

Rechtsgeschichte

www.rg.mpg.de

<http://www.rg-rechtsgeschichte.de/rg4>
Zitiervorschlag: Rechtsgeschichte Rg 4 (2004)
<http://dx.doi.org/10.12946/rg04/041-056>

Rg **4** 2004 41 – 56

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Legal History and Legal Education

Abstract

The article discusses why and under which conditions legal history is a central, formative subject for future lawyers. The Author's point is that the utility of history in legal education is fully distinct of that of dogmatic matters. Actually, while dogmatic legal education aims to fabricate certainties about contemporary law, conferring upon it rational / technical evidence, legal history renders problematic the implicit assumptions of dogmatics, namely, the rational, necessarily ultimate nature of our law. Therefore, legal history accomplishes this mission stressing the fact that law is necessarily bound to a cultural (in the deepest sense of the word) environment and, furthermore, that legal knowledge is also a »local knowledge« whose categories are deeply rooted in historical epistemes.



Legal History and Legal Education

The usefulness of the history of law in legal education is a recurring topic. Responses to it have been varied. Some used to say that history serves as a hermeneutical tool for current law. Others prefer the idea – once trendy in European legal culture – that tradition is able to manifest nature and, therefore, that history could reveal transtemporal legal values. Less sophisticated is the common sense opinion that legal history develops legal sensitivity, or that it widens the cultural insight of lawyers. Not to speak of the impact of a Latin *dictum* before a court audience or in front of a client ...

Often this complex issue is reduced to a plain answer: legal history is a formative subject. Yet it is less common to explain why this should be so. Still rarer are delineations of the methodological conditions under which history could play such a role. I strongly affirm that history is a central, formative subject for future lawyers. However, I mean this in the fully distinct sense in which jurists conceive the educational utility of dogmatic matters.

In fact, dogmatic legal education (such as civil law, constitutional law, general theory of law) aims to fabricate certainties about contemporary law, conferring upon it rational/technical evidence. On the other hand, the mission of legal history is to render problematic the implicit assumptions of dogmatics, namely, the rational, necessary, ultimate nature of our law. Legal history accomplishes this mission stressing the fact that law is necessarily bound to a cultural (in the deepest sense of the word) environment and, furthermore, that legal knowledge is also a »local knowledge« (Geertz, 1983) whose categories are deeply rooted in historical *epistemes*.

This critical task could be naturally assumed by other disciplines, such as the sociology of law or legal anthropology, or even a certain understanding of jurisprudence or legal theory. However, academic conservatism in many law schools offers a sensible resistance to the integration of these studies in curricular programs, fearing that these novelties could endanger the implicit apologetic character of prevailing legal education. Furthermore, many say that the study of norms – the specific scope of legal studies – would be contaminated by the study of social facts, of empirical facts. As the idea of separation (*Trennungsdenken*) between the facts (*Sein*) and norms (*Sollen*) still underlies the spontaneous ideology of lawyers (cf. Bourdieu, 1986), this insertion of facts within the temple of norms would desecrate for good the purity of legal studies.

This is the reason why (also from a tactical perspective) legal history – a traditional and long-established¹ item of legal education – can fulfill the role that these »spurious« novel disciplines should play.

To play such a role, the history of law cannot be framed by just any methodological principles. In fact, it is well known that, under certain methodological assumptions, history can be at the very center of an acritical conception of law, collecting evidence of the enduring rationality of legal values (»already the Roman ...«) or of the idea of the linearity (one-dimensionality) of the progress of legal reason.

History of law as a legitimating discourse

Actually, the history of law can fulfil the very opposite role of scrutinizing the hidden ground

1 At least until new templates of legal education (like the shortened and »practice oriented« understanding of Bologna's model) give up such »cultural luxuries«.

layers of legal reason, as broached above. Law in itself is already a system of legitimizing social order, *i. e.*, a system promoting the obedience to the norms which will frame and build consensus about social discipline. However, law itself needs legitimacy, namely through a social consensus on the foundations of its cogency. As we know from M. Weber onwards, the legitimacy of political power can be obtained from several complexes of beliefs (»legitimizing structure«). These beliefs are organized around values like tradition, charisma, and rationality (Weber, 1956) – *e. g.*, law must be obeyed because (i) »it lasts in history«, (ii) »it was inspired by God«, (iii) »it is rational or efficient«, (iv) »it has been established by the progress of rational methods«. Some of these models of reasoning are deeply dependent on historical evidence.

The history of law played this legitimizing role during a large period of European legal tradition. During the Ancien Régime, a cultural traditionalist matrix prevailed, according to which »what was ancient was good«, because time was capable of unveiling the nature of things. In this context, fair law was identified with established and rooted law – as usages in force by prescription, law »received by practice« (*usu receptum, usu firmitum*), opinions commonly accepted by experts (*opinio communis doctorum*), judicial practices (*styli curiae*), rooted rights (*iura radicata*), and the usual content of contracts (*natura contractus*). Therefore, the history of law (the »historical argument«) was decisive as a *ratio decidendi*. Actually, history was the means of proving the durability of norms. Some of the first studies of legal history – like those of Hermann Conring, *De origine iuris germanici* (1643) – were clearly aimed at solving dogmatic issues, namely to assess whether specific norms of Roman law had previously been

enforced in Germany, a requisite to their value as enforceable law. In early modern Southern Europe, where a global reception of Roman law was assumed, legal history had, on the contrary, to carry evidence of practical proficiency and interpretation (the »digestion« of Roman law norms or principles, or *praxistica*).

