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Is legal history just writing a text?

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Summary

The question, what constitutes the methodology of the legal history research, is answered in different ways. One is that it is the same as for general history: writing on history according to a set of rules which constitute its methodology, because in the end all research on history is just creating a text. It follows from this that legal history is a variation of history and belongs to history faculties, since there is no connection with legal methodology. It is maintained in this article that this view is based on too simple a view of history as science: there is not one methodology but various methodologies ('discourses', not only in history but in science in general), each with its own conditions and requirements. Legal history's discourse has a particular distinguishing element, viz. legal analysis and methodology, which sets it apart from history in general. Its natural place is consequently in law faculties.

Keywords

legal history – methodology – Rechtsgeschichte

'Here as there, the question arises: what does "writing history in the postmodern era" mean? Can one simply carry on as before, piling one source interpretation on top of the next in order to get closer to the goal of a (whatever kind of) historical truth? Or does one see oneself as a narrator whose text only states that it "may have been so" – that a supra-individual claim to truth is thus already abandoned at the outset? Historians and legal historians have to make

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a decision in this respect'[1]. This paragraph renders best the methodological discussion on legal history as a scholarly discipline which the eminent legal historian Michael Stolleis wanted to broach and with which he dealt in several publications. Recently a journal brought these publications under renewed attention with the aim of opening a new discussion, with these as point of departure, and so a closer consideration of his views is warranted[2]. Stolleis set his views on history and legal history most lucidly out in 1997 in his 'Legal history as a work of art' (Rechtsgeschichte als Kunstprodukt)[3]. After distinguishing between the various national developments he turns to Germany. In this country legal history came after the Nazi-period under the influence of the 'history of ideas' (Ideengeschichte). The Germanists underlined the values of freedom, justice and social responsibility. With the Romanists two lines appeared. One was Neohumanism (Neohumanismus), which, detached from effective law, concentrated on textual analysis in close contact with other ancient history disciplines. The other line, Neopandectism (Neopandektismus), maintained that the study of Roman law was only possible in a lively interaction with the actual law. According to this line Roman law with its long tradition, dogmatic refinements and common sense (*ratio scripta*) offered also the real basis for the actual law. From the history of its dogma's, behind which one could surmise the same ideas (be it historically differently framed and phrased), one could learn the actual law; as phrased by Koschaker. Similarly the Germanist line based on 'eternal values' (ewige Werte), immanent rationality etc.[4]. Methodologically there was little reflection here. In the second half of the twentieth century two projects were started: the 'Historisches Wörterbuch der Philosophie' (Historical Dictionary of Philosophy) and the 'Geschichtliche Grundbegriffe' (Historical basic concepts). The first focused on philosophical concepts (Begriffe); the second on historical concepts (Begriffe). These they hoped to

1 M. Stolleis, *Rechtsgeschichte schreiben – Rekonstruktion, Erzählung, Fiktion?*, Basel 2008 (hereafter RS), p. 7: 'Hier wie dort stellt sich die Frage, was bedeutet «Geschichte schreiben in der Postmoderne»? Kann man einfach weitermachen wie bisher, eine Quelleninterpretation auf die nächste häufen, um dem Ziel einer (wie immer gearteten) historischen Wahrheit näherzukommen? Oder versteht man sich als Erzähler, dessen Text nur besagt, daß es «möglicherweise so gewesen» ist – daß also ein überindividueller Wahrheitsanspruch schon im Ansatz aufgegeben ist? Historiker und Rechtshistoriker müssen sich insoweit entscheiden'.

2 With the above citation the journal Clio@Themis nr. 26 invites authors to take a stand to Stolleis' views. It seems sensible to deal with this question also in a legal-historical review.

3 M. Stolleis, *Rechtsgeschichte als Kunstprodukt, Zur Entbehrlichkeit von 'Begriff' und 'Tatsache'*, [Würzburger Vorträge zur Rechtsphilosophie, Rechtstheorie und Rechtssoziologie, 22], Baden-Baden 1997 (hereafter RK).

