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WOZU – Rechtsgeschichte?

Abstract

In his article Dag Michalsen maintains that to define the character and purpose of ›legal history‹ is both a vague and personal task. No one can claim a privileged position on this issue. What is possible is to map some general aspects of the many types of legal histories that are at present being unfolded in the scientific community. Thus ›legal histories‹ are the result of a long list of parameters: the institutional setting and professional background of the researcher, the definition of the subject matter, the geography of law and history, and the choices of legal historical methods. But although maintaining the model of legal history as a personal choice, it is all the same part of a larger scientific communication. Although one could with good reasons question the validity of the term ›legal history‹ / ›Rechtsgeschichte‹ to denote this wide variety of activities and attitudes, it helps us nevertheless to identify modes of thought concerning law in society and history.



WOZU – Rechtsgeschichte?*

1. *An individual voice*

To reflect upon ›Wozu Rechtsgeschichte‹ today does not mean reflecting upon a coherent discipline of law, but rather reflecting upon a field of research that involves different subject matters depending on the individual voice of the researcher and the questions being posed. Perhaps we should talk about ›legal history‹ in the plural form, ›legal histories‹, as this signifies the many combinations of disciplines that such a practice involves. Thus to talk of ›a method of legal history‹ is in today's global and fragmented world of research quite out of the question. All the models, angles and methodological tools with which the many legal pasts both are and ought to be studied automatically exclude an abstract notion of a discipline and a set of common methods – rather it is a question with whom you would like to be common. Admittedly this at once private and democratically defined past-making will always be countered by several factors, such as the need for communication and the presence of institutional frameworks. But regardless we still have to recognize that the conditions of research have altered during the last decades.

2. *Whose legal histories – Lawyers v. historians?*

During the 20th century the model of the lawyer's legal history first defined by the German Historical School increasingly became historicized in different ways. One line of thought was to ask whether legal history should be part of legal science or historical science – is it the

lawyer's or the historian's discipline? But the question is not very aptly posed: neither legal science nor historical science are fixed entities (to say the least), and their relations to the legal pasts are full of varieties. To propose a dividing line between the historian's general history and the historian's legal history might address whether the historical legal material is utilized in order to analyze past legal systems, or rather past non-legal social phenomena (such as social stratification). But this distinction loses its significance quite soon as it is impossible to foresee what might constitute interesting knowledge of legal pasts, both for historians and lawyers. Now, it is obvious that professional background forms the ways of research methods. But whether this distinction is more important than other characteristics of research is debatable. Legal histories are fields of research – and to acknowledge professional strengths is not the same as defining a discipline.

However, lawyers obviously have some specific qualities for legal historical research. And it is a fact that much research is carried out within specific institutions requiring a degree in law. Then my pragmatic question would be whether one should place some demands on the research into legal history that is carried out at faculties of law. Thus we are confronted with the classical question: what is the task (or even responsibility) that legal history has in relation to legal science? – keeping in mind that this question must be understood as part of a comprehensively understood category of ›legal histories‹.

* As I define my task in responding to the invitation to answer the question *Wozu Rechtsgeschichte?* more as offering a statement than writing an article I omit references to literature, being aware however that my reflections belong to common modes of thinking among legal historians.

3. *The lawyer's legal histories:
Legal dogmatic and legal science*

Now, it might be worth distinguishing between the contributions of legal history to legal dogmatic and to the more general aspects of legal science. During the past few decades much criticism has been directed towards the assumption that legal history is part of the legal dogmatic. And indeed, it is not self-evident. The idea of an historical legal dogmatic was part of the program of the German Historical School. From the very beginning there was a debate as to whether it was possible to realize this program or not, and if so, how such a program could be implemented. Depending upon the structures of the sources of law and institutional settings, we are however in practicing legal dogmatic not at liberty just simply to choose more or less history: thus after the passing of a new codification the laments of the legal historians are often heard. Altogether the increased use of legislative texts has made this province of the lawyer's legal history more contemporary and social science-like than before.

The question of the status of the role of history in legal dogmatic is all the same multifaceted. As a member of a faculty of law, I often find myself in a paradoxical situation: my colleagues want to see more legal historical research being done, as they somehow believe that ›history‹ gives dimensions and validity to the dogmatic sentences themselves. Thus I unexpectedly find it necessary to express an uncomfortable skepticism about the limits of combining history with legal dogmatic. I have to remind the lawyers of the unhistorical character of the basic legal concepts that are often applied to whatever legal past. The historical reconstructions of the concepts of the legal world thus contradict our

notion of historical interpretation, of the present drive towards historicization of the legal pasts.