Also in the nineteenth century, under the impact of Romanticism, this practical use of history as a diagnosis of the suitability of legal solutions was pervasive. Once and for all, history was the measuring stick of the so-called *Volksgeist* (the »Spirit of the People«), from which law was deemed to derive, according to the German Historical School. However, if we pick French political Romanticism (*e. g.*, F. Guizot), the idea of the existence of a historical constitution (and of historical standards for law) is also clearly present, namely as a safeguard against arbitrary (legislative) innovations.²

In our own times, the impact of the idea of »progress« hinders this reappraisal of tradition as the structure of legal legitimacy. Therefore, the history of law has lost a good deal of its credit as an oracle for a fair or fitting law. At least in the West, as in the East (from Singapore to India or Iran), the search for a theory of law liberated from Western contamination tends to grant history a hermeneutical role in the unveiling of a system of law coping with Eastern cultural specificity, heavily marked by a communitarian sensitivity, opposite to Western individualism.

To boost history as a means of revealing national spirit – if such a thing ever existed – would raise rather serious methodological problems. Actually, contemporary historians are quite aware of the fact that the writing of history is something more closely related to creation than to description. In other words, what the historian identifies as the spirit of the people, or the na-

² The hidden scarecrow was the Jacobin law of the French Revolution.

tional soul, is probably more likely to be his own spirit, his own soul, in a word, his pre-comprehension (*Vorverständnis*) of a national character.

In any case, the historical topic has definitely a broader meaning, because it can be inserted into other juridical discursive strategies.

On the one hand, history went on being used to prove that specific categories of legal discourse – like »State«, »legal person«, or »private property« – either belonged to the nature of things or were the result of a legal progress of mankind, which can be perceived by historical observation.

According to a lighter version, history could at least demonstrate a coalescence of social consensus on specific values or norms, a consensus which should be observed in the present. History could attest to the workings of silent democracy across time. This was what the Romans meant when they defined usage as *tacita civium conventio* (D. I, 3, 32–36).

Poetic fancy apart, this idea of a continuous plebiscite amidst several generations of people would suppose that all the »voters«, independent of their time or location, gave the same meaning to the values under scrutiny.

This daring hypothesis ignores the gap existing between the apparent permanence of words and their changing, deeper meaning. Words like family, person, democracy, liberty, obligation, contract, property, robbery or murder are surely quite old in the Western legal tradition, often with a strong literal continuity. However, if we go a bit deeper in their hermeneutics, we will soon realise that, under the literal sameness of form, there has been an ongoing change of meaning, so that any kind of transtemporal consensus is the product of successive equivocations between several temporal layers of speakers, each one leaning on a local or relational³ meaning of the words. Legal concepts

integrated structured semantic fields, which produce their meaning, receive semantic influences and connotations from different levels of language (ordinary language, ethical, religious, political, medical discourses), are differently appropriated by social and cultural *strata*, serve diverse argumentative strategies, etc. A radical discontinuity of sense is lurking beneath the ostensible uniformity of words. This rupture of meaning naturally discredits any idea of trans-historical consensus or even of progressive construction of axiological sense.

All things considered, this alleged continuity of legal categories – which was deemed to have been proven by history – cannot be sustained. Once this continuity is dismissed, also the point to be asserted – the natural character of enduring legal categories – becomes fully problematic. Actually, what was being used was a very common intellectual mystification, that of considering natural what seems trivial to us (the so-called naturalization of culture).

Legal history can also be merged in a slightly different legitimizing strategy. Actually, some historians – and some jurists, even more so – believe that history can be used as a witness of the linearity of progress (in this case, legal progress). Let us assume an evolutionist historical model. A model which conceives of history as a progressive accumulation of knowledge, wisdom, and sensitivity. From this point of view, law would have had its infantile phase of ruthlessness. Subsequently, the progress of human intellectual experience or the successive discoveries of a sequence of great minds would have pushed law to a better state; in the end, to its contemporary stage. In this progressive history, the legitimating element is the contrast between the crude law of the past and the sophisticated law of our days, the latter being the product of a

3 I. e. related to other neighbouring concepts, occurring in the same epoch of legal or political discourse (e. g., »liberty« has been successively confronted with »slavery«, »despotism«, and »anarchy«; »democracy« with »monarchy«, »aristocracy«, »license«, »dictatorship« or »totalitarianism«, grasping different sense from every opposition); contextual nature of meaning is a venerable acquisition

of post-Saussurian (Ferdinand de Saussure, 1857–1913) linguistics (cf. *Cours de linguistique générale*, 1916).

huge project of refinement carried out by generations of remarkable jurists.

This theory of a lineal progress is often the outcome of a reading of the past from the perspective of the present. From this standpoint, it is always possible to find forerunners and anticipations. Some of them are no more than mere lucubrations of historians, giving mistaken sense to past events or texts. However, what is also often left out of sight is that several other possibilities of development were lost and that the chosen way had costs, or shortcut other valuable goals. The celebratory trend of history (of legal history) tends towards a distorted and denigrating panorama of the past, which results both from the need of commemorating the present and of giving up the categories of the past as keys for the understanding of old days.

The present, on the contrary, is sanctified, glorified, as a unique human goal and as the only horizon for the evolution of mankind. As non-Western worlds can be seen (and have been seen) as pre-modern worlds, the Western-centred progressive history inspired in the 1960s the »modernization theory«, which proposed a universal model of social evolution, also in the field of law. Modernization could be measured by social, economic and legal features. In the case of law, these features were: statute law, codification, state-oriented justice, and representative democracy (Wehler, 1975; critical appraisal, Baumann, 1993, 2001). The historiographic misdemeanours of »modernization theory« are as devastating as its results in today's handling of international affairs.

