.” *Id.* at 325. In *Lawrence v. Texas*, 539 U.S. 558 (2003), on the question of the constitutionality of a Texas law criminalizing same-sex intimacy, the majority opinion referred to the decision of the European Court of Human Rights in *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149 (1981). See *Lawrence*, 539 at 573. In *Roper v. Simmons*, 543 U.S. 551 (2005), on the question of the constitutionality of juvenile executions the Supreme Court engaged again in a cross-state comparison. The court also held that “the overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court’s determination that the penalty is disproportionate punishment for offenders under 18.” *Id.* at 578.

¹⁶³ MOUSOURAKIS & NICOLINI, *supra* note 29, at 7.

¹⁶⁴ Merryman, *supra* note 76, at 772.

¹⁶⁵ Samuel, *supra* note 6, at 183.

¹⁶⁶ For the first half of the 20th century view that comparative law is merely a method, i.e. “simply a means to an end, and thus the purpose for which the comparative method is utilized should define comparative law as a subject”. MOUSOURAKIS & NICOLINI, *supra* note 29, at 6.

¹⁶⁷ SCHOLARSHIP, PRACTICE AND EDUCATION IN COMPARATIVE LAW, *supra* note 4, at 42; see also Somma, *supra* note 16, at 751, 752; Matthew Dyson, *Comparative Legal History: Methodology for Morphology*, in COMPARATIVE LEGAL HISTORY, *supra* note 5, at 110, 119; Samuel, *supra* note 6, at 448.

¹⁶⁸ For this “internal approach”, see *supra* Part II.3; SIEMS 2018, *supra* note 119, at 6.

¹⁶⁹ See, e.g., Ugo Mattei et al., SCHLESINGER’S COMPARATIVE LAW 48 (7th ed. 2009); Adams, *supra* note 158, at 236; Petretta, *supra* note 162.

¹⁷⁰ For this “external approach” see *supra* Part II.3; Alan Watson, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 1 (2d ed. 1993).

¹⁷¹ See METHODOLOGIES OF LEGAL RESEARCH, *supra* note 64, at 236.

¹⁷² Bell, *supra* note 105, at 175.

¹⁷³ See METHODOLOGIES OF LEGAL RESEARCH, *supra* note 64, at 230.

¹⁷⁴ *Id.* at 239.

¹⁷⁵ *Id.* at 231–34.

not always have to be the case. Furthermore, the assessment of a legal system “from outside” may be even more revealing than an analysis of one’s own legal system “from within.” Moreover, the assumption that comparatists always compare their “own” domestic law with foreign law is no longer correct. Comparatists around the world can compare, and are in fact comparing different foreign legal systems (horizontally and vertically), without necessarily using their home jurisdiction as benchmark. In any event, the idea of a “home jurisdiction” may no longer be valid in times of globalization when academics, in particular legal comparatists, as well as practitioners, are qualified in multiple jurisdictions and conduct work on different legal systems.

Nevertheless, comparative law is widely acknowledged as a discipline. Clark, in his enlightening book on the history of American comparative law, has dedicated a whole chapter to the emergence of comparative law as a “Discipline.”¹⁷⁶ Vivian Grosswald Curran emphasized the academic legitimacy and increasing importance of comparative law as a discipline when stating: “Comparative law is a field which by definition deals with and analyzes the *other*, the different. This characteristic suggests its immediate relevance for major intellectual legal debates and practical legal issues of our time which also focus on the role of the different or *other*.”¹⁷⁷

The status of comparative law as a discipline is also evidenced by the available academic infrastructure. The ASCL¹⁷⁸ is a preeminent institution in the field of legal research and practice which – through its events and publications – is a driver of intellectual debates in the field. The American Journal of Comparative Law¹⁷⁹ published by ASCL is the leading publication worldwide in the areas of comparative law, comparative and transnational legal history and theory, private international law as well as the study of non-US legal systems.¹⁸⁰ The W&L Law Ranking lists at least¹⁸¹ 17 comparative law journals published in the US or with a focus on US-related comparative law themes.¹⁸² Last but not least, while not being a core subject comparative law has gained importance in the curricula at least of the bigger US law schools.¹⁸³ For example, at Harvard Law School, every law student “is required to take a course that satisfies the International and Comparative Law Course Requirement.”¹⁸⁴ Columbia Law School emphasizes and supports international and comparative law as an area of study because legal work “in a multinational arena – whether in trade, technology, finance, or the protection of human rights – requires an in-depth understanding of distinct legal systems and cultures, including their individual characteristics and how they work with, or against, each other.”¹⁸⁵

