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CAPÍTULO PRIMERO

LEGAL HISTORY IN GERMANY: ITS ROLE IN ACADEMIA AND PRACTICE

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SUMMARY: I. *Preliminary Observations.* II. *General Course on Ancient Legal History.* III. *Seminars.* IV. *Conclusions.* V. *Bibliography*.

I. PRELIMINARY OBSERVATIONS

Irrespective of the rich tradition of German scholarship particularly within the last 200 years or so, Roman law as well as Germanic law —or even legal history in general— are declining in the academic curriculum's appearance. No historical course is mandatory, and most students enter law school with little (or even very little) historical knowledge. Under these circumstances, legal history in general has a difficult position in German academic teaching. As a consequence, there is no guidance such as a best practice on how to teach legal history. Instead, every legal historian pursues his or her own path based on their own understanding of what is good for the students and how to get them interested in the subject. Accordingly, I will report in what follows of my own deliberations regarding this task and my thoughts regarding the structure of my courses. In other words, what follows is a rather personal account.

When writing about legal history and its teaching, it seems to me important and indispensable to clarify for whom this chapter is meant to be written, i.e. who are the primary recipients. It is evident that the pre-understanding differs dramatically when the primary addressees of such writing are colleagues from all around the world or when students are meant to be

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the main readers. After all, among colleagues there is no need to explain value and importance of this subject nor to offer justifications for all the efforts to dive into its huge range of facets.

When, however, such text envisages students as main readers, a decision must be made. On the one hand, do I throw them right away into the cold water (as a German saying has it when someone right from the outset is confronted with all details and technicalities of the subject)? On the other hand, do I prepare them and lead them, thus, slowly into this field? In the latter case, I would be thereby explaining the need of historical knowledge, justifying its research and study and demonstrate its value even today for any lawyer, including the one who will deal in his or her later practical life exclusively with AI law or space law (just to name fields in which legal history has little to nothing to contribute).

In my courses, I have always chosen the second path, based on a kind of political deliberations. I started teaching in Berlin just a few (five) years after the German re-unification and with most students (or at least half of them) being from the former German Democratic Republic (GDR). I taught at the *Humboldt-Universität zu Berlin.* This was the university at which Friedrich Carl von Savigny had taught as well as Friedrich Mommsen, but which had also been in the eastern part of Berlin which, like the rest of the GDR, had a rather different school system with little or no history courses reaching back earlier than a few centuries. Therefore, I was confronted with the fact that almost none of those students had the slightest idea of what I was talking about when I addressed some ancient Roman or Greek facts and events. As a side note, many of those students were not aware of the meaning of the term "Bible" nor could they make any sense of the differentiation between Old Testament and New Testament.

The level of historical knowledge of students who had gone to school in the western German school system was only marginally better, it should be clarified. I am afraid that this complaint about the diminishing interest and education in history is well known to most of our colleagues; and I fear that many will attest a similar experience. What puzzles me particularly in this context is the often-used argument that we are now living in the twenty-first century —thereby implicitly asserting that things have now dramatically and decisively changed so that the "old stuff" is finally overcome.

Well, things were as they were. I therefore tried to show in that course on ancient legal history to the newcomers that old thinking and reasoning is as topical and valid as the modern equivalent. I will describe that in the next section (II). In seminars, however, which I offered not in a regular manner, I pursued a different approach. There, I tried to copy the style of teaching

that I had learned during my own studies at the University of München; I will describe this in the subsequent section (III).

II. General Course on Ancient Legal History

Law students in Germany begin usually right after having finalized their high school education, which extends for 13 years. Thus, when students are around 18/19 years old, they enter university. Hereby I should mention that the German university system is strict only to a limited degree in setting an agenda which must be pursued mandatorily by the first year-students. Beyond mandatory courses, students may choose courses from a wide range of offers and once they have chosen, it will not be supervised whether they attend the chosen courses or not.

Humboldt-Universität agreed to offer in every first semester two courses on legal history from which students could choose. One course dealt with ancient legal history, covering the period from 1750 BC to 550 AD, the other course covered the time span from 550 to 1990. To make it attractive for as many students as possible, we offered the possibility to achieve a certificate for participation by successfully passing the exam. Such a certificate is one of the preconditions for being admitted to the final state exam at the end of the university education.