4 RK, p. 9. Stolleis refers for this opinion to Koschaker.

extract from the meanings of words. Hence the editors distinguished between words, which should be univocal, and concepts, which should be polysemic[5]. Stolleis cannot agree with this distinction, then words are often not univocal, and concepts are words. He suspects that the background of this is the in the eighteenth century introduced philosophical jargon of concept (Begriff) and fact (Tatsache)[6]. Concept was the precise scientific description of a phenomenon (fact, Tatsache), while 'word' was the daily imprecise counterpart of concept (Begriff). But such a distinction is untenable, words are always changeable and changing[7]. A second objection Stolleis raises is the distinction between words and facts. That again is untenable: the world as we experience it is constituted by language ('sprachlich konstituiert'), is settled in language, and so is history. As soon as we construe an (historical) fact, it exists only in language, as a compendium of information and interpretation[8]. As a result the distinction between historiography and poetry disappears too, while both use memory ('Erinnerung') as their source. What remains as difference is 'controllability on the basis of sources as well as the scientific-ethical requirement of scientific reasonability' ('Kontrollierbarkeit anhand von Quellen sowie [auf] das wissenschaftethische Gebot von wissenschaftlicher Redlichkeit' – I shall call the latter part 'scientific discourse')[9]. So what remains the task of the (legal) historian? According to Stolleis it lies in the analysis of texts, of how words became used in a particular period and how they could influence thought and by that the perception of the world ('reality', 'die Realität). History is consequently analysis of certain keywords, of texts, and cannot lead to an independent reality behind these words. What historians and legal historians do is nothing else than translating texts[10]. To do differently is wrong, like those legal historians who maintained that there were concepts, of, e.g., the essence of property, of possession, of claims etc.. These, being independent of reality, would be useful for present day law; as Pandectism already propagated. Yet that idea of immanent concepts is precisely the error we better avoid[11].

This essay is certainly compellingly written. At second glance, however, certain aspects strike the eye. Stolleis does not define history ('Geschichte') nor reality ('Wirklichkeit') when he writes: 'When history as the social construc-

5 RK, p. 11.
6 RK, p. 11.
7 RK, p. 12.
8 RK, p. 12-14.
9 RK, p. 14-16.
10 RK, p. 26.
11 RK, p. 27-28.

tion of past reality …' ('Wenn Geschichte als gesellschaftliche Konstruktion vergangener Wirklichkeit …')[12], he merely posits a possible definition. He had defined history in 1988 as history of science ('Wissenschaftsgeschichte')[13]. For constitutional history that might suffice but private lawyers would like to see the actual impact as well. He discusses it in the context of his own research, constitutional history, but it is restricted to the meaning of words. There is no consideration at all what law is or might be, nor of the world in which it functions. History is just a science of interpreting texts. Certain central terms like 'Geschichte', 'Wirklichkeit' are used without further precision. Regarding the study of Roman law after the Second World War, his representation is not quite correct[14]. Indeed, Koschaker thought Roman law could provide the fundament for European law. But that was in 1947[15]! And true, there are a few authors who continue in the way of the Pandectists (or, better, 'Pandektenwissenschaftler') of the nineteenth century. Other legal historians rejected this approach already for a long time and deny the existence of eternal concepts. They discuss texts in their historical context, pointing out that in different times the same word may have a different meaning. As such, a historical presentation cannot be identical with an actual meaning. Or they underline the value of legal history for the law study to demonstrate the historical development and the dynamic character of law[16]. What they do is nothing else than the 'Neohumanismus' and the 'Wissenschaftsgeschichte', both valued by Stolleis[17]. The value of such an approach

12 RK, p. 15.

13 In the introduction to his *Geschichte des öffentlichen Rechts in Deutschland*, Bd. 2, München 1988, p. 43-46, Stolleis says basically already the same as later in his two mentioned essays.

14 It was Dieter Simon who, as director of the Max-Planck-Institut für europäische Rechtsgeschichte, wanted in 1988 to move away from the (private law) 'Dogmengeschichte' and turn to reconstruct the social conditions of dogmatics: J. Thiessen, *Das Max-Planck-Institut für europäische Rechtsgeschichte*, in: Th. Duve, J. Kunstreich, S. Vogenauer (Hg.), Rechtswissenschaft in der Max-Planck-Gesellschaft, 1948–2002, [Studien zur Geschichte der Max-Planck-Gesellschaft, 002], Göttingen 2023, p. 174. Was Stolleis, who became director in 1991, influenced by this? His own research program, which was public law oriented, had no connection with Dogmengeschichte.

15 See now *Methodenfragen der Romanistik im Wandel, Paul Koschakers Vermächtnis 80 Jahre nach seiner Krisenschrift*, hgg. von Tommaso Beggio und Aleksander Grebienow, Tübingen 2020, for an appraisal of Koschaker's critique and present-day methodological challenges for Roman law.

16 Mixing Roman and actual law, see J. Hallebeek, *Teaching Roman law in the 21st century: A note on legal-historical education in the Netherlands*, ZSS-RA, 137 (2020), p. 194-227, here p. 204-207 on the Dutch textbook *Prota* by J. Lokin.

17 Like Simon, Stolleis considered the *Institut* more as a humanistic than as a juridical institution (Thiessen, *Das Max-Planck-Institut* [*supra*, n. 14], p. 183).

is not that it may explain or even contain actual law, but that it improves the understanding of law by comparing. That is like comparative law, but historically. Stolleis does not condemn comparative law. Nonetheless, Stolleis stuck to his rejection of the classic dogmatic approach and preferred international, interdisciplinary and theoretical research[18]. In practice this meant a farewell to the actual application of law in the past. Law was studied as a 'freischwebende' discipline, to use an expression of Mannheimer.