3. Relevance of Comparative Law?

The importance of comparative law in times of an ever-increasing internationalization of legal work¹⁸⁶ and the fact that in today’s globalized world almost all legal systems are mixed or mixing¹⁸⁷ is nowadays widely accepted. “No modern legal tradition is a purely native growth. Like the communities they serve, each is a unique hybrid created in significant part by the complex and dynamic diffusion of law, legal thought, legal institutions and people.”¹⁸⁸ Foreign legal systems are therefore claiming importance for

¹⁷⁶ CLARK, *supra* note 17, at 264–72, 379–402.

¹⁷⁷ Grosswald Curran, *supra* note 45, at 657.

¹⁷⁸ See *The American Society of Comparative Law*, ASCL, <https://ascl.org/> (last visited May 29, 2026); see also CLARK, *supra* note 17, at 467–79.

¹⁷⁹ *About the Journal*, THE AM. J. OF COMPARATIVE L., <https://academic.oup.com/ajcl> (last visited May 29, 2026); see also CLARK, *supra* note 17, at 392–96.

¹⁸⁰ See *id.*

¹⁸¹ Note that due to international features (place of publication, editorial board members etc.) of many comparative law journals it may be debatable if a journal qualifies as US journal.

¹⁸² *W&L Law Journal Rankings*. W&L L., <https://managementtools4.wlu.edu/LawJournals/Default.aspx> (last visited May 29, 2026) (focusing on the “Comparative Law” section).

¹⁸³ For post-World War II comparative law developments in US law schools, see CLARK, *supra* note 17, at 402–18.

¹⁸⁴ The President and Fellows of Harvard College, *International and Comparative Program of Study*, HARVARD L. SCH., <https://hls.harvard.edu/academics/programs-of-study/international-and-comparative-law-program-of-study/> (last visited May 29, 2026) (“The benefits of such courses are most obvious for students intending to specialize in the international arena, but even individuals who anticipate a career anchored principally in their own nation’s legal system have much to gain from such offerings. . . . exposure to the ways in which others think about law has the potential to enrich how each of us understands what may (or may not) be universal in our own legal system and in the relationship between law and society in general.”)

¹⁸⁵ *International and Comparative Law*, COLUM. L. SCH., <https://www.law.columbia.edu/areas-of-study/international-and-comparative-law> (last visited May 29, 2026).

¹⁸⁶ See MOUSOURAKIS & NICOLINI, *supra* note 29, at vii (“In response to the growing internationalization of legal practice and academic research, law schools worldwide have expanded their comparative law programs. Most law schools have integrated one or more comparative law courses into the first-year curriculum to help students gain an understanding of the nature, goals, and methodology of comparative legal studies. Additionally, there is an increased focus on comparative legal analysis within core legal subjects, alongside greater attention to the impact of global developments on domestic laws.”).

¹⁸⁷ Lutz-Christian Wolff, *Comparing Chinese Law . . . But with Which Legal System?* 6 CHIN. J. COMP. L. 151, 160 (2018); see also Kahn-Freund, *supra* note 62, at 2. For the US, see FRIEDMAN, *supra* note 24, at xix.

