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## On the Relations between Law and History

Legal History has been approached in varying ways throughout its existence as a scientific discipline. Friedrich Carl von Savigny (1779-1861) can be regarded as its father, as his *Geschichte des römischen Rechts im Mittelalter* formed a source of inspiration for many subsequent works. However, Savigny's program was not intended for legal-historical studies as such, but concerned legal science as a whole.<sup>1</sup> This led to essentially a-historic ways of approaching the past, which nevertheless continue to influence modern legal scholars. David Ibbetson remarks that while it is perfectly justifiable to study law inward-looking, within the logic of the legal system, we should avoid *theorizing* it as such, separated from anything that is happening in other places and governed entirely by its own internal logic.<sup>2</sup>

Randall Lesaffer states that »there is no separate legal history in the sense of a methodology which is fundamentally different from that of other historical subdisciplines.«<sup>3</sup> Likewise, Michael Stolleis argues that while legal history is usually conducted in law schools, its questions are those of historical science. Broadly, its subjects are the »historical context of legal systems and the cultural embedding of legal norms«. This, according to Stolleis, closely connects it to cultural history and the history of ideas. Therefore, general historical methodologies and their connected philosophies of science form a way to open up the debate regarding the nature of legal history and the proper method that should be applied in its study.<sup>4</sup>

An excellent example of such a potential source for inspiration is formed by Johan Huizinga (1872-1945), one of the greatest historians the Netherlands have brought forth. He argued that history should be understood as »the mental form through which a culture accounts for its past.«<sup>5</sup> While Huizinga's ideas have never had a large impact on legal historians as such, his method and philosophy could potentially provide them with a clearer sense of how to approach the past, and how to integrate it into their current academic frameworks. In this article, I will show how Huizinga's definition might provide us with a better understanding of legal history as a bridge between two disciplines. Through an analysis of the debates about its proper nature and function, I will attempt to provide some methodological guidelines for further research.

<sup>1</sup> R. ZIMMERMANN, Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science, in: *Law Quarterly Review* 112 (1996), pp. 576-605, here pp. 579 and 585.

<sup>2</sup> D. IBBETSON, Comparative Legal History. A Methodology, in: A. MUSSON and C. STEBBINGS (Ed.), *Making Legal History. Approaches and Methodologies*, Cambridge 2012, pp. 131-145, here p. 132.

<sup>3</sup> R. LESAFFER, Law and History. Law between Past and Present, in: B. VAN KLINK and S. TAEKEMA (Ed.), *Law and Method. Interdisciplinary Research into Law*, Tübingen 2011, pp. 133-152, here p. 146.

<sup>4</sup> M. STOLLEIS, *Rechtsgeschichte schreiben. Rekonstruktion, Erzählung, Fiktion?*, Basel 2008, p. 6.

<sup>5</sup> J. HUIZINGA, *Cultuurhistorische Verkenningen*, Haarlem 1929, p. 166. Original quote: »Geschiedenis is de geestelijke vorm, waarin een cultuur zich rekenschap geeft van haar verleden«.

## Approaches to Legal History

What is Legal History? Scholars have expressed varying ways of approaching this subject. Traditionally, it has often been connected to *comparative* legal studies. Kent Lerch even argues that the »search for artificial boundaries« that might be discerned between them should be regarded as »meaningless and unfruitful.«<sup>6</sup> Others seem to regard it as a tool to unify differing legal traditions in the present. Reinhard Zimmerman pleads for a combination of comparative and historical legal studies, which might serve to understand the relations between common and civil law. In this way, he argues, we could advance »the process of mutual understanding and harmonization.«<sup>7</sup> Thomas Duve also expressed a wish for legal historical science to contribute to the creation of a transnational legal scholarship. He envisages a combination of local, national studies with a »parallel trans-national structure« that would need to be set up. Besides this global aspiration, according to Duve legal history might also fulfill »a critical function within the judicial system.«<sup>8</sup>