Naturalizing or »progressive« legal historiography leans on a specific way of building historiographic narrative. Actually, relevant historical subjects are identified according to the current array (or pattern) of legal concepts and

issues. This leads to a biased perspective of the historical field, obscuring everything which disappeared from our scenery and highlighting everything which seems to have anything to do with us. The present is imposed on the past, depriving the latter of its autonomy, of its own logic, of its specific teleology.

This ignorance of the autonomy of the past is also the cause of other perplexities and mistakes in the course of historical research. As the retrieval of the sources is guided by our current matrix of understanding of law, it becomes common that we cannot find our subject in an otherwise organized historical corpus. For example, a good deal of medieval and early modern »constitutional theory« is to be found in sources dealing with the theory of justice, law and jurisdiction. Also a theory of administration should be sought in the theory of *judicium* (*i. e.*, of judgement) or in the theory of the family's rule (*oeconomia*).⁴ On the other hand, legal doctrine on banking or usury is to be found – outside of what we call today legal doctrine – in the theories of virtues (namely, *beneficentia*, *gratitudo* or *miser cordia*) (cf., *e. g.*, Clavero, 1991).

However, this serfdom to contemporary legal pre-comprehension can be the source of a harsher consequence: a total blindness to the very meaning of the sources. For example, when royal charters speak of the love of the king for his subjects, a cynical reading prevails, which ignores the local meaning of »love« in medieval and early modern political vocabulary.⁵ When domicile is protected against intrusions of authorities, the contemporary principle of inviolability of domicile supersedes the consideration of the political autonomy of family and household in earlier times.⁶ Speaking of parliaments, the current concept of representation (as a voluntary political *mandatum*, or agency, of the people) is imposed

4 Cf. FRIGO, 1985.

5 Cf. CLANCHY, 1983.

6 Cf. FRIGO, 1991.

upon the older concept of representation, as an act of unveiling, of rendering manifest the whole realm, in spite of the absence of any act of political delegation (like the performance of an actor who impersonates or renders visible the represented character without consent from the latter). In any case, the result is a fully mistaken reading.⁷

It is worthwhile stressing that this issue of the legitimacy of using contemporary concepts in legal history has a long tradition of debate. Some consider, reasonably, (i) that the use of current concepts as a framework for legal research is unavoidable, because nobody can free himself from the images or prejudices (pre-comprehension) of the present. Others – often in our field of the history of law, but also in the history of philosophy or the history of ideas – wonder if this »present mind approach« is not the very condition for giving sense to historical facts or to making them useful for us.⁸ The first position (i) points to a radical impossibility of an objective historical knowledge, which actually underlies our own personal epistemological attitude.⁹ From the second position (ii), on the contrary, arise the severe methodological objections already evoked, when speaking about the superimposition of the present on the past. In fact, the so-called »historical dialogue« rendered possible by the present mind approach (*i. e.*, by the »hermeneutical« perspective) is actually an artificial confrontation between historians and their historical subjects, deprived of their own autonomy, looking like ventriloquist's puppets to whom voice is given, words are taught, alien thoughts and feelings are imposed.

A critical history of law

Legal education – as it has been conceived and institutionally organized since the late eight-

eenth century – doesn't need to add dogmatism to the already prevailing dogmatism. It will not be used as a way of granting still more self-confidence to the already arrogant imperial discourse of jurists. It had not to narrow the already very plain vision that lawyers used to have about social life, which is surely one of the most complex phenomena we can deal with. The real need of legal education is to deepen the sense of complexity,¹⁰ to render problematic a number of certainties, to lessen arrogance, to promote »indolent« legal reasoning by forming a (prudent) body of knowledge from contradictory pieces of experience.¹¹ History can perform this role if it copes with some theoretical and methodological guidelines.

In the next paragraphs, I propose some hints for arriving at just such a critical history of law.

Law as social product

It became a truism (although a not very cherished one by traditional historians) to say that law is a social product. Jurists' reactions against the proposition is indeed triggered by a pervasive functionalism this *motto* had some decades ago. Not only did orthodox (?)¹² Marxists stress the super-structural place of law (»reflex's theory«), but also every kind of functionalism used to assign to law a function of control and discipline, determined by a set of objectives defined elsewhere in the social field. There are, anyway, further motives for such antipathy. A social conception of law dissolves prized myths of lawyers, such as the leading role of isolated jurists in the invention of law, in its dogmatic construction, in its tuning with social needs; or such as the atemporality of legal *dogmata*. Therefore, to stress that the final results of legal »science« depend on social organization and

7 Cf. CAPPELLINI, 1987.

8 Cf. BETTI, 1927.

9 However, with the restriction that we recognize the existence of a cogent discursive grammar (or *regulae artis*) which prevents the arbitrary and renders communicability possible. Furthermore, as we shall argue, epistemological relativism – a quite common attitude in history – has very little to do with moral relativism.

10 BAUMAN, 1987.

11 See in this sense SANTOS, 2000.

12 Orthodox, in opposition to the new wave of western Marxist perspectives in the last four decades of the twentieth century (already A. Gramsci; then L. Althusser, N. Poulantzas and others). The quotation mark inserted in the text renders problematic the coherence of mere economic

points of view with many insights of Karl Marx about law.

social processes of legal invention – from school organization and legal field organization to social feelings of justice – naturally destroys this role.