I had a twofold intention given all these deliberations and factual circumstances particularly at Humboldt-Universität. On the one hand, I aimed to demonstrate the width and breadth of law in antiquity. On the other hand, I aimed to demonstrate that the basic issues, the law's approach to deal with them, and —fairly often— the solution itself were anything but old and, thus, neglectable. To the contrary, the latter were similar if not equal to the modern approach and solution. Thereby, I tried to show students that the treasure trove, as it were, of legal history is full of instructions and models for solutions to present day issues. In short, I wanted students to get (at least) a feeling that engaging in legal history increases the toolbox for any legal activity.

The first course[1] began with explaining that even though the subsequent semester would be devoted primarily to learning the technicalities of the application of law, students should never forget that law is much more than just a set of techniques. To give them a basic understanding of law as

[1] I used a hand-out entitled *Einführung in die Rechtsgeschichte der Antike* (Introduction to Ancient Legal History).

a cultural phenomenon, I described to some degree those disciplines which deal with other facets than just the dogmatical application. Examples given were sociology of law, philosophy of law, comparative law, and legal anthropology. I always found interesting the answers given by the students to my question whether mafia is a legal order? More than once, this resulted in intense debates which lead directly into that field where law is anything but a technical method of applying a certain norm to a certain case.

The first legal source to be presented in class was a text from the Codex Hammurabi. After all, a copy of that statute is preserved in the Pergamon-Museum around the corner of the classrooms. In the materials, being made available to the students right from the beginning, I had copied article 9 of that statute. It deals with a rather complicated triangular relationship in which a good was stolen from the owner then sold by the thief and then the deal was discovered by the owner. The issue is how to undo this situation. Needless to point out that this is a case of eternal topicality which, for that very reason, allows to show students that precisely the same deliberations were applied then and now.

The next topic would then be biblical law —thereby distinguishing between Old Testament (i.e., Jewish law) and the New Testament—. As indicated supra, this was also done with the intent to inform the young students about what is considered a central pillar of European culture and thought. I dealt with these topics particularly joyfully as one of my teachers —probably the most influential one for me personally— was David Daube from Berkeley, California. I discussed, thus, not only the Ten Commandments but, amongst others, also those rules which deal with the debt releases ordered by the Jubilee Years (Ex. 21.2, Deut. 15, Lev. 25.8). This was once more done to demonstrate the topicality of these time-honoured rules. These discharge provisions were introduced into the Christian canon of general rules by Pope Boniface VIII in the year 1300 and were from then on to be celebrated and applied among Christians every 50 (now every 25 years) years. In his speech "urbi et orbi" on 1 January 2000, Pope John Paul II announced the new Jubilee year and admonished the creditors from all over the world to forgive all debts of the developing countries —thereby touching a subject for which mankind still has no binding rules!

Regarding the New Testament, I included in my hand-out two sources, both from the Gospel of Mark. The first source is Mark 15.1 et seq., dealing with the trial of Jesus before Pontius Pilate. It deals, thus, with Roman criminal procedure law as applied in the provinces. More precisely, it is a remarkably clear application of the rule according to which the one who

confesses is to be treated as condemned —*confessus pro iudicato habetur*—.[2] The second source is Mark 14.66 et seq., which gives an interesting insight into the incorporation of Jewish law into the New Testament.[3] It is the story about Peter's denial of Jesus upon which the rooster crows twice. It is a striking exemplification of a discussion which was particularly intense then among Jews —is it allowed and if so when to deny God?—. The answer was not a simple "yes" or "no," but distinctions had to be made. It was said that it is always better to respond in a way which evades a direct answer; and it was also said that it is better to have such conversation among only two persons rather than in a crowd. Now, this pattern can be found in the said source of Mark. It is first the maid who is asking Peter, and he responds that he does not understand what she is talking about. He is running out and the maid is following him to the group of soldiers. She repeats the question, Peter is answering the same. And then someone in the crowd turns to him and says that he is one of Jesus' people. And that brings Peter to a direct and explicit denial.

