

BARTOSZ BROŻEK
 <http://orcid.org/0000-0002-4324-7600>
Jagiellonian University in Kraków

*Why Legal History Matters? Opening of the Webinar**

Welcome, ladies and gentlemen. I am honored that, although only in the digital space, this seminar takes place at the Jagiellonian University. I'm very happy that leading scientists from important research centers across Central and Eastern Europe agreed to take part in the project and in this meeting. I would also like to thank the organizers for their effort in putting this event together.

I would like to share two short reflections of why I think the history of law is important for lawyers. Since my professional background is in the philosophy of law, and in particular in legal epistemology, it is from this theoretical perspective that I would like to approach this question.

As I said, I would like to make two points. The first is that – as in any other area of culture: in science, art, or literature – history of law is a history of problems and attempts to solve them. Thus, the way we understand what the law is, how it functions, how we design the law for the future, always grows out of the past; the past which is filled with problems, attempts – both successful and failed – at solving them, and new problems arising on the basis of the old ones.

This is clearly visible in such disciplines as physics. Imagine that at the times of Thomas Aquinas, some medieval scholar – thanks to a miracle involving time-travel – is able to get their hands on the famous article of Heisenberg in which he used the matrix approach to construct his version of quantum mechanics. And let us assume further that the scholar is capable of understanding the mathematics involved in Heisenberg's theory. Even under these counterfactual conditions, the physical layer of the theory would be

*
•
• **Visegrad Fund**
•
• The project 'Continuity and Discontinuity of Pre-war Legal Systems in Post-war Successor States (1918–1939)' is co-financed by the Governments of Czechia, Hungary, Poland and Slovakia through Visegrad Grants from International Visegrad Fund. The mission of the fund is to advance ideas for sustainable regional cooperation in Central Europe. Visegrad Grant No. 22030159.

completely alien to our medieval scholar. The reason is simple: back at the medieval times, when the Aristotelian conceptual framework was used to account for natural phenomena, mathematics was not utilized to investigate nature. The modern physics was developed much later. Moreover, it would be impossible to understand Heisenberg's theory without mastering Newton's laws of dynamics, or without getting acquainted the models of atom developed by Thompson, Rutherford and Bohr.

One can easily construct similar stories in relation to the history of law, and this points out to two important insights. The first is that, even if we are preoccupied with investigating particular legal acts or the actions of individuals, the history of law remains, at the bottom, a history of problems: their formulations and attempts to solve them. This sequence of problems and solutions is important because it determines the direction of the possible future developments of law. The other insight is that the conceptions which failed as solutions and were rejected, are "still there": they form, in an important way, our joint framework for understanding the problems that we are currently dealing with. Thus, the fact that something was rejected as a bad solution to a legal problem, does not mean that the solution is unimportant and should be forgotten. It is important because it co-constitutes the way we understand legal reality.

Let me now turn to my second point. Recently, I've been working on the intersection of legal epistemology and the cognitive sciences, and something has become more and more clear for me; something which might have been always clear or even trivial for you as legal historians. I have come to the conclusion that legal thinking, just like thinking in general, is very much rooted in the concrete, it is, in other words, case-based. Our theoretical constructions, the legal rules and the legal codes, our grand theoretical projects are but a kind of scaffolding, which helps us to get from one case to another. But it is the concrete case that lies at the bottom of legal thinking. Surprisingly, when you look at the methodological textbooks, it transpires that this key aspect of legal thinking is almost invisible: the legal mind is treated as an abstract mind. It is a mind which deals with the logical schemes of reasoning, with transforming one sentence into another. True, the concrete cases, both actual and imagined, are referred to, but not as something essential – but only illustrative. It seems to me that this is a gross mistake, it is putting the cart before the horse. But when we reinstate the case, the concrete example, where it belongs – at the very center of legal thinking - the role of legal history becomes evident.

Case-based thinking centered around concrete examples is intimately linked with imagination. Imagination seems to be a forgotten faculty of the legal mind. This is true as long as we stick to methodological textbooks. However, once we consider what the lawyers *actually* do, it turns out that they use their imagination on daily basis: they analyze and compare actual past cases, but they also construct new ones to gain intuition and insight as to how to solve the problem at hand. In this context, historical cases are important because they provide fuel for our imagination. Imagination has its limits. The publisher of the first stories and novels of Philip K. Dick – Anthony Boucher – said that when you're developing a new science fiction or fantasy story, you can put there someone who can go through walls. But you cannot simultaneously introduce there someone who can read minds or someone who can time-travel, because the world in which you would have all those superheroes would be completely incomprehensible to the reader. This is, I think, a very powerful message: when we imagine a certain set of circum-

stances, which is to help us solve a legal problem, we cannot change too much or else we will be unable to control all the consequences in the imagined case. In this context actual historical cases and events are very important: they are like a check and balance mechanism for our imagination. They teach us not to go too far too easily.

Let me sum up: I think that legal history is important to lawyers for at least two reasons. First, the law is a long sequence of problems and attempts at solving them, and in order to understand where we are in the sequence and why, we need to know its history. Second, when we try to imagine the future of law – whether close or distant – we need history because it helps us to control the outburst of our imagination.