But law texts, in any case on private, criminal and administrative law, pretend more than being just a linguistic description of the world. They are meant to be normative, viz. to give rules how to behave and, as Hart has so aptly defined, give secondary rules in order to apply these rules. If we read legal texts like the civil codes, we may and should read them as expression of the time they were written in, and by placing them in a moment before the moment in which we do this, we make them historical in the sense that they are of the past (this is different from history as 'Geschichte'). But jurists do not read the civil or criminal code merely to analyse texts in this way. The purpose of a law code is to apply and jurists read to apply; or, at least that is the purpose of the law study. That implies that even if they analyse the text in an historical sense, they analyse it also as application. Yet their training makes that they apply it also at the same time for the present and figure out the differences. This hermeneutical aspect of the law study Stolleis does not mention or expound, apparently as a result of his rejection of a dogmatic approach.

In the other essay, 'Rechtsgeschichte schreiben', Stolleis returns to his first essay, expands on some parts and works out some details. Again he underlines his view that history is nothing but interpreting texts in their social and historical context ('soziale und historische Welt'), and that these texts ('Worte') may not be considered as facts ('Tatsachen'). Language depends on the reality and reality is shaped by language in so far as language designates reality. In the study of legal history we see a shift from dogmatical research to 'law in action'. Nevertheless, Stolleis sees also a trend where actual law should set the stints of legal history, like 'the essence of property' etc., which then should be disentangled from earlier periods (the 'Begriffsrealismus' of the nineteenth century)[19]. He considers the 'gegenwärtige Rechtserfahrung', the experience of the actual law, as a danger for the legal historian who has been trained as a lawyer. The more one enters into the contents of earlier law, the more one goes back in time, the more difficult it becomes to understand the texts and make

18 As when it came to searching for his successor in 2005, see Thiessen, *Das Max-Planck-Institut* (*supra*, note 14), p. 190.

19 RS, p. 19-23.

an adequate 'translation'. And here the jurist-legal historian will involuntarily apply his own legal experience to interpret the texts, particularly the more the ancient world differs from his own, and he may be set by that on a false course. Further, these actual experiences precisely direct the interest we have in doing this and no other research[20]. But it is elementary in historical research that motives must be separated from the research hypothesis and analysis of sources[21]. In a reply to Kroeschell, who said that we do not only have texts but also tangible remains of previous times like the throne of Charlemagne, Stolleis says that these too are described in language, their provenance must be argued before and accepted by the professionals[22]. (I return to this point, because here Stolleis makes a fallacious simplification: the argument by which it is established that it is Charlemagne's throne, is different from the legal historical argument and is therefore independent evidence.) After returning to the theme of the historian as author, Stolleis once more underlines that, although we cannot escape the fact that we act from the present, we must avoid false actualisations and misunderstanding the alien in as far as we too quickly identify it with what is familiar to us. The result must be translated[23]. He does not deny that there is a development or evolution visible in as far as the fundamental constellations of life are somehow similarly organised in a legal way. It is tempting to deduct from these universal concepts permanent legal figures, yet the way one names it remains a simple label, nothing more[24]. Stolleis ends with formulating research goals of legal history, which he does within the framework of his previously set out methodology of legal history[25].

Stolleis' two essays, and particularly the second, are, as said, compelling reading, written by a great scholar. What he writes about the central function of language to communicate the world and the past is very worthy of consideration. It is his view on methodology which is not convincing. He departs in his methodology from general history, not from legal history, and applies this as the sole methodology. Although he does not deny that historical research is founded in the present, his aim is an historical research as much detached from the present as possible. This is certainly not the Rankian goal of history

20 RS, p. 25-27.
21 RS, p. 28.
22 RS, p. 30.
23 RS, p. 41.
24 RS, p. 41-43.
25 In the introduction to his *Geschichte des öffentlichen Rechts in Deutschland*, Bd. 2, München 1988, p. 43-46, Stolleis says basically already the same as later in his two mentioned essays.

'wie es gewesen war' (how it has been), yet Stolleis reduces the hermeneutical process to a one-way process and in that sense he still represents a historicist's position. That is, the historian is a subject who studies the past as an object, in the Kantian way. The idea that by engaging with the object of his research the researcher may find his own experience of the actual law ('gegenwärtige Rechtserfahrung', so Stolleis) changing, that 'Verstehen' is a two-way process in which precisely the distance in time makes a fusion of the position of the interpreter and what is interpreted (the 'Horizontverschmelzung') possible and by that the producing of new meanings, he does not mention[26]. Still, Gadamer's seminal work *Wahrheit und Methode* on the methodology of the 'Geisteswissenschaften' (humanities) cannot have been unknown to him[27]. It would have been interesting to know what he would have said to that.