¹⁸⁸ Donlan, *supra* note 104, at 80; see also Duve, *supra* note 2, at 25–26, 28, 32.

domestic and international legal practice everywhere. Domestic legislative activities adopt comparative approaches to develop the best solutions for domestic questions.¹⁸⁹ Comparative law work is also the basis of legislative work at the international law level,¹⁹⁰ in particular in the context of harmonization and unification initiatives.¹⁹¹ Day-to-day domestic court practice is increasingly using comparative tools in the conflict of laws context or to address issues which domestic law fails to cover properly.¹⁹² Last but not least, as outlined above,¹⁹³ comparing is part of the daily routine of every lawyer.¹⁹⁴

Furthermore, as for legal history,¹⁹⁵ comparative legal research and teaching does not only aim to add value to the application of law in practice. The value of comparative law work can consequently not be assessed only based on its actual or potential practical usability. By contrast, comparative law scholarship also aims to generate new insights and knowledge. “[C]omparative law can offer tools to understand the rapid changes of modern law. . . . For the needs of a future legal professional, having such a map – albeit rough and with some blank spots – and an understanding of how and why the map may change, is the most valuable thing a comparative law program can offer.”¹⁹⁶

And yet, despite its obvious importance,¹⁹⁷ comparative law is generally regarded as a niche area.¹⁹⁸ “To a majority of lawyers and law professors in most countries of the world, comparative law remains *un plaisir de dilettante*.”¹⁹⁹

Since the 1990s, US comparatists have demanded a “demarginalization” of the area.²⁰⁰ They have picked up on the deficits of comparative law teaching in US law schools, regarded as a “Eurocentric discipline”,²⁰¹ and developed proposals to ensure that comparative law can serve global and American needs.²⁰² As reported above, leading law schools are trying to internationalize their curricula by adding comparative and supra-national features. However, like legal history, comparative law does not play a central role in law teaching but rather remains a secondary subject.²⁰³

In the late 1990s, Ugo Mattei observed that the disrespect for comparative law is particularly prevalent in the US:

Among non-lawyers, comparative law is discriminated against because of the subject matter. Social scientists consider law technical, practical, difficult to understand and therefore useless in interdisciplinary research. . . . Among lawyers, it seems that comparative law suffers from the underdeveloped, methodological awareness that affects it in the United States. . . . While American scholars engaged in . . . critical approaches and comparativists in Europe have actively engaged in dialogue with their colleagues in the social sciences, American comparative lawyers have, by and large, failed to do so. The most likely explanation . . . is that all Americans are comparativists to the extent that they consult out-of-state authorities. . . . [N]on one takes the time to study, understand or verbalize the activity of comparing.²⁰⁴

Along the same lines, Mathias Reimann has argued that US law students are forced to familiarize themselves with multi-jurisdictional scenarios and features from day one of their studies due to their introduction to multiple states’ laws and the federal and state regimes.²⁰⁵ By contrast, according to Vivian

¹⁸⁹ See Geoffrey Wilson, *Comparative Legal Scholarship*, in RESEARCH METHODS FOR LAW 162, 164 (Mike McConville & Wing Hong Choi eds., 2017); ZWIGERT & KÖTZ, *supra* note 1, at 16–17.

¹⁹⁰ SIEMS 2018, *supra* note 119, at 5.

¹⁹¹ SCHOLARSHIP, PRACTICE AND EDUCATION IN COMPARATIVE LAW, *supra* note 4, at 47; ZWIGERT & KÖTZ, *supra* note 1, at 24–28; Bell, *supra* note 105, at 157; Samuel, *supra* note 64, at 180.

¹⁹² SIEMS 2018, *supra* note 119 at 4–5; Duve, *supra* note 2, at 18–19; SCHOLARSHIP, PRACTICE AND EDUCATION IN COMPARATIVE LAW, *supra* note 4, at 47; ZWIGERT & KÖTZ, *supra* note 1, 18–21.

¹⁹³ See *supra* Part III.1.

¹⁹⁴ Grosswald Curran, *supra* note 45, at 658 (“[T]hose who have always ‘practiced’ comparison (i.e., everyone). . . .”).

¹⁹⁵ See *supra* Part II.4.

¹⁹⁶ Pihlajamäki, *supra* note 2, at 743; HUSA, *supra* note 1, at 36, 59.

¹⁹⁷ See *supra* Part III.1.

