American versus European Legal History

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From 7 to 9 November 2013 I had the opportunity to attend the Annual Meeting of the American Society for Legal History (ASLH) in Miami, Florida (http://www.legalhistorian.org/). For the first time an exchange panel was invited from the European Society for Comparative Legal History (ESCLH) and I happened to present a paper in this panel, about which I will tell a bit more below.

Before attending this conference, I had formed an opinion about what American Legal Historians do, also in contrast to what particularly their European counterparts do. Now, my opinion ran more or less like this: American Legal Historians are generally more ‘historical’ and less ‘legal’ in their research, whereas Europeans are generally more ‘legal’ and less ‘historical’. I will try to explain this some what.

Being a European myself and regularly attending and participating in European conferences on legal history, such as the Forum of Young Legal Historians, the Biennial Conference of the ESCLH, the British Legal History Conference, it appeared to me that in most European legal historical research legal changes are decisive for the story told. To me this seems to be even more the case where Roman law is involved, if one for instance looks at the program of the 67th conference of the Société Internationale ‘Fernand de Visscher’ pour l’Histoire des Droits de l’Antiquité (http://www.unisalzburg.at/fileadmin/multimedia/Privatrecht/documents/Programm_SIHDA_2013_05.09.13-aktuell.pdf). Generalizing – which is risky – it seemed to me that European Legal Historians are focussing particularly on changes in legal dogmas, how these changes relate to legal changes in other European jurisdictions, and – sometimes – whether they can be traced back to Roman law. Historical context (or why these legal changes actually occurred) is important, but secondary to the legal story, to put it bluntly (and I know that I do many European legal historians unjustice right now).

American legal historical research on the other hand, appeared to me to place historical events, persons, movements, etc. at the forefront, whereby the legal changes or background played a secondary role. This perception I based primarily on following the Legal History Blog (http://legalhistoryblog.blogspot.nl/). This idea grew stronger when I saw the program of the 2013 Annual Meeting of the ASLH (http://aslh.net/wordpress/wp-content/uploads/2013/06/2013-Meeting-Program.pdf): many panels were about slavery and civil rights, and e.g. on judicial biographies. Therefore, I grew a bit worried about the reception of our European panel, including my paper, which was hard-core comparative legal history.

However, after attending several panels, I felt more at ease. Although the themes indeed often considerably differ from European themes, the backbone of the papers I attended was thoroughly ‘legal’: it appeared that the legal changes or conditions had been decisive after all, not only for topics to be chosen, but also for how stories were structured. Obviously, there are differences. American law seems to depend much on individual persons, such as judges, hence also the interest in the intellectual lives of individuals. When explaining why
certain legal changes took place the way they did, often these changes can thus be related to certain individuals. Then the historical context is of profound importance; it helps that for the more recent American history many sources are available, and not just legal sources. Moreover, contrary to most European legal historians, most of which have a legal background, American legal historians tend to have a somewhat more diverse academic background: for me this also explains this more historical, narrative approach.

After our European panel, I even came to the conclusion that much European legal historical research is rather similar to American legal historical research, after all. The papers of Marianne Dahlen (University of Uppsala, marianne.dahlen@jur.uu.se), Markus Kari, University of Helsinki, markus.kari@helsinki.fi, Aniceto Masferrer (University of Valencia, aniceto.masferrer@uv.es), and myself (janwillem.oosterhuis@maastrichtuniversity.nl, Maastricht University), all used the comparative method. Marianne compared the French, American, and Swedish copyright law (Copy or Copyright Fashion? A Comparative Legal Historical perspective on textile and fashion design protection); Markus compared the English and American Security Acts of the 18th and 19th centuries, and how they influenced each other (Entangled origins of the 1933 Securities Act); Aniceto explored the relation between sin and crime in the Early modern period and its (lacking) influence on modern ideas on the relation between crime and sin (Taking Sex Less Seriously: A Comparative Approach to the Secularization of Criminal Law in the 18th and 19th Centuries); whereas I presented a research project to compare English, French, German, and Dutch sales laws concerning the liability for hidden defects (‘It’s the economy, stupid’ – Is a converging European sales law preceded by converging economic circumstances?).

Richard Ross (University of Illinois, rjross@illinois.edu), chair and commenter of the European panel, nicely distinguished the purposes for which the comparative method was used: (i) Marianne and I were ‘Hypothesis Testing’ (divergence and convergence respectively); (ii) Markus explored ‘Legal Transfer, or Lines of Influence: In what ways did legal developments in Europe affect the United States, and vice versa?’; and (iii) Aniceto’s paper was an example of ‘Core-Periphery Relations: Better Understanding of Developments in European Metropolitan Core Allows Truer Appreciation of Colonial American Periphery’. According to Ross these papers thus deployed some of the classic agendas and narrative structures of comparative history: hypothesis testing by using nations as cases; charting of legal transfer; and analysis of core-periphery relationships. Scholars of ‘entangled’ history would favor other agendas and narrative strategies: they examine e.g. mutual influence in interacting societies, or parallel developments in societies on account of similar pressures. These scholars would probably look for more interactivity and multiparty transfers; multiply the contexts for understanding parallel developments; rethink the unit of comparison (is it a nation? Or an empire? Or a region or social group?). Here comparative history might indeed benefit from entangled history, be it in the US or Europe. However, I realized that I and many of my European colleagues already look for wider contexts to explain certain legal changes (such as religious beliefs); that we do focus on social groups (mercantile communities in Antwerp and London for instance); and that we trace mutual influences (e.g. in customary laws).

American legal historians may have other themes and use a more ‘entangled’ language, but when European legal historians start explaining why certain legal changes happened, their approaches seem to be more similar than at first glance. So maybe I am more American than I thought I was.