In a way Stolleis' focus on history as general discipline and on texts as sole and mere sources, be it that the text of another researcher will also be object of research, obscures also another important aspect of analysis and interpretation. Kroeschell's reference to Charlemagne's throne was indeed rather simplistic, but equally simplistic is it to reduce the acceptance of the historical throne of the emperor as a text, accepted in the scholarly discourse. The problem is that Stolleis speaks of what an historian must do, but does not elaborate this. For him 'Geschichtsschreibung' is the 'gesellschaftliche Konstruktion vergangener Wirklichkeit' which is 'nur durch Sprache verständlich': writing history is the social construction of past reality, which is understandable only through language. The historian is merely a species of the genus poet/author, be it a learned person and bound by special methodological rules[28].

But which methodological rules? Are the rules for writing on the history of Charlemagne the same as for examining his throne? Can the premise, both are rendered in a text, mean that in both cases the same methodology applies? Is überhaupt the assumption, everything is a linguistic rendering of reality, maintainable? What about copying an act? What about symbols, which

26 It has its correspondence in physics where depending on the observing person or instrument the object may change in property, like light may be material or a wave.

27 H.-G. Gadamer, *Wahrheit und Methode*, Tübingen 1960.

28 RS, p. 33. As he says in RK, p. 16: '… daß der Historiker nur eine gelehrte und sich auf ältere Texte und Zeichen stützende Species der Gattung "Dichter/Schriftsteller" ist, dann verliert der changierende Grenzbereich zwischen gesicherter Geschichtsschreibung und frei erfundener Dichtung seinen Schrecken'. This position is very close to that of R. Koselleck, as formulated in *Darstellung, Ereignis und Struktur*, in: Vergangene Zukunft, Frankfurt am Main 1989, p. 144-157, previously published as *Ereignis und Struktur*, in: Poetik und Hermeneutik, V, p. 560-571.

remain symbols even when explained, and which have their own value[29]? What is the difference between a surgeon giving his opinion of a wound and that of a random individual? Between a jurist and any individual analysing a contract? Is it not that one is trained in a special methodology and the other not? For Stolleis legal history is part of the general history science, it is traditionally located in the law faculties but its central questions are those of history[30]. In that case: what is the methodology of an historian? Stolleis defined his métier as the social construction of a past reality, in a text, and in constructing that past reality he has, as he sets out for legal history which, as he poses, following:

> Legal history wants to know how a past legal system functioned. It asks about the emergence of legal norms through custom or legislation, about the communication of norms to jurists and citizens, and about the enforcement of legal norms in everyday life, whether through the administration or through court rulings. In a broader sense, legal history is the subject that deals with the historical context of entire legal systems and the cultural embedding of legal norms. In this respect, it is part of general cultural and intellectual history and must therefore maintain contact with cultural anthropology, historical everyday life research, religious and political history. It acquires its subject matter by isolating it from the mass of historical information with the help of 'prior knowledge' about law, however acquired, not unlike political, economic or social history[31].

29 See on this, e.g., Ernst Cassirer, *Philosophie der symbolischen Formen*, Darmstadt 1954, and *Wesen und Wirkung des Symbolbegriffes*, Darmstadt 1956.

30 RS, p. 6.

31 RS, p. 6: 'Die Rechtsgeschichte will wissen, wie eine vergangene Rechtsordnung funktionierte. Sie fragt nach der Entstehung von Rechtsnormen durch Gewohnheit oder Gesetzgebung, nach der Vermittlung von Normen an Juristen und Bürger sowie nach der Durchsetzung der Rechtsnormen im Alltag, sei es durch die Verwaltung, sei es durch Gerichtsurteile. In einem weiteren Sinn ist die Rechtsgeschichte das Fach, in dem es um den historischen Kontext ganzer Rechtsordnungen und um die kulturelle Einbettung von Rechtsnormen geht. Insoweit ist sie Teil der allgemeinen Kultur- und Geistesgeschichte und muss folglich Kontakt halten mit der Kulturanthropologie, der historischen Alltagsforschung, der Religions- und Politikgeschichte. Ihren Gegenstand gewinnt sie, indem sie ihn mit Hilfe des wie auch immer angeeigneten «Vorwissens» über Recht aus der Masse geschichtlicher Informationen isoliert, nicht anders als die Politik-, Wirtschafts- oder Sozialgeschichte'.