¹⁹⁸ See Mattei, *supra* note 45, at 710–11 (remarking in relation to the question if the importance of comparative law for teaching and research will increase: “This wonderland remains in the distant future”).

¹⁹⁹ Masferrer et al., *supra* note 5, at 12.

²⁰⁰ See Grosswald Curran, *supra* note 45, at 658.

²⁰¹ CLARK, *supra* note 17, at 459.

²⁰² *Id.* at 459–61. For European calls to give comparative law more weight in legal education, see, e.g., ZWIGERT & KÖTZ, *supra* note 1, at 4; HUSA, *supra* note 1, at 91–95; Samuel, *supra* note 6, at 444.

²⁰³ See, e.g., Grosswald Curran, *supra* note 45, at 665; CLARK, *supra* note 17, at 457; ZWIGERT & KÖTZ, *supra* note 1, at 3; HUSA, *supra* note 1, at 11; Mathias Reimann, *The End of Comparative Law as an Autonomous Subject*, 11 TUL. EUR. & CIV. L. F. 49, 52 (1996).

²⁰⁴ Mattei, *supra* note 45, at 717.

²⁰⁵ See Mathias Reimann, *Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop Its Own Agenda*, 46 AM. J. COMP. L. 637, 637–46 (1998).

Grosswald Curran that US law students “nevertheless often proceed through their studies with little contemplation of the possibility of more fundamental systemic differences. The sort of diversity to which American law students typically are exposed does not involve differences in deeply rooted predispositions, in underlying ways of thought, presentation, argument and representation.”²⁰⁶

David S. Clark observed on a more positive note that while there was “a sense in which American comparative law today is less significant in legal academia than it was in the first quarter of the twentieth century . . . one could assert that U.S. comparative law, rather than being marginal, was ascending.”²⁰⁷

4. Distinguishing Features?

As explained above,²⁰⁸ in Europe modern comparative law was originally developed as a tool to bring international features into domestic law and to counter nationalistic tendencies. However, from a purely functional point of view, the comparative approach does not seem to be special at all. If comparative work forms part of most lawyers’ daily work, then there does not seem to be anything left that distinguishes the substance of comparative law from other legal disciplines of which comparing seems to be a constituent component.²⁰⁹ At best, it is the legacy and the identity of those who consciously engage in comparative work which characterizes the field. From the taxonomic point of view, this may sound disappointing, but it reflects reality.

IV. The Relationship Between Legal History and Comparative Law

1. General

Konrad Zweigert and Hein Kötz have concluded in their famous book, *An Introduction to Comparative Law*, that “[t]he relationship between comparative law and legal history is surprisingly complex. . . . How does historical research differ from comparative law? Where does one and the other begin? At what point must the comparatist yield the floor to the legal historian? The questions admit no rational answer.”²¹⁰

Despite this admission, Zweigert and Kötz apparently still regarded legal history and comparative law as separate disciplines. Many other comparatists and legal historians have expressly or impliedly done the same.²¹¹ According to David S. Clark, “[l]egal history and comparative law overlap in important respects.”²¹² Mathias Siems has concluded that “there is a close relationship between comparative law and legal history.”²¹³ As mentioned at the outset,²¹⁴ Siems also suggested that comparative law should be expanded to cover also legal history.²¹⁵ Similarly, Heikki Pihlajamäki has recommended that legal history and comparative law should be merged.²¹⁶ According to Thomas Duve, both disciplines should enter into a dialogue.²¹⁷ But all these statements still imply that legal history and comparative law are different.

Derek Roebuck has taken a slightly different approach.²¹⁸ While concluding that “[l]egal history and comparative law are complementary methods of looking at the same thing,”²¹⁹ he suggested that legal history should be regarded as a subset of comparative law.²²⁰ This is an intriguing idea, although it can be suspected that legal historians may find it more convincing to regard comparative law as part of legal history.

Interestingly, the ongoing discussion on the comparative law side concerning the relationship between comparative law and legal history does not seem to be mirrored by similarly energetic attempts of

²⁰⁶ Grosswald Curran, *supra* note 45, at 663.