However, one must differentiate between the actual use of history in legal interpretations and the history of legal dogmatic ideas (›Dogmengeschichte‹). The first form of historical legal dogmatic is in part unavoidable as the legal questions might require historical research. Anyone who has tried to untangle the ›law of possession and property‹ in the north of Norway involving conflicts between the indigenous Sámi and the Norwegian population is well aware of this. But in what way is the historical material ›relevant‹ to solving the legal issues at hand? The answers we are offered to this question involve different levels of arguments. Ontological, epistemological and normative models of the relationship between history and law are proposed, and often the arguments glide from the one to the other: from theories of the historical dimension of law, to questions of which methods might be suitable for ascertaining the relevance of historical data in defining law, to moral questions as to what we might ›learn‹ from the legal past for the present solutions. In the language of the lawyers the reasons for using history glides almost imperceptibly between these models, at times perhaps hiding the combination of interpretation and decision that characterizes the task of the lawyer. To sum up: lawyers who seek solutions to legal questions are caught up with history in various ways. The only way of solving this question in a historical manner is to be aware of the inherent unhistorical structures that shape legal interpretation and legal systematization.

Far less problematic is the analysis of legal dogmatic ideas: to present the complex web on legal ideas in their infrastructural settings gives rise to reflections on legal dogmatic. And this

point of view also applies to the general question of the relevance of history to legal science: My normative suggestion would be to observe law and legal science in a historical manner without any other aim or actuality than to conduct research into and reflect upon the historical contingency of law and legal science. But the foundations of these reflections are, and must be, contemporary – the contemporary debates on society in general and legal thought and legal action in particular. On this basis legal historians might be able to communicate with the larger legal community as they thematicize the many possible legal pasts, critically observing the constant productions of solutions, images and legitimizations within the legal system and society.

4. *The geography of legal histories*

Legal histories must reflect the variety of geography. Choosing geography is a historical, ideological and practical decision. The great geographical organizers of law in the Eurocentric history – Rome, the nation state, Europe – have also been very productive with regard to the writings of legal histories. The combination of these geographical dimensions still dominates contemporary Western legal history. However, as legal historical research reflects contemporary debates on law and society, and as there are changes in the geography of contemporary law itself, new forms of global legal orders represent gateways to a more liberated ›post-colonial‹ view of the legal worlds outside the West.

Altogether the geography of the present legal histories is in many cases too much a product of the 19th century images of legal pasts. This is an old assertion which has sparked many legal-historiographical debates, but is still worth mentioning. Indeed, these images seem to have

been revitalized through the present legal projects currently being undertaken by the European Union and by the legal situations of new nation states in Europe. Still, after decades of practicing the art of historicization, legal history is actively being used for ideological purposes. Indeed, one could discuss whether creating an atmosphere conducive to a European codification of private law is part of the business of legal history. Whatever the political, legal and practical worth of such a project, conveying illusions of historical examples seems to be a 19th-century continuation of the ideology of Roman law, being a cultural metaphysic of legal dogmatic.

The question of the geography of legal history comes into focus when researching in a small country's legal pasts. The 19th and early 20th centuries were a period of nation- and state-building in Norway. And discussions of national ideology are still easily triggered when discussing Norway's problematic relationship to the EU. As Norway was continuously part of different unions (partly also absorbed by unions) from the late Middle Ages until 1814 (with Denmark), and until 1905 part of a looser union with Sweden, the question of nationhood and nationalized people becomes important for the political interpretations of the past. The legal histories of the 19th century were, however, not altogether nationalistic; rather, they defined Norwegian law as both Norwegian and European, and the writers did so strategically: through the connection to ›Europe‹ the legal past of Norway was to be liberated from that of the Danish' hegemony over the legal past. To that end the Germanic idea was utilized to construct a European dimension in the legal past, which imbued law with a more general cultural quality to law by defining it rather as belonging to the ›Norwegian people‹ rather than to the Norwegian state. The fierce

discussions surrounding the role of Roman law in Germanic Norway were part of this legal-ideological self-definition of the legal past. Around the year 1900 intense debates on the geography of the Norwegian legal past took place: Norway, Denmark-Norway, Scandinavia, Germanic vs. Roman legal tradition, ›general Europe‹ and subsequently the models of universal modernity: all these levels were brought into play when discussing the character of ›the‹ legal past of Norway.