That is quite a task. It covers what is seen as the external history of law, it covers part of what is called the internal history of law, but we miss the mention of the methodology and systematics of law. Whether this comprises the curriculum of a legal historian remains thus open, but it describes in any case the general historian. History students must learn about sources, but also of theories about history which create out of chronicles a 'Geschichte', a coherent explanation of facts (again a term, not defined)[32]. Can they further master all the mentioned aspects? No. They rely on the results of other special disciplines like papyrology and epigraphy (subjects which Mommsen thought indispensable as basis for the study of history), or newer subjects like archeology combined with chemical and physical analysis, which also require special training and knowledge. Each of these thrive by their own specific scientific discourse. In logic *a* cannot be *-a* at the same time, but in quantum physics it can. And in mathematics minus multiplied by minus is positive, but in law it is not. Is there any similarity between the discourse of medics, lawyers, engineers, architects etc.? To some extent there is, but only basically: the superstructures differ, and the basics are insufficient to cover the entire discipline. When Stolleis requires 'verifiability on the basis of sources as well as [on] the scientific ethical imperative of scientific reasonability' ('Kontrollierbarkeit anhand von Quellen sowie [auf] das wissenschaftethische Gebot von wissenschaftlicher Redlichkeit'), then the 'scientific reasonability' is one, specific to that particular discipline. There is, in short, not one historical discourse, there are several discourses, each historical, each with its own 'verifiability' ('Kontrollierbarkeit'), own 'scientific reasonability' ('wissenschaftliche Redlichkeit') and own special requirements (for example: in papyrology philology and paleography; likewise exist for archaeology, epigraphy, philology, etc. special requirements). True, there may be some overlapping, but the differences remain. What we call general history is combining the results of these in another discourse which we call general and which has its own 'Kontrollierbarkeit' and own 'wissenschaftliche Redlichkeit'. The error here lies in the assumption that all these different historical disciplines are species of one general historical discipline and therefore can without problem be considered part of, even exchanged for the genus. But if that were true, there would be no sense in distinguishing the species, all would be one blurry mass of disciplines. The only

32 See R. Koselleck, *Terror und Traum*, in: R. Koselleck, Vergangene Zukunft, Frankfurt am Main 1989, p. 280: '… daß die Geschichte in ihrer Komplexität nur erkannt werden könne, wenn sich die Historiker von einer Theorie leiten lassen'.

aspect they have in common is that they deal with the concept of history and probably (but that aspect Stolleis does not work out) of 'Geschichte'. General history is a species too[33]. The genus here is merely the study of objects under the perspective of time[34].

Savigny and other jurists like Hugo and Hufeland tried to define the study of law in the terms of science as used in their times. A science had to be systematic, it had to have an object, which were for Hufeland the legal acts ('Rechtshandlungen', we would say) as the elements of law, for Savigny the concepts ('Begriffe'); and a method: the exegesis. Savigny's view led to the 'geschichtliche Rechtswissenschaft', nowadays called 'Rechtsgeschichte' or legal history[35]. Their efforts were aimed at defining the legal discourse of law (and legal history) with its own 'Kontrollierbarkeit' and 'wissenschaftliche Redlichkeit' in modern terms.

This difference between discursive worlds return in a new phenomenon: the suggestion of a 'new legal history'. According to Suzanne Dixon there has been a shift in the study of Roman law from the traditional *Rechtshistoriker* who study especially the Digest, applying 'finely honed philological and philosophical skills', to neo-*Rechtshistoriker* (her term) whose approach is neither wholly legalistic nor wholly philological: they are classically trained[36]. And

33 General history knows its waves of interest, as the marxist in the seventies, followed by the feminist, then gender, now the slavery discussion: all questions of the present day, but applied to the past. Is that still real research of what we consider the past or a reinvention or rewriting of the past to accommodate the present discussion? Whatever one thinks of this, it is anyway clear that this discourse cannot be the generic of the singular historical disciplines nor comprise their methodologies.

34 Cfr. for the lost quest for a unity of sciences and humanities: L. Daston, *Ein Traum von Einheit, wie die Wissenschaftler versucht haben ihre Welt zu ordnen*, in: FAZ 25 November 2022, p. 12.

35 This was in the line of Savigny, be it without his view that law had an existence in the Volksgeist and developed autonomously within this Geist, to be extracted by jurists. Yet Savigny's position, which is nowadays no longer a viable view, might be saved if we construct law as a body of rules, which are taught to humans when young as objects of culture, and which humans, when older, may change as subjects of culture. In this case law is not an immaterial being but a complex of human views and knowledge transmitted continuously and intergenerationally as a part of culture.

36 S. Dixon, *Family*, in: P.J. Du Plessis, C. Ando [and] K. Tuori (eds), The Oxford handbook of Roman law and society, Oxford 2016, p. 461-472, here p. 462, says that these 'neo-Rechtshistoriker' 'acquire the relevant expertise in Roman law and in such dynamic and complex specialist areas as inheritance strategy, close-kin prohibitions, intergenerational conflict and gender relations, depending on their focus. They have also widened the range of sources they use to include epigraphic, literary and theological texts'. Dixon sets this against a caricature of Roman lawyers. She does not know that with the emergence of papyrology and epigraphy the traditional *Rechtshistoriker* have already from the early

that is precisely the point. They are trained in a different discursive universe which is not 'legal' (and 'neither wholly legalistic' means, in practice, not at all). Another author endeavoured to construct this difference as the duality of *historia interna* and *historia externa*[37]. The latter implies the practice of law in society. That is in itself fine, as long as the law as such is understood in its own context. That, however, requires knowledge of the legal discourse, next, as would suppose, of other discourses like sociology. Sometimes that is indeed the case, but often not[38].