²⁰⁷ CLARK, *supra* note 17, at 458.

²⁰⁸ See *supra* Part III.1.

²⁰⁹ See Reimann, *supra* note 203, at 49 (noting the “serious question whether comparative law should be considered as a separate discipline”).

²¹⁰ ZWIEGERT & KÖTZ, *supra* note 1, at 8; see also HUSA, *supra* note 1, at 35 (noting that it is “surprisingly complicated”); MOUSOURAKIS & NICOLINI, *supra* note 29, at 29 (emphasizing it is “closely intertwined”).

²¹¹ CLARK, *supra* note 17, at 41 (referencing “the two academic disciplines”); Siems, *supra* note 3, at 862; HUSA, *supra* note 1, at 34–36; MOUSOURAKIS & NICOLINI, *supra* note 29, at 19.

²¹² CLARK, *supra* note 17, at 1; see also Siems 2019, *supra* note 3, at 866.

²¹³ SIEMS, *id.*, at 866–68; see also Donlan, *supra* note 104, at 83.

²¹⁴ See *supra* Part I.

²¹⁵ Siems 2019, *supra* note 3, at 866–68; 887 (avoiding, however, to offer a definition of comparative law as a starting point).

²¹⁶ Pihlajamäki, *supra* note 2, at 735, 743–44; Dyson, *supra* note 167, at 110.

²¹⁷ See Duve, *supra* note 2, at 727; see also THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 7, at 770–71; Masferrer et al., *supra* note 5, at 12 (explaining “a story of cross-fertilization”).

²¹⁸ See *supra* Part I.

²¹⁹ SCHOLARSHIP, PRACTICE AND EDUCATION IN COMPARATIVE LAW, *supra* note 4, at 50.

²²⁰ *Id.* at 54.

legal historians to clarify if and how legal history differs from comparative law.²²¹ One may speculate that this is because legal history, if regarded as a history sub-discipline,²²² appears to have a much more powerful backing.²²³ Furthermore, as explained above,²²⁴ legal history work was originally mono-jurisdictional.²²⁵ Overlaps with comparative law with its traditional multi-jurisdictional focus,²²⁶ seem to be less evident and the need to distinguish may therefore appear less pressing.

Finally, it can also be observed that the relationship between legal history and comparative law is much more a topic of discussion in Europe than in the US. This is in line with a general trend in Europe to (re-)focus on theoretical and methodological aspects of comparative law which are probably stand less in the center of attention in the Americas.

2. Differences and Similarities

The separate treatment of legal history and comparative law makes only sense if actual differences between the two areas can be identified. While the literature does not provide much help in explaining what these differences might be, the historical roots are of course not the same.²²⁷ Legal history work originally served to explain and justify domestic law based on Roman law. In contrast, modern comparative law emerged as a movement to bring international features to domestic law with the ultimate goal to achieve international justice and to create a common law of mankind (*droit commun de l'humanité*).²²⁸ It does not take much to understand how this has led to the development of different scholarly communities.²²⁹

But apart from the separate historical origins, why should it be necessary to carve out territories? Only if legal history work concerns the analysis of legal issues at one particular point of time in the past without any (horizontal or vertical) benchmarking, then no comparison would be involved. *Vice versa*, only when comparative work is purely horizontal and concerned only with current law, i.e. when legal systems, laws, institutions and legal cultures presently in place are compared without vertically exploring their historical evolution, then no legal history work would be required. But this is indeed rare.²³⁰ Derek Roebuck has therefore surmised: "To discover the law which now exists, it is necessary to understand how it has developed. This is especially necessary if that law is to be compared with others."²³¹

Does it make a difference that comparative law as a discipline was in the past often regarded as covering (also) the analysis of foreign law with no comparison involved at all?²³² When considering this question, one has to take into account that it has also been suggested that "comparative law is patently more than legal history, in that legal historians may choose to consider only one jurisdiction."²³³ But these observations regarding the scope of legal history on the one hand and of comparative law on the other hand are obviously random. As indicated earlier,²³⁴ it is not explainable from a functional point of view why in modern times legal history work should be restricted to just one jurisdiction while it is possible and may in fact be extremely helpful to conduct mono-jurisdictional comparisons without involving any foreign law. The foreign law element just cannot serve as distinguishing feature which allows or even requires any differentiation between legal history and comparative law. In fact, if the analysis of foreign law and legal

²²¹ CLARK, *supra* note 17, at 1 ("Legal historians, perhaps especially in the United States, have been sceptical about the possibility of a fruitful comparative legal history, preferring in general to investigate the addictiveness of their national experience.").