In general, scholars distinguish between three main types of research that have been conducted under the name legal history. Randall Lesaffer treats them as *history in law*, *history of law* and *law in history*. Firstly, we should discuss what essentially forms an instrumental approach to legal history: *history in law*. This closely follows Savigny by tying the present closely to the past from which it has emerged, and *vice versa*. Its concern is not the faithful reconstruction and presentation of a historical situation as it really was, but as if it were a picture, that serves today's purposes. Exemplary of this sort of legal history is the study of Roman Law as an authoritative body of jurisprudence, rather than as a historical system. While this approach is a-historical, it was dominant in the 19<sup>th</sup> century and to a certain extent continues to be employed by some modern scholars.<sup>9</sup>

Secondly, there is the *history of law*, which is more historical in its approach. It strives to understand what 'law' was at a certain time and place in history, thereby sharing characteristics with the study of contemporary law. A general problem that is often present in this type of studies, however, is their evolutionary character. The legal historian is not so much interested in the past legal tradition, as its place in a gradual progression to a present situation that is often idealized. This is sometimes described as a »Whig interpretation of history.«<sup>10</sup> This teleological type of legal history is problematic, as it is essentially also an a-historic way of approaching the past. Caroni describes it as a »hope for the future-perspective«: the only source passages one will observe in the past from this

<sup>6</sup> K. LERCH, Das Verschwinden der Unterschiede. Vom Nutzen und Nachteil der vergleichenden Methode für die Rechtsgeschichte, in: *Rechtsgeschichte* 3 (2003), pp. 38-44, here p. 38.

<sup>7</sup> ZIMMERMANN, Savigny's Legacy (n. 1), p. 602.

<sup>8</sup> T. DUVE, Global Legal History. A Methodological Approach, Max-Planck Institut für Europäische Rechtsgeschichte Research Paper Series, no. 4 (2016), pp. 7 and 17: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2781104](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2781104).

<sup>9</sup> LESAFFER, *Law and History* (n. 3), pp. 134–137; ZIMMERMANN, Savigny's Legacy (n. 1), p. 579.

<sup>10</sup> LESAFFER, *Law and History* (n. 3), pp. 136–138.

perspective will be those pointing towards the envisaged future goal, rather than the ones diverging from it.<sup>11</sup>

The third variant of legal history is what we like to call *law in history*. This entails the historical study of law within its broader social, economic, cultural and political context. The historian is not primarily concerned with the origins or further evolution of law as such, but studies it as a phenomenon within the particular society and time in history where it occurred.<sup>12</sup> Thomas Duve pleads for the use of what he calls *glocalization* in (global) legal history, which is closely connected to this third variant: »whilst retaining an openness for global dimensions [...] legal history needs to methodologically prioritize the local«. Legal historians should not search for 'law' in the sense of an objectively existing order, but as the »communication of those involved as to what is considered right and not right«. Therefore, a legal historian needs »to reconstruct the social world in which the law is embedded« as a whole.<sup>13</sup>

Even though some of its products might have value on their own, to be proper legal *history* any study on the *history of law* needs to be firmly grounded in *law in history*. Only then, we can properly understand the past as consisting of unique episodes, judged on their own and within their contemporary context. Lesaffer strongly advocates the use of a proper historical approach to attain this goal. »Before we can learn anything from history that might be relevant for the present«, he states, »we first have to let history speak for itself.«<sup>14</sup>

I firmly agree to this point, if only because it advocates the study of history as a valuable goal in itself. A problem with many of the approaches mentioned above is the fact that they use history for a modern purpose, whether this is the explanation or justification of (a set of) modern laws or the unification of various national traditions. Michael Stolleis firmly distances himself from these uses of legal history for current purposes. The only proper goal of legal history, he states, is to concern itself with past legal practices and tell in which ways these might have functioned. Even if instances occur when its products are relevant for solving current issues or can be used to make meaningful predictions for the future, these are side-products of its principle labor.<sup>15</sup> When one adopts these side-effects as goals in themselves, it becomes near impossible to experience and reconstruct history as it really was; to fully understand the contemporary meaning of past law, doctrine and legal practices. Therefore, it is useful to study history from a more contextual perspective, what Johan Huizinga likes to call a »cultural« or »aesthetical« view on- and understanding of the past.