As for law, what Stolleis enumerates is fine for the law of, e.g., Hammurabi, or pharaonic Egypt, or even ancient Greece, where the law as transmitted is merely a bunch of loose rules. But for the law of Rome from the end of the Republic onwards, for Byzantine law, canon law and the later learned Roman

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20th century made abundantly use of all these new sources too. A famous result of the use of papyrology was U. Mitteis' *Reichsrecht und Volksrecht*, of 1914. The handbooks of Kaser, Kaser and Hackl, and the recent *Handbuch des Römischen Privatrechts*, all include epigraphical and papyrological texts. And the relevant expertise she brags about is usually absent, since the neo-Rechtshistoriker lack 'finely honed' legal skills. E.g., the article by G. Kantor, *Property in land in Roman provinces*, in: Legalism property and ownership, ed. G. Kantor, T. Lambert [and] H. Skoda, Oxford 2018, p. 55-74, bibliography p. 261-294. Notwithstanding the extensive bibliography (34 to 20 pages text) the author does not deal with the Egyptian papyrological evidence on land ownership (P.Oxy. II 237 + P.Merton III 101; P. Straßb. 22), nor with the imperial rescripts on possession of land in the provinces (CJ. 3,32,4 Gord. A. Muniano mil.; C. 8,27(28),5 Alex. A. Sossiano; CJ 4,19,4 Alex. A. Vito) or the legal writings (D. 44,3,9 Marcian. 5 *reg*.; D. 44,3,3 Mod. 6 *diff*.; leaving out the important texts after 285, the year Kantor stops at); and not engaging with the material in the required discourse. Not surprisingly the conclusions do not yield new insights.

37 D. Ibbetson, *Historical research in law*, in: M. Tushnet and P. Cane, eds., The Oxford handbook of legal studies, Oxford 2005, p. 863-879: 'A convenient and conventional division can be made between 'internal' and 'external' legal history. The former, we might say, is the history of lawyers' law, of legal rules and principles. Its sources are predominantly those that are thrown up by the legal process: principally statutes and decided cases, supplemented where possible with lawyers' literature expounding the rules and occasionally reflecting on them. The latter is the history of the law in practice, of legal institutions at work in society rather than legal rules existing in a social, economic, and political vacuum. The former, defined by its own terms, is bounded within its own field of reference; the latter, in its very nature, is necessarily unbounded'. There is no general definition of *historia externa*, but taking M. Kaser, *Römische Rechtgeschichte*, Göttingen 1950, p. 18, as basis, Ibbetson relegates what Kaser understood as external legal history to the sector of *historia interna* and expands the first to other areas. It leaves several questions, but fundamental is here that the law is no longer the centre of legal research but an object of research of another nature, with another discursive context.

38 For example, D. Jones in his *The bankers of Puteoli*, finance, trade and industry in the Roman world, Tempus 2006, considered by a reviewer as an important contribution, p. 86-87 does not understand the *fiducia* and so misinterprets TSulp. 87 completely.

law it is insufficient because here the law had since the arrival of Panaitios in Rome in the second century BC been systematised with the help of Stoic methodology and philosophy, leading to what was called already then an art, *ars boni et aequi*: jurisprudence. It led to a prolific literature: books have been written on norms, their application, their analysis and coherence. Even contradictions presume coherence. It was taught in schools. Theoretical constructions have been proposed to solve systemic problems, like the 'Durchgangserwerb' and the logical second. True, there are authors who have projected into classic Roman law interpretations which fitted their own times and not those of the Roman jurists. Yet it is indisputable that the Roman jurists applied their own methodology and system. Hence jurisprudence must also be researched in order to understand the law of a certain period. Just as in Antiquity and later on it requires training, in the same way as papyrology and other ancillary historical specialisms require training. It is the raison d'être of legal history. That are the criteria of 'Kontrollierbarkeit' and own 'wissenschaftliche Redlichkeit' for this historical discipline. This point is completely absent in Stolleis' narrative. The central question of legal history is precisely a legal, a juristic question. It is about norms, their interpretation and application. That is the legal competence and the legal scientific discourse. Although Stolleis refers to this, he does not single it out as a separate competence but lets it dissolve into the other competence, that of the general historian: 'In a broader sense, legal history [is] the subject that deals with the historical context of entire legal systems and the cultural embedding of legal norms. In this respect, it is part of general culture and intellectual history …'[39]. Formulating legal history in this way makes it move out of its original methodological context and put into a different context. Even if you still call it legal history, it is not legal history, it is general history in which law as a societal phenomenon occurs and is one of the elements because it involves another scientific discourse, another methodology. It no longer deals with interpretation and application of norms but with the way law as a cultural component functions. What is part of the general history of culture and 'Geistesgeschichte' is a different law than that in the discipline of legal history because it is subjected to a different methodology. It shifts the core of legal history into another discipline. It is the way historians use law without understanding the law as such. To be clear: it is not wrong to ponder about the way a norm functions in society, on the contrary, it is part of being a critical jurist to look at law from a different perspective. Stolleis is certainly right to