I then turned to the Greek world. Here, I did touch less on primary legal sources. Then and there, all I did was mentioning some of Solon's reforms, the law of Gortyn, and the rhetors Lysias, Isokrates, or Demosthenes. To do justice to the Greek contribution to the general development of western law, I concentrated on the philosophical side (legal philosophy). Accordingly, I presented text passages from Plato's *Politeia* as well as some from Aristotle's *Nicomachean Ethic*. Regarding the former, the focus was on the discussion about the best form of a constitution and the need to have philosophers as rulers or rulers being philosophers respectively. Regarding the Stagirite, I used his differentiations between natural law and positive law (*physei* and *thesei*) as well as between strict law and equity to again point at the fundamentality of these insights and their ongoing and ever-lasting relevance. Thus, a reference to a kind of natural law was given by the German Supreme Court only a few years ago when previous soldiers of the German Democratic Republic had been accused of having shot to death fugitives at the Berlin Wall and elsewhere along the borders. The excuse of having acted upon superior order and even law was rejected with what Aristotle —*in nuce*— had already described as natural law. With respect to the second distinction, I took the opportunity to describe briefly the development in English law with

[2] For more details, *cfr*. Paulus, Christoph, *Der Prozess Jesu - Aus römisch-rechtlicher Perspektive*, Berlin, De Gruyter, 2016, available at: *https://www.degruyter.com/view/title/521285*.

[3] *Cfr*. Daube, David, "The Old Testament in the New: A Jewish Perspective", in *Appeasement or Resistance. And Other Essays on New Testament Judaism*, 1987, p. 1 *et seq*.

the emergence of Equity as an alternative to the strictness of the original Common law.

It is in this vein that I also discussed a further text passage of Aristotle, this time from his *Politeia*. There, he discusses a topic which is of almost frightening topicality today: assume, a tyranny happens to change into a democracy. What is going to be the fate of the previous obligations? Is the new "state" obliged to repay loans which the tyrant has entered into? Aristotle concludes that the difficulty is to determine whether the new state is still the same or not. In the second half of the twentieth century, the UN Law Commission tried to come up with a binding solution of precisely this question —and they failed to reach a consensus—. Accordingly, this very problem pops up again and again whenever a new state emanates. Examples are found in, amongst others, the breakdown of Yugoslavia and its split-up into various successor states, the reunification of Germany, and the split-up of the former Soviet Union.

After this *tour d'horizon* which usually took something like half the semester, I finally turned to Roman law and, thus, to the history of another millennium. After giving an initial overview over this history (remember, most of the students had not yet heard this part of history ever before), I began with some fundamentals. There, for example, I explored Gaius' description of the various differentiations of what constitutes law (Gai. I.1,3) and, of course, Ulpian's famous classification of law (Ulp. D. 1.1.1). Moreover, I described the role and function of the Roman jurists and how they had learned and taught their knowledge. In this context, the names and qualifications of the most prominent jurists was given.

The beginning of the strict legal (as opposed to the historical) teaching was, of course, the Law of the Twelve Tables. I had collected a couple of norms from various tables, including the first ones with their procedural matters. The famous rule on the permission of a father to sell his son (Tab. IVb), for instance, allowed me to elaborate later developments such as emancipation. This, in turn, provoked the need to elaborate further on the method of the Roman jurists to develop their law. The no less famous rule on negligence (Tab. VIII 24a), in which this form of culpability is described in a rather archaic manner, allowed me to highlight to students how law and its terminology develops across time. Holding a chair of, amongst others, Civil Procedure and Enforcement Law, enabled me to certainly not resist the temptation to also describe the rather brutal way of enforcing claims in that antique period (by threatening the debtor to cutting him into pieces).

Attention was then directed to the constitutional side of ancient Rome. This movement was likely motivated by the fact that I had been, in my Mu-

nich years as a student, a research assistant for Wolfgang Kunkel who was then working on his treatise on the Republican constitution. I offered an overview of the different periods (Monarchy, Republic, Principate, Dominate) and their respective peculiarities and properties. I further described the various offices (*censor, consul, praetor, aedile, quaestor, tribunus plebis*, and the different forms of assemblies), as well as the common features such as collegiality, intercession, and annuity. In this context we read the descriptions by Pomponius about the legal history of ancient Rome (D. 1.2.2.16, D. 1.2.2.27 and 28, D. 1.2.2.18) and passages of Cicero's writings (de leg. 3.3.7). Here, again, I repeatedly used the ancient situation to describe it as a model for modern times. Moreover, teaching at this university I also took the liberty to expand briefly on the life and importance of Theodor Mommsen who, after all, was a professor at this very same university and who received the Nobel Prize there for his "Roman History."