I mention this Norwegian debate because the conflict between models of nation, union and universal modernity still structures the interpretation of law and the legal history and is part of the inventory of the legal historian. In today's Europe there is no good-bye to the legal history of nation states, there will presumably be a renaissance due to the enlargement of the EU. But still the integration processes (whether of a converging nature or not) demand broader European and global perspectives on the interpretations of legal pasts. Of particular interest is, perhaps, the regionalization of legal history reflecting the increased status of the regions of Europe. And thus the assumptions of a post-nationalistic legal history are being confronted with ideological attitudes one would have thought were historically out of date.

I shall give an example. In Norway during the past decade there has been a strong movement in favor of making the Sámi legal world more autonomous, also resulting in the establishment of a Sámi Parliament in 1987. Of particular interest for Sámi society has been the need to define the legal structures of the land (such as the question of ownership) used by the members of the Sámi population who maintain the traditional way of life. In the increasing conflicts surrounding land rights in particular,

and ›rights of a people‹ in general, Sámi legal history is being reconstructed as part of this legal movement involving ethnic character, the definition of a people, and questions relating to ›original settlements‹. In addition, lawyers had to take into account disputed legal interpretations of international conventions protecting the Sámi people. Thus the legal historian trying to untangle the complexities of the legal world of vast areas in the north of Norway is automatically drawn into ideological and political controversies that very much remind Norwegian lawyers and legal historians of Norway's own situation in the late 19th century and early 20th century, a period filled with ideas on nationhood and a unified people. But now this model has been recast with ›Norway‹ as the strong, denationalized partner. It is not difficult to feel sympathy for the Sámi point of view in a conflict between a pre-modern and a modern organization of natural resources.

Thus the idea of a detached legal historian loyal only to the ›reflections‹, as I advocated above, is somewhat easily shattered. Still, I am normatively skeptical to direct political involvement by means of legal history. I may be a naive researcher in my belief that geography should be only a basic structuring factor in legal historical research, not a question of loyalty. But I know very well that if I lived in less peaceful circumstances, I might have had to formulate myself otherwise, as the legal problems of the Sámi people have already forced me to do.

5. *Plurality of methods?*

I maintained above that it is impossible to operate with one common method for a unified discipline of legal history. This, of course, opens up for a discussion of methodological questions.

In their role as a link between history and legal science, legal historians ought to reflect upon the methodological discussions being conducted in both disciplines. But expecting them to take a standpoint on methodological debates that often only marginally concerns their specialized field of legal historical research would demand too much. Perhaps it seems rather a commonplace to ask for ›reflections‹ – but all in all it is difficult to ask for more. A practitioner of legal history is not obliged to have a fixed program for methods of research, acknowledging that research differs over time and is subjected to new trends in legal and historical methods. Still, being asked the question *Wozu Rechtsgeschichte?* provides an opportunity to comment on some often discussed themes.

Firstly, the radical epistemological pressures on history of the last decades have proven to be very rewarding. They have produced a number of interesting methodological programs that have radically historicized our conceptions of the past, and thus making it more difficult to uphold unreflective absolutist positions. Although I share a skeptical attitude to the possibility of knowing ›the reality of the legal past‹, and accept the existence of necessary philosophical questions, I also have to accept as a practitioner of legal history, the concept of the existence of such a past reality, or rather past realities. This, however, very soon transforms itself into a question of the relationship between the represented past and the present historical representation. There is no one-to-one relationship between a historical legal source (text) and a past legal reality. What we have to deal with is to discuss pragmatically how we ought to organize our legal-historical representations, their vocabulary, classes and relations, within the framework of the historical and legal methods for reading historical sources.

Secondly, I would like to address what I would call the virtues of nominalistic readings of past legal-historical texts. I distinguish between nominalism as an ontological position and as an epistemological strategy. Thus I take no stance towards nominalism as a philosophical position that claims the existence only of particulars, not universals. By defining nominalistic readings as an epistemological strategy I only aim at reflecting upon modes of readings of past legal texts that will contribute to a more uncertain and manifold interpretation, with a constant eye on the particular in the past. This mode of reading, especially, would focus on those forms of historical representations that tend to shape the historical past in large scales, such as narrative metastructures (›history of Roman law‹) and abstract historical concepts (such as ›the state‹, ›the influence of‹). How are we to address the reading of past legal texts with a more skeptical attitude to these schemes of traditional legal historical interpretations and reconstructions?