39 RS, p. 6: 'In einem weiteren Sinn ist die Rechtsgeschichte das Fach, in dem es um den historischen Kontext ganzer Rechtsordnungen und um die kulturelle Einbettung von Rechtsnormen geht. Insoweit ist sie Teil der allgemeinen Kultur- und Geistesgeschichte …'.

emphasise this. But it involves a different scientific discourse, a different methodology and here, in my opinion, Stolleis errs by shifting it into a different area and discipline. That area lies outside of legal history. The statement replaces the main issue by at the best a side-issue.

For these reasons Stolleis' statement 'Legal history is a part of the study of history. Its academic location is usually the law faculties, but its central questions are those of history'[40], I cannot accept. It is wrong because its central question is different from history. It is: what are the binding rules (the norms) and how are they applied? That is what research in legal history should investigate, within the appropriate legal discourse (methodology).

So it appears that legal historians, just as epigraphists, papyrologists, numismatists, general historians etc. have a particular competence. It is the competence to find norms, to analyse the norms found and to apply them. Where must that be taught? That is not the point as long as it is taught, and it might be a history faculty. That shifts the question to: where is it taught? Or, where is it taught best? And the answer is: not in history faculties and it is a competence which, as many publications show, is not present with (general) historians. But the competence is taught in law schools to the students in modern law and taking that as basis it is easy to apply to and enrich it with Roman or other law. It is a general legal competence, most developed in the private law[41]. Not, however, is it a competence taught in legal philosophy if that might be suggested as an alternative. Legal philosophy deals with the question whether law should be applied at all, or nor, which may be in some cases a good thing to reflect upon; but it does not deal with the application of legal rules as such[42].

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40 RS, p. 6: 'Die Rechtsgeschichte ist ein Teil der Geschichtswissenschaft. Ihr akademischer Ort sind zwar normalerweise die Juristischen Fakultäten, ihre zentralen Fragen aber solche der Geschichte'.

41 See B. Sirks, *Geschichtliche Rechtswissenschaft damals und heute*, in: Geschichtliche Rechtswissenschaft, 100 Jahre Heidelberger Institut (1918-2018), Christian Baldus, Christian Hattenhauer [and] Klaus-Peter Schroeder (Hrsg.), Heidelberg 2018, p. 149-182, in general also dealing with the above issue, on this point p. 174-176.

42 Legal philosophy is not concerned with the application of legal rules, but whether law should apply at all – which is a different question. As to the so called analytical legal philosophy, with at least a few philosophers a similar ignorance of or disinterest in the legal competence is visible, leading to a distortion of the law, as in J. Waldron's *Moments of carelessness and massive loss*, in: The philosophical foundations of tort law, ed. D.G. Owen, Oxford 1995, p. 387-408: Waldron does as if both drivers displayed the same amount of carelessness and therefore the outcome be one of extreme unfairness, but since he attributes carelessness only to Fate ('he failed to notice'), this justifies the attribution of loss to Fate and therefore the entire argument goes wrong, as does his subsequent argument for a different liability system. The question, is it fair that the one driver should pay so much,

What Stolleis aims at, as he himself admits in the preface to the second volume of his 'Geschichte des öffentlichen Rechts in Deutschland', München 1988, and which he practices, is 'Wissenschaftsgeschichte' (and perhaps also, as we saw above, Kultur- und Geistesgeschichte)[43]. And there is nothing against studying the science of law as such, restricting oneself to the writings of authors as expression of their ideas. But it cannot be the entire law because it neglects the application aspect. And it is very questionable whether one may read these writings as pure scientifical texts. Their authors usually had a very practical purpose in mind: application. In constitutional law this aspect is not so visible. Writers like Bodin published their ideas about the ideal state, but there was no immediate application visible or even thinkable. In private and criminal law it was and is different. Application occurred and occurs every day, with every judgment. There is here no room for pure 'Wissenschaftsgeschichte'.