In any case, the stressing of the process of social production of law on its own seems central. By »on its own« I mean: without displacing the legal agency outside the field of law, refusing to define law as the result of a process of, let us say, economic production (like in economic materialism) or – another version of hetero-explanation of law – of production of the self (like in psychoanalytic theories).

Actually, short run models, situated inside the »legal level« of normality (whatever this may be in any epoch) seem more productive, as they perform a more fine and complex analysis of the very level of law production. One of them could be P. Bourdieu's theory of symbolic fields.¹³ Another could be the genealogical analysis of discourse, carefully described – as a practical method! – by M. Foucault in *L'archéologie du savoir*.¹⁴

Therefore, the most fruitful history of law should be the history of the »legal field« (= the organization of human agency about law): the history of court organization and the history of legal protagonists (professors, lawyers, notaries, etc.);¹⁵ the history of legal discourse and discursive strategies in use, including the history of conceptual frameworks [as creative legal devices] and their changes;¹⁶ the history of legal writing and legal books¹⁷ (today broadened to the study of systems of legal communication, including old and new orality¹⁸ and computer-based communication).

In any case, the use of short-range models (*objektbezogene Erklärungssysteme*) will assure the stressing of the idea that legal developments are largely arbitrary, in the sense that they don't

obey a strict global social logic. However, we can even take a further step by emphasizing that legal imagery and categories, though socially arbitrary, can, on the other hand, model social imageries, as well as frame related decision-making processes and direct human behaviors. Actually, legal discourse (more so than formal legal norms) has strong *poietic* or *symbolic* abilities, which spread over non-legal levels of human practice. Law is surely a factor of crystallization of social images: of fairness and unfairness, of crime, of liability, of women, of insane people, of proper ruling groups, etc.¹⁹

However, this intercourse between law and other human symbolisms cannot be precisely described by a simple and straightforward directional arrow. In fact, when they are the object of a migration to other levels of human or social values, legal concepts suffer a process of re-reading – of integration in a new intellectual context –, which reshapes them.²⁰

This emphasis on the *poietic* ability of law can renew the historiographic strategies of the discursive legal tradition. Actually, legal literary tradition is a huge repository of topics, subject to continuous processes of reading and re-reading (of reception). Although this uninterrupted (and circular) process of reading is creative of itself, the weight of *formulae, dicta, brocarda*, pieces of reasoning, concepts, etc., is felt by successive waves of readers, forming a kind of reader's intellectual framework (»reader's horizon«). In this sense the literary thesaurus conditions the future of law, not by a process of mere influence, but by forming a flexible and moveable predisposition (a *habitus*, to use Bourdieu's concept) for the understanding of both texts and non-textual experience.

All the above considerations can be theoretically very sound, but do they bring any advant-

13 Cf. BOURDIEU 1972, 1979, 1980, 1984 (general approach); application to the law BOURDIEU, 1986.

14 Cf. FOUCAULT, 1969.

15 Cf. BOURDIEU, 1986; also, from a broader perspective BAUMAN, 1987.

16 See as an example, COSTA, 1969, 1999; HESPANHA, 1984; CLAVERO, 1991; PETIT, 1994.

17 RANIERI, 1982; HESPANHA, Form and content in early modern

lawyers' books. Bridging material bibliography with history of legal thought (article to be published).

18 Cf. HESPANHA, 1983; PETIT, 1992, 2000; SHERWIN, 2000.

19 Cf. SARAT, 1994.

20 For the theoretical construction of this process of reshaping one can use either the more classical »reception's theory« – JAUSS, 1965; ISER, 1976; cf. also HOLUB, 1984 – or the more modern (and ele-

gantly built) »system theory« (s. SCHMIDT, 1987, for an overview of a rather split theoretical inspiration).

age for legal education? Put in this bold way the question is odd, because it seems to imply that, whatever may be the theoretical grounds for a rosy legal history, the utility for legal education might arise anyway, even out of impressionistic approaches or from methodological rubbish.

However, the question deserves, for the moment, a merely perfunctory answer. And the answer is affirmative. Actually, awareness of the social processes of legal creation (also of dogmatic legal creation) (i) promotes an understanding of its temporality, of its local character; (ii) dispels the idea of arbitrary individual legal lucubration; (iii) stresses the manifold social impact of law (even of doctrinal law), either on normative (as a norm, in the strict sense of the word) or symbolic (as a mental framework) levels. In a way, future lawyers become more aware of the complexity – but at the same time of the limits, weakness and delicacy – of law and of the processes of legal creation and regulation.

*How to deal with the sources:
a thick reading of historical documents*

The theoretical issues evoked above have methodological consequences. Of these, one of the most important concerns the exegesis of legal-historical sources.

When reading some of the historians who made decisive innovations in legal history in the last forty years, we note that they have something in common: a new way of reading sources. In a short phrase: they take historical sources seriously. I will explain this adaptation of Dworkin's famous topic.

When reading sources, modern historians note carefully what they tell. Even when what they tell seems odd, even when it is expressed with unusual words, or argued with strange

ways of reasoning. This is what they do. But it is also worth stressing what they do not do. They do not filter the content of the sources with our current ways of feeling, of ranging, of classifying, of conceiving, of reasoning. Nor do they use our local legal categories to give sense to the sources, nor take our axiological standards to evaluate the »correctness« or the fairness of what old legal documents state. Finally, they do not even adopt our disciplinary boundaries (between law and morals, law and religion, law and medicine) to identify what is pertinent to legal history.

Combining what they do with what they do not do, we can say that, above all, they do not trivialise the past; that they are aware of the gap existing between us and the men who are the object of our historical research. In such a way that to restore their sensitivity or their logic would be to think and to behave – as an English historian put it – »as if I was a horse«.