²²² See *supra* Part II.2.

²²³ See HUSA, *supra* note 1, at 10 (concluding that comparative law "has lost some of its old methodological and theoretical innocence. It has been challenged by history, sociology, economics and anthropology").

²²⁴ See *supra* Part II.1.

²²⁵ *Id.*

²²⁶ See SCHOLARSHIP, PRACTICE AND EDUCATION IN COMPARATIVE LAW, *supra* note 4, at 47; see also Pihlajamäki, *supra* note 2, at 738; ZWIEGERT & KÖTZ, *supra* note 1, at 6.

²²⁷ See *supra* Parts II.1, III.1; see also Pihlajamäki, *supra* note 2, at 735.

²²⁸ See ZWIEGERT & KÖTZ, *supra* note 1, at 3; see also David S. Clark, *Nothing New in 2000 – Comparative Law in 1900 and Today*, 75 TUL. L. REV. 871, 876 (2000); MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* 13–19 (Cambridge 2001); Pihlajamäki, *supra* note 2, at 736.

²²⁹ Pihlajamäki, *id.*, at 750; Ibbetson, *supra* note 17, at 133 (noting the "polarisation between nationalism and cosmopolitanism").

²³⁰ See, e.g., ZWIEGERT & KÖTZ, *supra* note 1, at 8; HUSA, *supra* note 1, at 35; MOUSOURAKIS & NICOLINI, *supra* note 29, at 18 ("A comparative perspective is as essential to the historical study of law as legal history is to the study and comparison of contemporary legal systems."); Fisher III, *supra* note 41, at 1096 (defining as one of the goals of legal history to "[c]ontribute to contemporary policy debates by enabling readers to assess the merits and preconditions of policies pursued in other societies").

²³¹ SCHOLARSHIP, PRACTICE AND EDUCATION IN COMPARATIVE LAW, *supra* note 4, at 49; see also HUSA, *supra* note 1, at 34; Dag Michalsen, *Methodological Perspectives in Comparative Legal History: An Analytical Approach*, in COMPARATIVE LEGAL HISTORY, *supra* note 5, at 98.

²³² See HUSA, *supra* note 1, at 60.

²³³ SCHOLARSHIP, PRACTICE AND EDUCATION IN COMPARATIVE LAW, *supra* note 4, at 47; see also Pihlajamäki, *supra* note 2, at 738, 740; ZWIEGERT & KÖTZ, *supra* note 1, at 6.

²³⁴ See *supra* Part II.1.

culture is part of the scope of comparative law,²³⁵ then any work on foreign legal history²³⁶ qualifies as comparative law as well. Moreover, the comparatist who engages in the analysis of foreign law will most likely have to consider the historical development of such foreign law and therefore engage in vertical comparative work.²³⁷

It has been suggested that the difference between legal history and comparative law lies in the method.

While legal history shares most of the techniques of comparative law, it cannot subject its informants to the same social science techniques to gather information. We cannot ask King John what he thought at Runnymede, whether he was very much in favour of, quite liked, was indifferent to, felt mildly peeved by, or absolutely loathed the activities of the barons. The sources of the legal historian and the techniques for making them speak must be more limited than those of the comparative lawyer. Otherwise the scope of enquiry can be the same.²³⁸