The value of legal history is different. The hermeneutical process includes explanation, interpretation and application of texts. Having a prejudice towards these is no obstacle, on the contrary, it is an advantage because it facilitates access to it, but requires that the reader is also open to what the text might have in store for him. Reading such texts will lead to a reflection on and appreciation of the present law: an academic goal. Thus reflection on the Fifth Command and its sanctions in the Torah may lead to a reflection on the background of present day sanctions for killing and murder, on the grounds why we criminalise killing and what sanctions we impose. As said, we do not see Stolleis taking the modern hermeneutical aspect into account. He even considered knowledge of present law disadvantageous (his 'prejudices') and detrimental to legal history (and, I guess, history in general): the researcher has to drop his presumptions. But it is very important, these prejudices are precisely providing entrance to the process of 'Verstehen' (Dworkin calls them the conception of the recipient[44]). And if the

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is actually a question whether it is fair that law as such should apply. In itself it is an interesting question, but a non-legal question. If the answer is that it should apply, it should also be said how it should apply, and if the answer is that it should not, a solution outside the law should be given. But Waldron is not interested in how or whether a specific legal rule (liability on account of negligence) should apply, but whether law should apply at all (answer: no, his proposal is that everyone should insure himself for what accidents might happen to him but that means that no law applies, it is everybody for himself). In philosophy this is perhaps an interesting question, but it is of no relevance whatsoever for law. See further note 44 for Dworkin.

43 M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, Bd. 2, München 1988, p. 6.

44 R. Dworkin's *Law's Empire* (London 1986) is an admirable work on law, morality and justice, and on the way the judicature arrives at decisions, written in and for the self-contained universe of the English and American legal system and limited to that. Still, it has much food for thought for the civilian lawyer. Dworkin's exposition of the conversational

hermeneutical process might lead to inspiration for new actual law, all the better. Since it always concerns an action on what is already present, it has always a historical dimension, even if, as in the natural sciences, an event can be repeated.

So much for research in legal history. Returning to a question Stolleis put forward: Can legal history provide suggestions for the present law, as the Pandectists did and, in Stolleis' words, Neopandectists do? Leaving aside the first group because their position and significance at that time was one of a kind (they rather rewrote classical Roman law into a modern legal system), that indeed is not so easy as it may seem. The idea of eternal immanent legal values is impossible. They are always embedded in a specific context of human understanding. Surely, a Command like the Fifth, 'Thou shalt not kill' (Ex: 20,13) is still a rule to abide by and in the context of the *nulla poena* rule it has the advantage of the norm having been published, it is clear that there is a general view behind it through all ages and times that a human may not kill another human being, yet the interpretation of its importance, the view on human life as such and the ending of it, the limits of the precepts, all these things differ in time and place, and that goes too for the legal embedding. To restrict ourselves to the present, within the modern context other requirements must be fulfilled without which it cannot apply. Likewise one cannot pluck an opinion of Ulpian out of its context and present it to, e.g., as a useful text for a European Civil Code or a European Court. A careful argument would have to go with it. But what is possible is to use legal history as a means to demonstrate the dynamic character of law and so counteract positivistic tendencies; next to deepening hermeneutic competence.

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interpretative method is close to Gadamer and the 'Verstehen', and with him it is always in a historical sense because we always react on something or some text which is already there (see p. 55-59). However, Dworkin's basic tenet that law is more than the mere statute (positivism) and should in its application also include political ideals, morality and justice, may be a useful reminder in that universe, but (perhaps unknown to Dworkin) is in continental civilian systems already part of and processed in the system: in Dutch law there are the many references in the civil code to reasonableness and fairness, in the German civil code the sections 158 and 242, in the French system the necessity to apply equity. It is part of the scorned positivist system and Dworkin is consequently interesting but irrelevant for these systems on this point. It would be interesting to see his views actually applied to the statutory 'equitable openings', otherwise they have no sense for law students. Dworkin might probably reply to this that these 'openings' are part of the law whereas he means that it should be the reverse. That is indeed so, but his view on the application of the positive law as a part of a greater whole might in principle lead to setting aside the law to give way to morality or justice. In essence, his position is the same as that of Waldron (see note 35), viz. that the only question is, whether law should apply at all or not, not how legal rules should apply.

By defining what the essential method of legal history is, we define also the subject itself. Its object is legal rules (norms) of the past, either in practice or in theory (legal literature), its method is interpretation and application in a scientific legal discourse (its methodology). As to the question, whether legal history belongs still in the law faculty or might also be placed in the history faculty, my answer is that where it concerns the training in legal methodology as mentioned above, it does in theory not matter where this is done as long as it is done. But reality is that such training only takes place in the law faculty and not in history or other faculties. It means that legal history is best positioned as part of the legal curriculum. And the legal curriculum profits in its turn because legal history develops an essential part of it: the mastering of legal methodology, combined with the value of the training in legal history for a deeper appreciation of actual law[45].

45 And that is exactly what Savigny had in mind when he wrote his *Vom Beruf unsrer Zeit*.