The course moved on to describe the Roman process: *legis actio* procedure, formulary procedure, and *cognitio* procedure. Thereby, I tried to highlight how these procedural changes corresponded with the evolution of substantive law and its reflection of the ever-growing complexities of a growing city. Once all this was done, I finally moved on to what nowadays is called private law. Friedrich Carl von Savigny taught, wrote, and held the position of Rector at my university, hence I praised this part of Roman law with his words, namely that the Roman jurists calculated with the terms ingeniously and reached thereby just results for the most complex and disparate cases. I also pointed out that this law managed to be dominant and applicable for millennia and that in Germany it was binding law until 31 December 1899.

Instead of replicating the classes in modern private law (*Bürgerliches Gesetzbuch*, BGB) courses, I preferred to introduce particular legal instruments to the students. First and above all, we looked at *patria potestas*, and in describing it, I could refer back to the respective norm in the Law of the Twelve Tables which deals with the liberation of a son after having been three times sold by his father. The *emancipatio* allowed me to demonstrate the pyramid-like structure of the Roman family hierarchy.

From here I turned to the next instrument: marriage and divorce. To the degree that a *coemptio* was at stake or an acquisitive prescription of the wife, this fitted nicely to the previous topic of the *patria potestas*. What usually caused astonishment among students was the fact that Max Kaser described in the following words: "the Roman marriage was more a social fact than a legal act."[4] In this context, it was kind of natural that I was pushed

[4] Kaser, Max, Knütel, Rolf and Lohsse, Sebastian, *Römisches Privatrecht*, 22nd ed., Munich, 2021, § 69 I marg. No. 2, p. 397.

by questions to elaborate more on the role of women in ancient Rome. In particular, the fact that a divorce was possible from both sides was met with surprise.

The next instrument to be explained was the legal capacity and its various differentiations, beginning with the *infantes*, the *impuberes*, but also the special instrument of *minores viginti quinque annis*. Regarding the *impuberes* and the dispute about its duration particularly for boys among the schools allowed me to elaborate a bit on the meaning and influence of the Sabinians and Proculians. I further clarified that further restrictions in the legal capacity even of adults were possible as a consequence of the far-reaching and all-encompassing structure of the *patria potestas*. It was here that I addressed the role and function of the *peculium*.

This was followed by elaborating on contract law and its classical differentiation in real contracts, consensual, verbal, and literal. Under present German law it is almost impossible not to see, even for first-semester students, that most of the existing contracts regulated in the BGB are direct descendants of those ancient models whereby only in very recent years new categories appeared thanks to the latest technological developments. I chose to focus on three selected topics: *emptio venditio*, *locatio conductio*, and *negotiorum gestio*. The first allowed me to demonstrate the enormous increase of flexibility and variety by means of a consensual contract compared to more formal variations of concluding a contract. The second served as a model for a contract which, in the course of the times, has become subdivided into four contracts as regulated, for instance, in the BGB (lease, rent, contract for work, service contract). *Negotiorum gestio* helped demonstrate the legal technicality to give incentives for altruistic behaviour and to suppress those deemed egoistic.

The subsequent topic treated law of property whereby the differentiation between ownership and possession covered a major part. But also, the *in-rem* claims, and here in particular the *rei vindicatio*, were addressed as well as *usucapio* as a means of acquiring ownership.

The attention then moved towards the *lex Aquilia*, since this is arguably the most interesting topic for beginners. After all, there is action. Explaining the different calculation periods in the relevant chapters, I listed in my hand-out a couple of cases from the second title of book 9 of the Digest, among them, of course, the notorious case of the barber who shaves a slave right next to people playing ball.

In a final round I touched upon the law of succession, which is admittedly complicated and complex, but which is adopted to a high degree in the BGB. Almost all niceties and categories, sub-categories, and sub-sub-cate-

gories are to be found in present German law. What is most striking is that a particular rule offers the solution for the famous causa Curiana of which Cicero reports more than once in his writings (de inv. 2.122).

The last two meetings in that course were devoted to Justinian and the *Corpus Iuris Civilis*. Explaining the process of its coming into existence was accompanied by reading the *Constitutio Tanta* (12, 13, and 19). This served primarily for closing the circle, as it were, and to refer to the beginning of the course and the treatment of the Codex Hammurabi. There, one finds a very similar attempt to declare the new codification as the once-and-forever solution of all future cases. The reading of the *Constitutio Deo Auctore* allowed me to refer to later centuries where this legislative pronouncement was used and instrumentalised in the dispute between the Emperors of the Holy Roman Empire and the Popes in the centuries-lasting dispute known under the name of the two swords doctrine.