This statement does carry a lot of truth. At the same time, it must also be acknowledged, however, that the use of historical and comparative methods is not a distinguishing, but a shared feature if it is accepted that legal history work entails comparisons and that comparative law is not restricted to purely horizontal approaches.²³⁹ And this is indeed nothing new. For example, representatives of the “historical jurisprudence”²⁴⁰ did effectively promote the use of comparative methods for legal history work.²⁴¹ “‘Historical jurisprudence’ was itself an aspect of comparative jurisprudence comparing across time, rather than across geographies. . . . Maine²⁴² had also emphasized the use of comparison to help fill gaps in knowledge or historical evidence, comparing across both time and space.”²⁴³ Having said that, historical jurisprudence did not aim or even imply a synthesis of legal history and comparative law. Comparative law did not even exist as a discipline in those times.²⁴⁴ Historical jurisprudence rather (just) promoted the use of comparative and other methods to historically contextualize legal theory.²⁴⁵

According to Mousourakis:

With respect to methodology, legal history and historiography exhibit a high degree of sophistication and consistency, whilst comparative law remains largely underdeveloped. . . . Regarding objectives, legal history primarily focuses on understanding the past (and, by reflection, the present), with little emphasis on the practical utility of its findings for current legal practice. In contrast, the comparative study of law is pursued not only for the sake of knowledge but also for its practical applications, such as legal reform or the international harmonization of law.²⁴⁶

It is, however, not convincing to differentiate between methodologies merely based on their state of development especially when it remains unclear how the respective state can be verified. Furthermore, the claim that legal history “primarily focuses on the past” only considers the academic (“vertical”) side of legal history research and ignores its practical importance e.g. for the interpretation of legal norms.²⁴⁷

Finally, Heikki Pihlajamäki has pointed that “legal history differs from comparative law in one significant aspect. While comparatists are well organized at the international level, legal historians are not.”²⁴⁸ This may have been correct at least in the past but institutionalized cross-border collaborations of legal

²³⁵ See *supra* Part III.1.

²³⁶ See, e.g., Alford, *supra* note 21.

²³⁷ Again, the work by Alford, *id.*, serves as a good example.

²³⁸ SCHOLARSHIP, PRACTICE AND EDUCATION IN COMPARATIVE LAW, *supra* note 4, at 48; but see HUSA, *supra* note 1, at 17 (“[T]he question about whether comparative law is ‘a research branch’ or ‘a method’ is irrelevant – it is both of them.”).

²³⁹ See ZWIEGERT & KÖTZ, *supra* note 1, at 8.

²⁴⁰ See *supra* note 76.

²⁴¹ Reimann, *supra* note 6, at 402.

²⁴² Henry Sumner Maine (1822–1888), see *supra* note 76 accompanying notes.

²⁴³ Lorren Eldridge, *Gone and Forgotten: Vinogradoff’s Historical Jurisprudence*, 41 LEGAL STUD. 194, 200, 208 (2021) For attempts to “re-historicize” legal thinking by the American critical legal studies movement, see *id.* at 197–200.

²⁴⁴ See *supra* Part IV.2.

²⁴⁵ Eldridge, *supra* note 243, at 194.

²⁴⁶ MOUSOURAKIS & NICOLINI, *supra* note 29, at 18.

²⁴⁷ See *supra* Part II.4.

²⁴⁸ Pihlajamäki, *supra* note 2, at 734.

historians are catching up.²⁴⁹ Furthermore, while as explained above,²⁵⁰ legal history and comparative law communities have historically developed separately, the level of international organization does not affect the substance of legal history and comparative law as legal disciplines or methods.

To sum up, substantive differences between legal history and comparative law as disciplines do nowadays not exist. While historical methods and comparative methods are of course not the same, these (and other methods) are used in both disciplines and therefore cannot serve as defining features. James Gordley has accordingly concluded:

The mistake for legal historians is to assume that the law of a given time and place develops in its own way which can be studied without regard to how the law developed elsewhere. The corresponding mistake for comparative lawyers is to assume that the law of each modern jurisdiction forms a coherent system rather than an amalgam of solutions developed over time.²⁵¹