This taking of distance is crucial, especially in the history of law, because our sources – the texts which form the European legal tradition – have been the object of a constant work of reinterpretation. This has been the centuries-long work of lawyers who granted these texts an absolute authority (*ratio scripta*), who reread them continuously under the impact of new social, cultural and legal contexts, trying to find in the old authoritative texts the proper meaning for the moment. On the other hand, a tradition of legal historians, framed by the theoretical and methodological assumptions of the history of *dogmata* (*Dogmengeschichte*),²¹ reread this literary tradition in retrospect, trying to find fore-runners for each one of the current legal categories. This was done even at the cost of fabricating them on the basis of updating interpretations or of reducing the intellectual autonomy from the past by trivialising the oddity of the sources.

21 In a word: separation between history of concepts and social history purification [*Reinigung*] of legal history, belief in a merely rational way to the elaboration of legal categories, assumption of the progressive nature of the process of finding law.

After all these operations, the freshness of the original meaning is now often hidden behind successive layers of reinterpretation (*duplex interpretatio*) and updates. The strange became familiar, the unattended became trivial, the shocking impact became palatable. So that common reading only finds the attended things in the foreseen places. Words became so much common sense, having lost all their specific older meaning. The present looks at the past, finding there its own image, as in a mirror.

Any residual oddity – like the invocation of love, friendship or mercy in legal or political texts – is taken as a metaphor or as a merely rhetorical device: the original author must not have meant what he literally said; the historian should therefore reduce him to the proper meaning, uncovering, behind that which was actually said, that which is now supposed to have been said.

On the other hand, a thick or deep reading of the texts,²² which respects everything which is said and told, which refuses common sense, which subverts an appeasing reading of the past, will show that these texts lean on mental and affective worlds, on argumentative strategies, on discursive grammars, on disciplinary neighbourhoods, fully different from ours, even if we are referring to quite contemporary sources.

The work of rescuing original meaning is often painful. Shallow sense shall be put apart, opening up lower layers of underlying meaning. As in archaeology, excavation must proceed by levels. Findings in each layer must make sense at that very level. The way they had been later understood belonging to the archaeology of upper layers. Finally, at the end of this archaeological enterprise, there is surely place for a final history of the changes of sense across the whole superposition of slices of time.

For the moment, at each layer, the aim is to recover strangeness, not familiarity; it is to avoid pacific and trivial interpretations; it is unremittingly to ask »why« to every word, proposition, »evidence«, searching for an answer, not according to our logic, but according to a defying one, that of the very text. This must be done until the text's implicit assumptions become explicit and can be the object of description. Then, the trivial will be loaded with new, surprising, unexpected meanings. The past, in its scandalous diversity, is finally met again.

Listening to the depths of a text is also a voyage to the limits of our universe of interpretation. Can we rebuild the »soul's geometry« of historical agents, the geometry which can explain their utterances and behaviour? If so, how?

In fact, underlying human actions in the past are human options that arise from lost emotional and cognitive dispositions. Unless we adhere to the hermeneutical perspective of an enduring and common structure of the human soul, these dispositions are out of our range of perception, enshrined as they are in mental worlds that are far from being like ours.

The best we can do – in this somewhat tragic task of unveiling the roots of lost practices – is perhaps only to carefully note the external manifestations of external symptoms (behaviours or discourses, namely those which describe inner dispositions related to outer reactions), in order to depart from here to an essay of identifying embedded spiritual dispositions. However, taking into account the imbalance between their inner world and ours, the enterprise will be, besides risky and problematic, filled with theoretical ambiguities.²³

²² Cf. GEERTZ, 1963; MEDICK, 1984.

²³ Cf. 1986, 75. Also skeptical, although for different reasons LEVI, 1985.

Discourse, thick interpretation, Dogmengeschichte and the history of ideas

What is, then, the distinction between this model of legal history – mainly oriented to texts and attentive to embedded meaning²⁴ – and the disciplines that are traditional in this domain, like the history of legal dogmatics (*Dogmengeschichte*)?²⁵

The distinction consists precisely in the adoption of an attitude of taking distances (*Entfremdung*) towards the object of study. Actually, the most pertinent criticism one can make of conventional legal history regards more its dogmatism than its formalism. Formalism can still be considered as a positive factor, while it keeps the autonomy of the legal-jurisdictional level, avoiding falling into an impoverishing monocausality. However, dogmatism hinders every historical contextualization. Institutions and *dogmata* are shown as necessary (and, consequently, cogent) models, arising from the nature of things, from rational evidence or from the progress of the spirit. Therefore, (social, political or cultural) contextualization becomes useless. On the contrary, the guideline proposed above renders problematic such conceptual and doctrinal models, promoting their historical approach (*Historisierung*),²⁶ their reading within the context of a history of cultural forms and, naturally, forces to make an effort of rooting those models in practical, pragmatic contexts.²⁷

Furthermore, it can be added that the history of ideas cultivates an explanatory model based on the centrality of the subject/author. This model is fully absent from our methodological proposal, which adheres to Foucault's proposal of an »uncentering« of the subject, of a history with a subjective sense-giving centre. Subject is replaced by discourse, by discursive context, by

the very »strength« of words and texts, as schemes that model perception, evaluation and communication. Nothing can be further from the traditional conception according to which the author was the decisive entity of producing meaning ...²⁸

New objects of a post-dogmatic legal history

Dogmengeschichte had a target, which we can somewhat roughly describe as (i) legal learned doctrine, (ii) based on official state law. The exclusivity of this orientation highlighted some normative objects, while other normative sets were correspondingly concealed, excluded or obscured as source of legal regulation. Actually, law was reified in certain type of norms (according to their source, or according to their type of sanction); law was an enduring »thing«, not a moveable social »function«. In a word, norms that could not be related to learned doctrine or to the state, in their origin or in their guaranty, were excluded from »law«, and therefore from legal history.