<sup>11</sup> P. CARONI, Der Schiffbruch der Geschichtlichkeit: Anmerkungen zum Neo-Pandektismus, in: Zeitschrift für Neuere Rechtsgeschichte 16 (1994), pp. 85-100, here p. 88.

<sup>12</sup> LESAFFER, Law and History (n. 3), p. 136.

<sup>13</sup> DUVE, Global Legal History (n. 8), p. 11.

<sup>14</sup> LESAFFER, Law and History (n. 3), pp. 142 and 144.

<sup>15</sup> STOLLEIS, Rechtsgeschichte schreiben (n. 4), p. 41.

## Law and History as Cultural Phenomena

Huizinga defines ‘history’ as a way of shaping the past (*een vormgeving*), always entailing the searching- and interpretation of *zin*: meaning, sense or reason.<sup>16</sup> This is necessarily connected to the present. However much we would like to approach the past from what Stolleis calls an *Unschuld des Nichtwissens*, the »bond with the present« that sometimes helps us to place documentary fragments of the past into their context at other times also distorts our view.<sup>17</sup> This stance should, however, expressly not be mistaken for philosophical skepticism.

Whilst postmodern critics are right in their claim that *the past* does not exist as such, and can only be revived through a historian’s mental reconstruction, this does not mean that the used historical sources only tell us something about the historian himself, as claimed by Derrida’s theory of intertextuality. As Caroni states, »every historian knows, that history [...] cannot be known directly, but only through the detour of the historian’s subjectivity«. However imperfect and shaped through their authors’ preconceived notions and concerns as they may be, historical sources always tell us important things about past events and societies which *can* be extracted and interpreted by an individual historian. Even though the questions that we ask to the past, our motifs, all come forth from current perspectives and debates, this is not problematic as long as we are aware of this and act accordingly by separating our present motivations from the construction of hypotheses and the analysis of source material.<sup>18</sup>

If, following Huizinga, we consider ‘doing history’ to be a way of shaping, then its product must also be a »shape« or »figure«. He sees this as a »mental form« that is used to make sense of the world, just like literature, philosophy or natural science. History distinguishes itself from those other forms by exclusively focusing on the past, *in* and *through* which it strives to understand the world. The way in which this relation to the past is conducted as a mental labor is best described as »an accounting for«. According to Huizinga, this both expresses its seriousness and the need for truth and reliability of knowledge that is inherent to the execution of history as such.<sup>19</sup>

Just like Huizinga approaches general history as a mental form, Wolfgang Ernst suggests that law should be interpreted as a *Gedankenbilde*. Law comes into existence when people attempt to live together in an orderly fashion, which creates the need to devise binding rules that are enforceable through sanctions. This makes law a *construct*, and its ethics dependent on a history of communication, shifting according to place and time. Law principally exists outside of its effects in the physical world. Ernst uses the example of a film of proceedings in a law court: this would not make an objective watcher understand what we define as the concept of ‘law’. Therefore, it is the subject of a *history of ideas*, which should make use of the historical method of interpretation,

<sup>16</sup> HUIZINGA, *Cultuurhistorische Verkenningen* (n. 5), pp. 161-162.

<sup>17</sup> STOLLEIS, *Rechtsgeschichte schreiben* (n. 4), p. 27.

<sup>18</sup> CARONI, *Schiffbruch* (n. 11), p. 87; LESAFFER, *Law and History* (n. 3), pp. 145–146; STOLLEIS, *Rechtsgeschichte Schreiben* (n. 4), pp. 18 and 27-28.

<sup>19</sup> HUIZINGA, *Cultuurhistorische Verkenningen* (n. 5), pp. 162-163.