There was finally some reading of several passages form the *Institutiones*, followed by a brief outlook into the Roman law's future of the next one and a half millennia. This is to say that the evolution described how Roman law was transferred into a ius commune and how the German pandectists from the nineteenth century finally refined the "stuff" to such a degree that a modernised version of the old law became the BGB which, in turn, serves its purpose now for more than 120 years.

My intention regarding the goal of this course was —again— to give the young students a first understanding of law as a cultural phenomenon. In all its technicality it is yet something deeply intertwined into its times but sufficiently abstract to remain adaptable for changed circumstances. Andreas Martin Fleckner, my successor as Roman law professor at Humboldt-Universität, pursues an entirely different approach. Fleckner teaches Roman law and bases his teaching entirely on the eminent textbook of Fritz Schulz[5] (who, too, was a professor at Humboldt-Universität).

III. Seminars

It was not on a regular basis that I offered seminars. This had several reasons, one of which has been that I was probably somewhat spoiled from my own experiences which I had the privilege and honour to enjoy in my times at the university of Munich. There, at the Leopold-Wenger-Institute, every

[5] Schulz, Fritz, *Prinzipien des römischen Rechts*, Berlin, 1934 (reprint 2003).

Wednesday evening from 7 till 9 (or so), Wolfgang Kunkel and Dieter Nörr,[6] offered a seminar mostly on private law issues, such as lease contracts, unjust enrichment, and tort law. Irrespective of any overlapping with soccer games (particularly during World Cups this was a real challenge), semester after semester these professors were sitting in the big reading room of the library, accompanied by roughly three to six assistants and around ten students (or so). Every participant had in front of him or her a copy of the Digest. Occasionally, it would have taken up to 30 minutes to reach an acceptable translation of one single source. Even though students would have prepared such translation, it was yet scrutinised word by word. This exercise alone, in which each participant could and would join, was tremendously enlightening. Not only students that had some knowledge of Latin, but also an eminent expert such as Kunkel (who once had to choose between a professorship in law, in history or in ancient philology) were struggling —and were explaining the reasons for such struggle—. This gave so many insights in Roman law thinking that this part alone would have been educative in itself. But, of course, this intellectual level was kept throughout the entire exegesis. This almost unique atmosphere was enriched by participants who were also experts in, amongst others, Egyptian law, Sumeric law, Greek law. Occasionally, scholars from the German Archaeological Institute (*Deutsches Archäologisches Institut*) would participate and contribute their knowledge to the already existing culmination of expertise. Accordingly, almost every single aspect of all sources could be illuminated.

I arrived at Berlin with that background experience in seminars. My arrival was shortly after the fall of the Wall. A great part of the students had no knowledge of Latin at all, and —even when ridiculous to mention— the library had only two copies of the Digest. I therefore discarded the plan to even try to continue the tradition of the Leopold-Wenger-Institute and chose instead to offer every now and then a seminar on topics such as historical examples of states going bankrupt or bankruptcy legislation in the early times of the sixteenth century.

My absolute favourite seminar, however, was less based on my own initiative but rather on that of five of my students. I had known those students already for quite some time and I knew that they were very smart and very educated. Shortly before my last semester before retirement, they approached me and asked me to conduct a seminar in which they could learn what digest exegesis (*Digestenexegese*) means. I selected a papyrus with a rather elaborated shipping, transport, and securitisation contract. During the en-

[6] Dieter Medicus and Gerhard Thür took over after the passing of Wolfgang Kunkel.

tire semester, we fought our way through this document word by word, and always with a map of the eastern part of the Mediterranean Sea including the Black Sea at hand, in order to doublecheck our translation with the intended route of the ship, with the intended cargo on the various stops, and with the agreed upon control mechanisms. Those five students proved to be one of the greatest gifts I received in the context of my retirement.

IV. Conclusions

When considering that my teaching experiences took place at the very university at which such eminent scholars as Friedrich Carl von Savigny, Theodor Mommsen, or Fritz Schulz had taught, the preceding report must necessarily be sobering —to say the least—. However, it is one thing to step into the footsteps of such scholarly giants and another to get more than just a handful of students interested in the subject. This tension had to be addressed, and the teaching had to be accommodated one way or the other. As it has been indicated above, I decided for the "student" way. After all, to get young people to understand and recognise that law from ancient Roman times is still today a massive cornerstone of our present-day legal cathedral is a goal which, in my understanding, deserves all efforts.

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