3. *Why Distinguishing?*

If no functional differences exist between legal history and comparative law, it must be asked: Is any distinction really needed? Such need is certainly not merited from the point of view of scholarship. There is no compelling reason why research must be labelled as one or the other. Taxonomy is important to advance the understanding of legal phenomena²⁵² and also of particular fields within which these phenomena exist. But taxonomy must be based on substantive differences which – as shown above²⁵³ – do not exist between comparative law and legal history as disciplines in modern times. In any event, legal history research often qualifies as comparative and *vice versa*.²⁵⁴

The same is true from the viewpoint of practical legal work. While both historical and comparative approaches are important in legal practice,²⁵⁵ nothing is gained from forcing related work under either of these headers, let alone a need to do so.

One has to acknowledge that for law school administration it is helpful to categorize law courses and programs, e.g., to describe the taught contents. The title of courses and programs could consequently depend on whether the focus is on historical or comparative features while at the same time almost inevitably embracing methods and approaches of the respective other. Again, however, this would not change the above conclusion that both areas are functionally the same.

Finally, of course, identities of legal communities need to be considered. Legal communities serve as networks of researchers, law teachers and practitioners who do similar work as demonstrated, e.g., by joint academic events and publications under a discipline name. Members of these legal communities normally have a sense of belonging and may even share a particular culture. As explained above, the existence of separate communities in the areas of legal history and comparative law has historical reasons,²⁵⁶ although memberships may overlap. Moreover, it does not do any harm to accept the existence of these different legal communities despite the acknowledgment that they are largely covering the same field maybe just with different foci. The center of attention of the former is the assessment of the law, legal institutions and legal cultures in the past while the latter concentrates on the present.²⁵⁷ However, this focus-based distinction does not hold water in the sense that it allows for a clear-cut scientific delineation.

V. Final Remarks

In conclusion, legal history and comparative law are not only supplementing and supporting each other.²⁵⁸ In contrast, in modern times legal history work is more often than not comparative in nature and comparative law work naturally embraces historical research.²⁵⁹

²⁴⁹ Compare the references in note 19 above.

²⁵⁰ See *supra* Parts II.1, III.1.

²⁵¹ THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 7, at 763; see also Sandberg, *supra* note 13, at 27.

²⁵² Horwitz, *supra* note 38, at 1835.

²⁵³ See *supra* Part IV.2.

²⁵⁴ See *supra* Part III.1.

²⁵⁵ See *supra* Parts II.5, III.4.

²⁵⁶ See *supra* Parts II.1, III.1.

²⁵⁷ Cf. HUSA, *supra* note 1, at 35.

²⁵⁸ See Reimann 1998, *supra* note 203, at 496.

²⁵⁹ See Pihlajamäki, *supra* note 2, at 740.

Legal history and comparative law are much of a muchness; views may differ on which of these twin sisters is the more comely, but there is no doubt that the legal historian must often use the comparative method and that if the comparatist is to make sense of the rules and the problems they are intended to solve he must often investigate their history.²⁶⁰

As suggested at the outset, legal history and comparative are not different, they are the flip side of the same coin.²⁶¹ There is no justification and no practical need to distinguish between them. It was the main goal of this Article to make this point clear and thus to establish a solid basis for the creation of synergies.

Finally, considering the above discussion it remains doubtful if legal history and comparative law should be regarded as legal disciplines or – better – as one and the same discipline at all. It may be preferable to use the term “research dimensions”²⁶² as this reflects more accurately the lack of substantive distinguishing features. But this of course depends on the definition of the terms “legal discipline”, “legal history” and “comparative law” which leave a lot of room for interpretation. It is the awareness of these interpretational options which is important, and which stands at the center of this Article.

²⁶⁰ ZWEIGERT & KÖTZ, *supra* note 1, at 8; *see also* Frederick Pollock, *The History of Comparative Jurisprudence*, 5 J. COMP. JURIS. 74, 76 (1903).

²⁶¹ *See* Masferrer et al., *supra* note 5, at 6 (noting the “historical-vertical perspective with a comparative-horizontal dimension”).

²⁶² *See* Michalsen, *supra* note 231, at 96.