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*verstehen*.<sup>20</sup> This method should, in the words of Stolleis, be understood as »a dialogical progression between stored knowledge and new information«. In this process, the »complementary imagination« of the historian plays an important heuristic function.<sup>21</sup>

Based upon this »productive role« of the historian's mind, some have argued that there is no distinction between (scientific) history and (historical) fiction as such. Both forms of history would use »the material of memory to construct an imaginary textual portrayal« of the past. Stolleis solves this problem by pointing at methodology. What separates the historian from a poet is the fact that his reconstructions can be checked and traced back to their sources. The fact that a work of history *can* be falsified, based upon newly found sources or interpretations, unlike a piece of fiction, separates the two.<sup>22</sup> Approaching (legal) history as an »accounting for« actually removes what Huizinga sees as a false distinction between story-telling, teaching and more scientific variants of 'doing history'. Everyone accounts for the past according to their own standards, and those of the society and worldview to which they belong. In our present society, this must necessarily entail the use of critical-scientific methods, but this should not completely invalidate the work of previous generations.<sup>23</sup>

This connects to what Huizinga perceives to be the proper subject of any history: *culture*. He defines this as »the gathering of insights and forms, which show us as mental unities certain groups of people in space and time«. What is more, the past itself is limited by the nature of this subject, when that strives to understand it. This is not meant to limit the past in an absolute sense, but to say that *past* can only be *history* for the members of a culture if it is relatable and understandable to them.<sup>24</sup>

David Ibbetson approaches historical law in a similar fashion, stating that »since legal change takes place at some particular time, within the law as it stands at that moment, it follows that the time at which change occurs is a factor in determining what that change is«. To this we might add the importance of the location or legal culture wherein the change occurs. Ibbetson argues that existing elements in a legal system limit the range of possible solutions to problems that might arise. Varying institutional underpinnings, such as the role of university doctors versus legal practitioners as source of authority in Medieval continental Europe and Britain, influence the ways in which these legal systems respond to pressure for change.<sup>25</sup> This points at the use of Huizinga's thinking for legal historians, who would also benefit from a decent contextual analysis as part of their studies.

<sup>20</sup> W. ERNST, Zur Epistemologie rechtsgeschichtlicher Forschung, in: Rechtsgeschichte 23 (2015), pp. 256-259, here p. 256.

<sup>21</sup> M. STOLLEIS, Methode der Rechtsgeschichte, in: A. CORDES (Ed.), Handwörterbuch zur Deutschen Rechtsgeschichte (HRG) Bd. 3: Konfliktbewältigung - Nowgorod, Berlin 2016, pp. 1475-1483, here p. 1480.

<sup>22</sup> STOLLEIS, Rechtsgeschichte schreiben (n. 4), pp. 33-39.

<sup>23</sup> HUIZINGA, Cultuurhistorische Verkenningen (n. 5), p. 163.

<sup>24</sup> HUIZINGA, Cultuurhistorische Verkenningen (n. 5), pp. 164-165.

<sup>25</sup> D. IBBETSON, The Challenges of Comparative Legal History, in: Comparative Legal History 1-1 (2013), pp. 1-11, here pp. 8-9.

## The Historical Method

If legal history should be studied according to the proper historical method, how should this then be defined, and be applied to legal studies? In his *Reflections on 'doing' legal history*, Sir John Baker actually confesses to his »lack of deliberate method«. <sup>26</sup> However, he too employs the historical tools of source criticism. In this final section, I will briefly outline some basic elements of what would constitute a solid method for a legal historian, trying to identify some dangers and how to deal with them along the way. 17

When we approach the past, we often carry prior assumptions with us. This is not necessarily a bad thing, as long as we are aware of it. In his discussion of the relations between historical and comparative legal scholarship, Kent Lerch points to the fact that the latter often seems to employ a *praesumptio similitudinis* without the necessary reflection. Legal historians would do well to operate from a *praesumptio dissimilitudinis* instead, he argues, as this removes the risk of imposing patterns and grand theories on the past that were not there in reality. <sup>27</sup> As Lesaffer states: »history is not a social science. [...] Whereas social sciences deal in clarity, the business of history is complexity«. He warns against approaching the past in a reductionist fashion, as this would similarly impose modern constructs upon it that exist in our fantasy rather than in the sources. <sup>28</sup> 18

This leads to the danger of an evolutionary 'history of law' as it has been discussed before, making history the servant of modern concerns by solely approaching it as the runner up to our current system. Lesaffer suggests that »the clock [should] always run forward«. Every historical phase should be understood in its own context, and lines of development should run from past to present rather than the other way around. This reduces the risk of legal history »deforming into some kind of genealogy of modern practices«. <sup>29</sup> Both Ernst and Stolleis argue that to understand a single source, a multitude of other sources need to be employed in order to place it within its timeframe. Only this will allow to practice the method of *verstehen* in a correct fashion. <sup>30</sup> 19