On the contrary, some of the most important streams of political reflection are nowadays directed towards these unofficial, persuasive (not coercive), minimal, invisible, sweet, forms of discipline (Foucault, 1978, 1980, 1997; Bourdieu, 1979; Santos, 1980, 1989; Hespanha, 1983; Serrano González, 1987a, 1992; Levi, 1989; Thévenot, 1992; Cardim, 2000). A great deal of such norms do not belong to the summits of politics or of power, but instead lie at the lowest level (»au ras du sol«, Jacques Revel)²⁹ of everyday social interactions (family, networks of friends, daily routines, intimacy [including the »care of the self«, M. Foucault], linguistic usages).³⁰ Provided with specific kinds of sanction, these normative entities can be seen as the »law of the

24 Even if legal history deals with practices, as they are mostly approached as embedded with meaning and not as merely external behaviors, they are also considered as texts (the traditional designation for sense containers).

25 About a modernized conception of the »history of ideas«, DUSO, 1999; POCKOCK, 1972; KOSELLECK, 1975; KELLEY, 1991.

26 Cf. SCHOLZ, 1977.

27 There is some theoretical proximity between the above proposal and the concept of *Begriffsgeschichte*, as it appears in O. Bruner, W. Conze and, mainly, R. Koselleck (KOSELLECK, 1975) (on whom, recently, CORNI, 1998, MAZZA, 1998, and DUSO, 1999).

28 As I have already said, a somewhat surprising confluence of topics from MICHEL FOUCAULT (1969), Mikhail Bakhtin (cf.

ZYMA, 1980), PIERRE LEGENDRE, 1983, Niklas Luhmann (cf. SCHMIDT, 1988); ROGER CHARTIER (1973), DONALD FRANCIS MCKENZIE (1997, 2002) can be traced here. Cf. SERRANO GONZÁLEZ, 1987b.

29 REVEL, 1989.

30 On the concept of a history of the quotidian (»everyday life«; *Alltagsgeschichte*, LÜDTKE, 1994).

quotidian« (»everyday life law«, Sarat, 1993), generated by »molecular« (Felix Guattari), »microphysical« (Michel Foucault)³¹ powers, dispersed but pervasive in human interaction.

This image of society as a self-organized complex is not new. It was born – to restrain the reference to modernity – in the nineteenth century, within either the liberal or the organicist political conceptions. In the twentieth century, it was shared by anti-liberal and anti-democratic streams (É. Lousse, O. Brunner, J. Evola); however, the core liberal idea of a natural social order (*main invisible*; the *Ordoliberalen* admitting that, in the case that the proper nature fails, natural order could be fostered by state law ...) also conveyed a certain mistrust towards the classical concept of law. Although with different sources and inspirations, the most recent political theory returns to this pluralist imagery of order; it therefore tends to redefine law accordingly as an inorganic bundle of subtle, quotidian and multiform mechanisms of discipline.

The critical theory of the Frankfurt School supported the move, stressing the political and control-oriented component of every human activity, even those that were apparently merely cultural or symbolic. Converging here were Foucault's suggestions about the molecular nature of power and its pervasiveness in society (»pan-politics«, »micro-physics of power«) (Foucault, 1978). From legal anthropology a further stimulus came with the idea of pluralism, of coexistence of multimode and manifold legal orders within the same social space.³² Finally, post-modernism brought a new sensibility towards implicit, informal and quotidian ways of organizing and controlling,³³ while criticizing the gigantic (although illusory) form of the »State« as the huge creation of modernity (Bauman, 2001: *maxime*, 26 ss.; 2002).³⁴

This is why we can say that the contemporary history of law has roots both in the most sophisticated theoretical reflections and in the most pervasive topics of modern pop culture.

The result has been a clear trend to widen the field of research of legal historians beyond the range of official law, integrating every social norm, regardless of its ordinary label. From religious norms to customs, from management rules to the most fleeting and ephemeral forms of ordering. Although this methodological wave is arriving at the history of contemporary law – where the idea of normative pluralism is defying more and more the reduction of law to Code and Constitution³⁵ – the most meaningful mass of this new kind of legal-historical studies is still concentrated on the society and politics of the European Ancien Régime: the law of peasant communities (*iura rusticorum*; or colonial subaltern law³⁶), the law and love (or friendship),³⁷ ordering through discourse,³⁸ and domestic order (Frigo, 1985).³⁹

*A note on legal history, legal education,
methodological relativism
and moral leniency*

»To think sociologically can render us more sensitive and tolerant of diversity ... thus to think sociologically means to understand a little more fully the people around us in terms of their hopes and desires and their worries and concerns.«

(Zygmunt Bauman and Tim May, *Thinking Sociologically*, 2nd ed., Blackwell 2001, 11)

Our opening reflections in this essay were focused on the history of law and legal education. Therefore, it is not useless to evoke a rather obvious objection. Is it wise to instill in young lawyers-to-be the seeds of gnoseological or axio-

31 FOUCAULT, 1978.

32 HOOKER, 1975; GEERTZ, 1963, 1983; CHIBA, 1986.

33 TOFFLER, 1990; HESAPANHA, 1992; SANTOS, 1995; SARAT, 1993; BAUMAN, 1993; LATOUR, 2002.

34 The »ethnographic« essay of Bruno Latour on this quintessence of the state, which is the French Conseil d'État, is one of the most devastating criticisms of the state mythology.

