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I was here about 10 years ago as a member of the Beirat, when Prof. Michael Stolleis was proud to show the project for the new Institute, and now we are in front of a well noteworthy reality thanks to his efforts and of his colleagues.

So, many congratulations, just to start!

There is no need to speak about the positive results of so rich a conference and the quality of the answers it gave Prof. Duve's proposals.

The proceedings are a quite clear product and leave no space to any doubt.

With Prof. Stolleis we lived through a first new trend after the long and fruitful direction of Prof. Helmut Coing's. I remember the first strong impetus given by Prof. Stolleis to the history of public law and the open-minded look at a larger Europa. He broke with the tradition of *Privatrechtsgeschichte* and *Ius commune* with his strong interest on national developments and the judicial and practical problems of legal systems, focusing on the ›police‹ first of all.

Prof. Duve is now proposing ideas much more revolutionary. Their basic objectives, as far as I understand, are to go over traditional European legal history and a break with the past. Not completely, but deeply and significantly.

I am basically in great sympathy with his call for a deep shift in method and goals of our *Rechtsgeschichte*. We face a new world context. I feel this necessity not only from today, even if I could not hitherto succeed in showing it in my concrete daily work. I agree also with his pragmatic approaches and the well balanced judgements.

But the break is deep. To penetrate it: no more concentration on European *Rechtsgeschichte*, but to move towards a global, transcultural, legal history. It should inherit the best from the traditional approach, but go further with new aims and tools which are applicable.

Duve speaks of *utopia* and rightly, because his aim is probably very close to other recent brave breaks with the past. For instance, to the incredible American dream of 50 years ago: basically, the problem is that of a transcultural dialogue. But this is difficult in general in social sciences, and becomes even more delicate when it involves legal history.

Because it has a traditional close bond with positive legal science, and is a discipline with a

strong constitution. Further, a constitution which is strongly bound with rich and deep European traditions, Eurocentric traditions with their trends often related to specific political and national needs. That is why is so difficult for us even to manage an interdisciplinary discourse within the social sciences alone.

Indeed, speaking of course from my national experience, till recent decades we have normally had few possibilities to speak with other social sciences and also with public opinion, the common reader with cultural interests, the ›ordinary people‹ who are willing to feed more and more the global culture.

Traditional legal history shows itself too institutionalized exactly like positive jurisprudence, too abstract, too learned; sometimes also too much linked with professional interests or with politics. The critics of legal history are everywhere strong, beginning with historians who have different interests, who are now entering our world more frequently.

It is important therefore to leave the Eurocentric, ›Germanized‹ traditions of legal history. If we want to fill this gap and also to participate in contemporary global problems with our specific skills, we should also put both the problem: (a) of the contents of our new researches, and (b) of the communication of the results: their destination.

I want to be clearer.

It is right to give up the pure *Dogmengeschichte*, and right again to make more space for praxis, for the real conflicts, for the different levels and faces of normativity; right to put aside the narrow paths of positivism.

But we should also be more aware of the more general significance of our research.

A critical, open-minded history of legal institutions sheds new light not only on the laws of the past, more or less distant though they could be.

If it is well furnished with transnational and interdisciplinary tools, it could help us to contribute not only to general jurisprudence and so to make a contribution to the development of academic awareness. Sure. But I see more in the global perspective Prof. Duve has outlined.

I see an attempt to make legal history a social science useful for answering contemporary anxi-

eties, showing the dangers of certain contexts, or the effects of some legal provisions. A contribution to the general, global, cultural awareness. In what way? By showing that the contemporary crisis is not (only) an economic one, (possibly) temporary. But awareness that there is a larger and deeper crisis because of the cultural obstacles to the conversation of peoples. We have to make history of these difficulties also. Starting with the right point of view on our traditions.

Critical legal history does not see continuous positive achievements throughout the centuries of European history. It shows, on the contrary, much stop and go, winning and defeated people and ideas. Even when they were not worse, considering then *ex post*. A past of conflicts of all kinds, of public and private affairs, of lay and religious problems, always hard to understand, however, because the entanglements are the rule, and their interpretation always largely subjective and historically conditioned.