Some might despair at the amount of work this implies. Is it not impossible to read *all* contextual sources as well as the main material within the limited scope of one's research? Contrary to Lesaffer, who advocates the study of primary sources »before properly engaging with secondary literature«, I believe that these two elements are of equal importance and should be engaged with simultaneously. This helps to overcome what Stolleis describes as one of the most important challenges for any historian: the separation of relevant material from the principally unlimited mass of potential other sources. <sup>31</sup> The work of other specialists might also help to understand the political and economic context of a period, while biographies bring alive historical actors who would otherwise remain 20

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<sup>26</sup> J. BAKER, *Reflections on 'doing' Legal History*, in: A. MUSSON and C. STEBBINGS (Ed.) *Making Legal History. Approaches and Methodologies*, Cambridge 2012, pp. 7-17, here p. 16.

<sup>27</sup> LERCH, *Das Verschwinden der Unterschiede* (n. 6), p. 44.

<sup>28</sup> LESAFFER, *Law and History* (n. 3), p. 147.

<sup>29</sup> LESAFFER, *Law and History* (n. 3), p. 148.

<sup>30</sup> ERNST, *Zur Epistemologie* (n. 20), p. 257.; STOLLEIS, *Rechtsgeschichte schreiben* (n. 4), p. 45.

<sup>31</sup> LESAFFER, *Law and History* (n. 3), p. 147; STOLLEIS, *Rechtsgeschichte schreiben* (n. 4), p. 25.

dead names. Together with an extensive reading of primary material, this will allow to form the mental image of a period propagated by Huizinga as the correct base for historical inquiries.

Sir John Baker's »lack of deliberate method« actually resulted in a good description of this historical process at work. He also pleads for a detailed reading of primary sources as the first stage, which he calls »sorting the fragments«. When material has been gathered, the »creative process« starts. Before engaging with the sources, a historian has in mind various questions raised by the secondary literature, and now those are supplemented by new questions formed through a reading and ordering of the source fragments. In a final stage, one might then be able to »formulate some answers«. As Baker acknowledges, these are never final, »but we help to take the general understanding forward«. In its essence, therefore, historical work should be seen as a constant revision of prior ideas.<sup>32</sup>

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Oestmann points at a tension in the field of legal history between those working on the history of legal dogmas and those focusing on praxis, instead. He thinks that it is unreasonable to expect a scholar of the one to be equally at home in the sources of the other.<sup>33</sup> This would, however, harm the idea of a proper contextual analysis of law as part of a legal culture. While Ernst warns against the idea that past legal practice would be more alive (*lebenswirklicher*) than the theory of that time, we should also not solely focus on past norms as they have come down to us, disregarding their functioning in society. As Ernst himself states, a 'Norm' based upon normative texts should not be studied as such, but only as the product of the mental culture described as 'law' in a certain period and place.<sup>34</sup>

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Studying law and history, *legal history*, as a cultural phenomenon, challenges us as scholars to step over the boundaries of our own narrow disciplines and specializations. A broader, contextual analysis of a legal phenomenon as part of its wider legal and historical culture promises to provide us with intriguing new views on our history. While a historical analysis necessarily contains a subjective element, this should not make one afraid to engage with it. As Huizinga already stated: »if modern historical science is sufficiently aware of its own biases, she need not be afraid to accept the relative worth of her own products«.<sup>35</sup>

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<sup>32</sup> BAKER, Reflections (n. 26), pp. 16–17.

<sup>33</sup> P. OESTMANN, Normengeschichte, Wissenschaftsgeschichte und Praxisgeschichte. Drei Blickwinkel auf das Recht der Vergangenheit, in: Max-Planck Institut für Europäische Rechtsgeschichte Research Paper Series, no. 6 (2014), p. 8: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2526811](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526811).

<sup>34</sup> ERNST, Zur Epistemologie (n. 20), pp. 257–259.

<sup>35</sup> HUIZINGA, Cultuurhistorische Verkenningen (n. 5) p. 167.