35 Cf. CAPPELLINI, 2002; PRODI, 2000; GROSSI, 2003. Cf. also HUNT 1994.

36 BAXI, 1992; CLAVERO, 1993, 2000.

37 CLANCHY, 1993; HESAPANHA, 1983, 1993; SERRANO GONZÁLEZ, 1992; CLAVERO, 1993; CARDIM, 2000.

38 AVELLINI, 1990; PETIT, 1992, 2000; GROSSI, 1992.

39 On this trend, cf. DE BENEDICTIS, 1990; SCHAUB, 1995.

logical nihilism, underlying the above methodological proposals?

Actually, there seems to be a great deal of relativism in what was assumed above on law and legal values: values were presented as not everlasting; justice as a local or contextual feeling; historical progress as a retrospective construct; knowledge about the past as more poetic than descriptive; and history as a perennial rebuilding of historiography.

In the middle of such disarray, little space seems left for ideas like »legal rationalization of conflicts«, »expelling force by imposing law«, or »ordering contradictory debate through legal method and controlled legal reasoning«. Summing up: what we were rejecting is what is commonly considered the very core and aim of legal education.

The first remark to be made is that what we are talking about is »gnoseological relativism«. In other words, we are discussing the seeming impossibility of founding legal values on »nature«, »reason« or »science«. However, it is not to be excluded that these values can be anchored elsewhere: in beliefs (namely, religious beliefs; but also political or ideological conceptions), in common sense, in what life presents locally as »taken for granted«, and in pragmatic and provisional conventions. Without having to possess any more pretensions than those of a »local« passable agreement.

The second remark stresses that this methodological relativism, besides being rather ancient in European cultural tradition, is also shared nowadays by the hard sciences, which replaced the old conception of truth as *adequatio intellectus rei* by soft conceptions like »internal coherence«, »paradigmatic truth«, »universe of beliefs«, and »explanatory efficiency (or elegance)«. ⁴⁰

Notwithstanding this weakening of rational certainties, ethical judgments, scientific commitments or political engagements did not (and do not) cease to exist, even to those who share relativistic points of view on the issue of values. In fact, methodological relativism neither prevents personal adhesion to values nor softens the strength of this commitment. Furthermore – now from a purely methodological point of view – relativism is fully compatible with the observance of methodological rules of art conventionally or commonly accepted. Finally, it doesn't oppose the pragmatic and provisional acceptance of consensual values.

In fact, certainties by which we are moved – for which we suffer or even are ready to die – don't need to be verifiable by scientific methods. Some of the most cogent and quotidian – like faith, affections, tastes, or simply the rules of a game – do not rely on objective or commonly shared evidence. Nevertheless, they bind our soul or the patterns of our behavior with such strength that we can sacrifice a lot of ourselves for them. These inner reasons that are not subjected to reason explain the fact – already stressed by Zygmunt Bauman (Bauman, 1993) – that, though we live in an era of uncertainty, we do not have decisive doubts even if decisive personal challenges are at stake.

Summing up,gnoseological relativism has nothing to do with ethical nihilism. Far from being a factor of axiological dissolution and permissiveness, this methodological attitude is strongly loaded from an ethical standpoint. On the contrary, existential postures based on cogent, necessary values are ethically as poor as those we assume by physical constraints, because every personal choice (and the related commitment) is excluded. In fact, to choose implies a personal risk and commitment. Values assumed

40 Cf., with some dissenting points of view, the testimony of a wise scientist: DEUS, 2003.

on the basis of a personal experience stand for an »option«, a »challenge«, a »risk«, for which we do not have any objective warranty. Henceforth, responsibility for them falls brutally on ourselves, without any possibility of excuse or alibi (like the lessons of Science, Truth, Natural Law ...). Therefore, relativism is a challenge to our readiness to take responsibilities and to fully answer to the risky consequences of our axiological assumptions. It is also an invitation to carefulness and reflection about our choices.⁴¹

On the other hand, relativism is also a stronghold of tolerance. Options on values are matters of personal conviction. They can neither be imposed nor taken for more than they really are. Namely, optional values cannot be presented as universal or natural, a (less) subtle way of qualifying axiological otherness as mistaken, abnormal or irrational. It is precisely this exclusion of an objective certainty that saves space for the affirmation of subjective convictions and which forces tolerance towards difference.

If we consider European legal history, the periods during which a strong belief in a unidimensional reason prevailed were epochs of violence (explicit or hidden, state-based or socially diffuse) over the plurality of each one's reasons, of oppression of law over rights (cf. Clavero, 1991). This effect can be easily understood: if one considers that it is possible to demonstrate the existence of natural human values, then every dissident person or group becomes a lesser or non-human entity. In a world where globalization still stresses the diversity of human values, all the warnings against the possibility of a *totalitarian humanism* (in our case, of a totalitarian conception of human rights and human legal values) are anything but superfluous.

Finally, if relativism is the proper ground for tolerance, it is also the condition for a real and

unbiased dialogue, as a means of acquisition of common postures, which will allow conviviality of individual or group differences. This acquisition of communal values can only arise from comparison, transaction or compromise between particular visions of the world. In order to reach a provisional, open-ended, pragmatic consensus on axiological issues, certainties must be temporarily halted.

However, with things as they are, what space is left for law as a standard for human conviviality?