Now, I am certainly not an empiricist in the sense of being skeptical towards conceptualizing legal pasts. It would be a defeat for our interpretations of the legal past if it resulted in nothing else but historical representations being identical to the past legal texts. But I am equally skeptical towards the assertion that interpretations of the legal past could be subjected to stringent models through a very consistent vocabulary that was not created for serving as historical representations. To take e. g. the social philosophy of Niklas Luhmann as a model for legal historical research is not so much problematic with regard to the will to conceptualize forms in the legal pasts and the relationship between legal and social pasts. But it might be problematic with regard to the model's inherent productions of abstract concepts (such as

›evolution‹), which can be difficult to apply to readings of past legal texts. And such models would certainly have difficulties in passing ›a nominalistic control‹ as to the relation between our readings of past legal and social texts on the one hand, and historical foundations of the historical representations, on the other.

What can such a ›nominalistic reading‹ contribute to the reading of texts of a past legal science? The most direct effect would be to question the suitability of the basic concepts, for example, ›legal science‹, ›development‹ or ›national‹, that are ambiguous words to use in historical representations. The good thing about using the concept ›legal science‹ in denoting a past reality, is that we understand what we generally are talking about, and that we may compare the findings of the past with those of other countries, both past and present. It constitutes a world of ›Sameness‹ that simplifies understanding and communication. But precisely this advantage may also be the problem. If we examine what is now called ›Norwegian legal science‹ around 1850, we find that the word itself was almost non-existent. We find documents giving evidence of a few persons engaged in lecturing on law, writing legal literature (but not much), and engaging in politics and judiciary work much of the time, who lived in a modest manner in a small town in northern Europe. At the time the ›legal science‹ in Norway was of quite another kind than for instance that of Germany or England, and these two were also very different from each other. In addition, the texts of contexts of each of these ›legal sciences‹ (such as the complexities of scientific relations, the structures of legal systems, the character of politics, cultural patterns, sense of pasts and futures, quite simply the manners of men) could very well be described as very different – perhaps

not eligible for comparison, as a nominalist would say.

On the whole I advocate a plurality of methods in the sense that the common territories of law and history are structured in a heterogeneous manner and the world of research is so manifold that to refrain from acknowledging the plurality of methods is simply quite useless. But there are limits to this plurality: our reflections on how to form representations of past legal worlds are not, in my opinion, subject to free choice, as I question both the empiricist tradition that lacks a conceptualizing mode of research and the abstract totalizing model that determines the quality of the particular in the past in a too definitive a fashion.

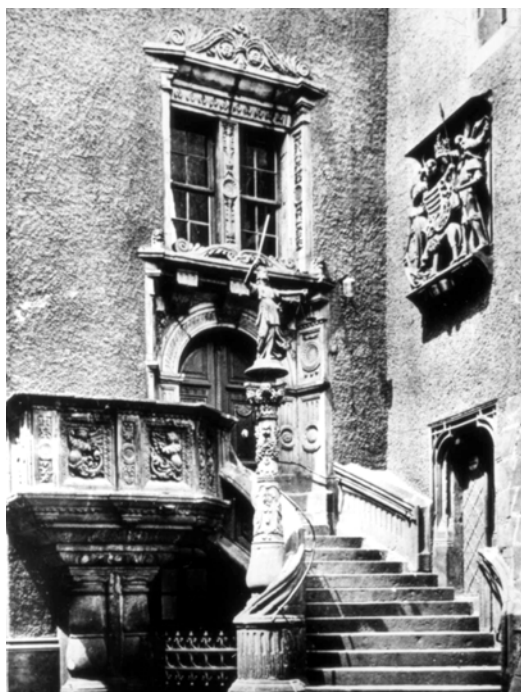
6. *Concluding remarks*

Defining the character and purpose of ›legal history‹ must necessarily be a vague and personal task. What is possible is only to map some general aspects of the many types of legal histories, many of which I am not familiar with. Thus ›legal histories‹ are the result of a long list of parameters: the institutional setting and professional background are important factors as the mode of research differs between lawyers, historians, social scientists and text-theoreticians. Of paramount importance is the definition of the subject matter – ›law‹: are the researchers examining the legal system as a social system or legal system as system of norms? And furthermore, what aspects of law are to be studied? At this point distinguishing between the role of legal history for legal dogmatic and for legal science in general has the value of specializing the historical reflection of law's history. The axis of geography can hardly be overestimated since it provides important perspectives on the legal pasts.

And lastly, the choice of legal-historical methods will always be a personal choice, albeit as part of a larger scientific communication. Although one could with good reasons question the validity of the term ›legal history‹/›Rechtsgeschichte‹ to

denote this wide variety of activities and attitudes, it helps us all the same to identify modes of thoughts concerning law in society and history.

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