But they cannot be put in order for showing the happy end of the story just to make their reading easier. We should read them, on the contrary, to detect how far the discovered *complexity* can contribute to a wider knowledge of the still tragic human, global history and condition.

Here the duty of the historian springs out particularly difficult and evident. The selection of the facts is not only inevitable but necessary. And the *selection* is a great responsibility which we should feel: neither hiding or concentrating on bad stories (good for best sellers!), but focusing on whatever transnational work could bring as more fruitful. And for these aims we should not obey formalistic schemas of learned legal doctrine, because otherwise we become prisoners of its internal questions.

We should look more to the fields which imply common problems with other social sciences, and other specialized histories, like political and social history.

Here we find the broad areas of colonialism, of immigration, of the various minorities, citizenships, discriminations of many kinds, religious intolerance, labour and gender studies and so on.

Topics are important, certainly, but how to approach them? With new categories and proposals is important.

I see a first step in abandoning our main traditional discontinuities, as for instance the neat opposition *ius commune* / codification, or the sepa-

ration of powers, or political and administrative functions like metaphysical realities finally realized in the contemporary *Rechtsstaat*. These are to be considered some main European historical problems in themselves, not as the end of the story: the fulfilment of Civilisation; not as rules sometimes operating here or there in the past and present, luckily discovered and steadily realized for our intellectual happiness!

Europe has been *magistra* of principles, of general rules explained with great and noble doctrinal speeches, but with much less paramount interest for their practical application, for their concrete impact.

The most sophisticated and well respected legal doctrine in Europe, as we all well know, could exist at the same time as the deepest barbarian totalitarianism. That says something about the dangers of the self-celebrating formalism and the always possible blindness of intellectual elites. A gap between universities and the contemporary world is always possible and was not uncommon in the past.

So public law, criminal law – a ›dark side‹ of *ius commune* as I stressed in the volume on Nordic Medieval Laws edited by D. Tamm and H. Vogt (2005) – and judicial and extra-judicial procedures imply strong political and cultural involvement, which better shows the contradictions of a specific context. Think, for instance, of the permanent gap between the proclaimed right of defense or the *par condicio litigantium* and the actual practice. The needs of politics have often introduced false messages for acquiring the consent of the people. The gap between formal normativity and the real, effective normativity can be very wide and focused with precise documents and the resulting historical interpretations. Obviously the same edictal law can be obscured or subverted by norms officially of a lower level or even from illegal customs. Underground illegality can be widespread in fields of great practical importance and void of interest under a doctrinal point. Bureaucratic or tax problems, considered lower legal questions, can involve daily life much more than a judicial problem or a legal question which is difficult from a doctrinal point of view.

In a few words: we need more freedom in posing questions without being bound by the traditional frameworks and prejudices of the past and to use this freedom in choosing topics easier to be studied and able, compared even to other social disciplines, to reach results of global interest.

In the effort to communicate these peculiarities of our context, what should we do? How can we promote as problems of general historical meaning our specific queries? How can we find the right road for leaving topics which are too technical and specific?

Here the other side of the problem emerges.

Only if we use categories of global utility, which could be available to everybody, can we usefully select our achievements and translate them into a common language to allow wider comparisons and to reach higher levels of conceptualisation and new light and stimulation for future research.

Here I think we need to make more use than usual of the languages of *social* and *political* history as common fields of a wider communication. It is on the level of social functions of a legal institute that we can make a link with researchers in other disciplines and realize a contribution to a global general jurisprudence. Human needs, human feelings are basically common and equal. The historical answers were conceived in different languages and concepts, but their functions are to be framed as comparable and evaluable.

We should not respect the formalisms and technicalities which can hide the substance of the problems. The claim to autonomy of legal thought is in itself an historical problem, as the separation of the law from religion, politics, the economy or cultural traditions.

Normativity is a *whole* with many changing and less than obvious faces.