Conviviality asks for a minimum of common rules that must be consensual. Let us delineate the concept. First of all, consensual doesn't mean unique, that is to say, values which, suppressing social variety, oppress individual freedom of feeling or thinking. By consensual values, we are referring to values which were/are the object of a political negotiation by individuals or groups that compose a society. Political negotiation means a fair process of debating, where opportunities of expressing diverse standpoints are balanced.

These conditions of dialogue are neither spontaneous nor easy to assure; normally, they require a positive effort to improve life opportunities and to maximize human freedom (Bauman, 2001, 140).

On the other hand, consensual values do not mean plebiscitary values, i. e., values obtained by some impoverished technique for sounding out public opinion. As Zygmunt Bauman stressed, »public opinion« mirrors a state of hyper-individualized, atomized, uprooted, disarrayed, shallow, human conscientiousness, provoked by the superficiality of today's forms of societal communication,⁴² where a fast cosmopolitanism flattens and trivializes differences and makes values a superabundant and interchangeable axiologi-

41 Like an invitation to an »indolent [legal] reasoning«, to use a felicitous formulation of Boaventura Sousa Santos, in his recent *Crítica da razão indolente* (SANTOS, 2000).

42 Remarkable analysis of the process and results of the dissolution of community and communitarian values in our hyper-individualized society, BAUMAN, 2000, 2002; from a different starting point,

with somewhat convergent results, ETZIONE, 1995.

cal commodity. Any attempt to reach a deeper consensus cannot be based upon superficiality and indifference, but in a profound hermeneutics of the other and in a serious consideration of his postures.

This process of finding a richer version of common values is described as follows by Bauman: »[It] implies the solidarity of explorers: while we all, singly or collectively, are embarked on the search for the best form of humanity, since we would all wish eventually to avail ourselves of it, each of us explores a different avenue and brings from the expedition somewhat different findings. None of the findings can a priori be declared worthless, and no earnest effort to find the best shape for common humanity can be discarded in advance as misguided and undeserving of sympathetic attention. On the contrary: the variety of findings increases the chance that fewer of the many human possibilities will be overlooked and remain untried. Each finding may benefit all explorers, whichever road they have themselves chosen. It does not mean that all findings are of equal value; but their true value may only be established through a long dialogue, in which all voices are allowed to be heard and bona fide, well-intentioned comparisons can be conducted. In other words, recognition of cultural variety is the beginning, not the end, of the matter; it is but a starting point for a long and perhaps tortuous, but in the end beneficial, political process« (Bauman, 2001, 135/136). In my opinion, Bauman is not very far from Gustavo Zagrebelsky (Il diritto mite, 2000), when he proposes his version of what could be the constitutional basis of a complex and pluralist society: »L'insieme dei principi costituzionali [...] dovrebbe costituire una sorta di ›senso comune‹ del diritto. Il terreno d'intesa e di reciproca com-

preensione in ogni discorso giuridico, la condizione per la risoluzione dei contrasti attraverso la discussione invece che attraverso la sopraffazione. Essi dovrebbero svolgere il ruolo degli assiomi nei sistemi dominati dalla logica formale. Ma, mentre questi ultimi restano quelli che sono, fino a tanto che si resta nel medesimo sistema, nelle scienze pratiche i loro assiomi, come il senso comune nella vita sociale, sono soggetti al lavoro del tempo [...] La pluralità dei principi e dei valori cui rinviano è l'altra ragione di impossibilità di un formalismo dei principi. Essi non si strutturano, di regola, secondo una ›gerarchia dei valori‹ [...] La pluralità dei principi e l'assenza di una gerarchia formalmente determinata comporta che non vi possa essere una scienza della loro composizione ma una prudenza nel loro bilanciamento. La ›pratica concordanza‹ cui si è fatto cenno, o la ›pesa dei beni giuridici indirizzata al principio di proporzionalità‹ (*Güterabwägung ausgerichtet am Verhältnismäßigkeitsgrundsatz*) di cui parla la dottrina tedesca rientrano in questa prospettiva. Ma, per quanti sforzi le giurisprudenze costituzionali abbiano fatto per formalizzare i procedimenti logici di questo bilanciamento i risultati – dal punto di vista di una *scientia juris* – sono deludenti. Forse, l'unica regola formale di cui si può parlare è quella della ›ottimizzazione‹ possibile di tutti i principi; ma come ottenere questa risultata è questione eminentemente pratica e ›materiale‹« (Zagrebelsky, 1992, 170–171).

These quotations give accuracy to the meaning of »consensual«. The search for consensual values implies therefore: (i) the acknowledgment of difference, of the legitimate multiplicity of individual or group standpoints; (ii) the effort to fully understand otherness; and (iii) the agreement on (provisional) values and on a mobile

hierarchy between them, which allows for the sharing of a common social space with the least sacrifice of social diversity.

If point (iii) clearly relates to social ethics, points (i) and (ii) depend on gnoseological attitudes, which are typical of historical knowledge: such attitudes include the awareness of diversity of human feelings and behaviors, the mistrust of familiarity and sameness, the sense of taking distance or estrangement, and the search for a careful and respectful hermeneutics of the other.

The lesson of legal history, for a future lawyer, is this training in the cultivation of humility towards oneself, of grasping diverse ways of life, of recognizing legitimacy in the values of others, and of perceiving the complexity of human social sociability. Law has been too well equipped to deal with generality and sameness; nowadays, the most urgent task for lawyers is to learn to deal with specificity and otherness. Here, the usefulness of history is undeniable.

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