Looking at the past, whatever past, we find a peculiar language (thought more or less as ›legal language) in that context, since it is the fruit of a complex cultural heritage, either more indigenous, more autonomous or the fruit of many encounters and transfers. But in any case that language will therefore be the fruit also of social and political factors. The relative stability of the law or of its concepts cannot hide its different use through time, and therefore we should always refer to the conflicts and the means of their resolution (or not!). With flexibility in our understanding, since the situation could be so complex that even conflict could not arise. Attention should be paid to reading all signs, but mainly the weak signals, the *underground* difficulties, the world with no words of a large part of the ›common people‹, the world with no explicit witnesses – ambiguous themselves. What is not forbidden was permissible, or not even conceivable for the evident possible negative

effects? The answers of the sources are normally ambiguous, increasingly so in sophisticated and learned contexts. Adulterated communications are the rule and hide real life. The deepest legal doctrine can obscure some tragic human conditions.

Smart but abstract discourses are part of our culture, and not only of the legal one. The civil values we all appreciate and we all consider a common acquisition are indeed always to be verified and reached *immer wieder*: never definitively conquered.

Always, the sophisticated propaganda of authorities and public powers and of jurists can even obscure an open-minded approach to the real world. Let me recall for instance the worthy campaign for the abolition of the death penalty. It was a brilliant moment in the great European struggle for respect of human life. But everybody knows it was contemporary with a large run of colonial conquests, and now that (reputedly sacred) principle exists at the same time as practical, wide-ranging politics of omission of help in various contexts of necessity, even if not formally ›labelled‹ death penalties!

The global context sheds further light on traditional principles, which are easier to respect in a narrower context. Global reality, like global history, involves new problems and challenges, and they are interlinked. We understand the new global world if we are aware of our past, and vice versa.

History is *always* ›contemporary‹ history – as Benedetto Croce explained. But this consciousness is not easily respected in our concrete historical work. Paradoxically, at least for the Italian case, probably we better apply this maxim when working on the founding period of the Middle Ages than on the recent history of 18<sup>th</sup>–19<sup>th</sup> centuries! Even fascism was not able to reduce the strong and conflicting urban and territorial identities still operating today – and not always in a positive way.

Jumping to a broader context and thinking of Mr Koskenniemi's brilliant paper, I consider a problem how right is our concentration on Early modern history for its colonial side and conflicting sovereign national States, and leaving aside – as is normally done – the Medieval world with its multifaceted ›international‹ jurisdictions and encounters of peoples.

But it has become more urgent to be able to speak outside our discipline and even outside the academic world, just as we should breath air from outside Europe and our own discipline. Sometimes

we just have to regain a space already lived in the past. I am considering for instance how far Italian jurists are now from a forerunner like David Santillana, professor at Il Cairo and writer of the important Tunisian code of obligations more than a century ago. Well, he was Jewish and worked on behalf of the Bey of Tunisia.

Let us go back to Duve's proposal. The difficult and uncertain contemporary context demands precisely for new utopic discourses. The exit from the crisis could be a false consolation, but also a utopian adventure. Anyway, this could be the right attempt for ensuring a positive presence of legal history in the transnational culture facing contemporary dramas: a way to give some hope to us (and to public interest). The other choice is a quiet, possible, existence, but in an academic world without any lively debate. Does the alternative need concrete proposals?

I should like to aim for these:

We need a series of national legal histories which should be written for an international read-

ership. That means: short books but answering to the same predetermined questions, so that they can contribute to the discussion and make it easier to overcome the traditional picture of single, different, national histories.

We have to aim also to realize an international conference for determining the topics which can now be seen as useful in aiming to develop the transnational transfer we are seeking. A lot of work has been done already. Now is the time to push it in the desired direction. With wise flexibility, to be sure, but with strong determination.

History presents awful stories, but shows also some trust in the future, many possibilities of change, of positive developments. The Enlightenment was a European turning point with many aspects we should look at. The negative trend could be stopped.

But historical consciousness is necessary. And new work has to be done. ■