Book Review: HANDWÖRTERBUCH ZUR DEUTSCHEN RECHTSGESCHICHTE HRG, 2., völlig überarbeitete und erweiterte Auflage, hrsg. von A. Cordes, H.-P. Haferkamp, H. Lück, D. Werkmüller und C. Bertelsmeier-Kierst, Redaktion: A. Karg, R. Müller, A.M. Auer, V. Peters, A.-M. Heil und M. Wolter. Band III: Konfliktbewältigung – Nowgorod. Erich Schmidt Verlag, [Berlin 2016]. XV S. + 2016 Sp.

Alain Wijffels

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In the original edition of the HRG, the first issue was published in 1964. It reached the entry 'Notzucht' in the twenty-first issue; which came out twenty-two years later, in 1982. When the first edition reached that entry, the work in progress was already covering 5195 columns. The new edition kicked off with its first issue in 2004. Twelve years later, in 2016, it had reached the same entry in its twenty-fourth issue. By the end of that last issue, the work in progress of the new edition had covered 6047 columns. How much more hard-working and efficient the new generation of legal historians has become!

These statistics are of course meaningless, except for pointing out that the team of editors in charge of the new edition have been very diligent and managed to keep their contributors on a tight leash. If they succeed in keeping the momentum and the same pace, the last issue of the second edition could see the light within just a little more than thirty years after the last issue of the first edition was published (in 1997).

Following the same approach as for the first two volumes of the new edition[1], I shall first list the new entries and the entries in the first edition which have disappeared in the new edition. Such a survey only offers a very rough approximation of the degree of revision achieved in this new edition. All entries which reappear in the new edition (the vast majority) have been completely rewritten, in most cases by new authors. Some old entries have been expanded, others have been trimmed. In several cases, the articles have been rearranged over existing and/or new entries. One easily understands the difficult choices the editors had to face. This is a dictionary of legal history, not a legal dictionary. In a legal dictionary, obsolete terms may simply be jettisoned. A dictionary of legal history has to keep up with entries reflecting recent developments (in law and historiography), but it also has a task of preserving the understanding of terms and concepts which were important in the past, but may have become outdated or may even have completely disappeared from present-day language. Since more than half a century, when the first edition of the HRG was launched, historiography has moved on. Medieval history, and definitely early-medieval history, does not figure as prominently today in legal historiography as it still did one or two generations ago. Modern history, in contrast, has been strongly developed and produces in this third volume, too, several new entries. Legal historians have also broadened their working ground to new areas and approaches, and these also have to be acknowledged in the new HRG. One of the great strengths of the current project is that it manages to open up its entries to the enlarged and diversified approaches of present-day legal historiography, while it preserves and updates much of the areas of expertise which no longer catch the limelight as before.

New entries in this volume, quite a batch again, include: Konfliktbewältigung, Königin (Kaiserin), Königliches Hofgericht, Königskrönung (in lieu of Krönung), Königsschatz (i.l.o. Hort), Konstitutionen von Melfi (a cross-reference s.v. Melfi would have been useful), Kopfsteuer, Krane, Kreistag, Kreuzberg-Urteil, Krieg, Kriegsverbrechenprozesse,

[1] *Tijdschrift voor Rechtsgeschiedenis* 80 (2012), 255-257 (HRG, Bd. I); 88 (2020), 639-643 (HRG, Bd. II).

Kriminalität, Kriminalitätsforschung, Kriminalroman, Kriminologie, Krönungsinsignien, Krüppel, Kulturgeschichte, Kuppelei, Kurbrandenburgische Landeskonstitutionen, Kurpfalz, Küste, Lade, Ladungsungehorsam, Landesrecht, Landesregierung, Landessynoden, Landhandfeste, Landschaft, Landstände, Landstreicherei, Landtag, Latein und Volkssprache, Laterankonzilien, Lausitzen, Lebensmittelordnungen, Leges fundamentales, Legislaturperiode, Lehnrechtsglossen, Lehnsschutze, Leibliche Beweisung, Leibzins, Leineberg (Gericht auf dem -), Leobschützer Rechtsbuch, Lex mercatoria, Lex scripta, Liberalismus, Ligische Vasallität, Linde, Literatur und Recht, Lossagung, Lösungsrecht, Lotharische Legende, Lücke im Gesetz (Lücke im Recht), Luzifer, Mainzer Reichslandfriede, Majestätsverbrechen (i.l.o. Majestätsbeleidigung), Majorat (i.l.o. Familienfideikommis), Markbeschreibung, Marktflechen, Marktkirche, Marktkreuz, Mauer, Mauerschützenprozesse, Meinung (öffentliche -), Meinungsfreiheit, Meister, Messer, Messerzücken, Militärgerichtsbarkeit, Minderfreie, Minorat (i.l.o. Jüngstenrecht), Missetat, Missio in bannum, Mittbestimmung, Mitverschulden, Monarchisches Prinzip, Monogamie, Mord und Totschlag, Münze, Münzeinung, Münzfuß (i.l.o. Munststoff), Münzmeister, Münzrecht (*jo*. Münzregal), Mutter, Mythischer Gesetzgeber, Napoleonische Gesetzbücher, Narr (*jo.* Narrenfreiheit), Natio (*jo.* Nationenbildung), Nationalismus, Nationalsozialismus, Nationalstaat, Nationalversammlung (Weimarer -), Nationalversammlungen (österreichische [1918-19] -), Naturalrestitution, Naturrechtsrenaissance, Nebenländer des Reiches, Neuhegelianismus, Neukantianismus, Normenkontrolle, Notarinstrument, Notstandsgesetze. Entries which have been dropped (though in many cases replaced by a different, sometimes more modern, term, or subsumed under a broader term): Körperschaftssymbolik, Kriegsgesetze, Kriegsverfahren, Kronkardinale, Kunstwerkfälschung, Kurfürstenrat, Landdrost, Landesfürstliche Gerichte, Landeshandfeste, Landeshuldigung, Landeskonstitutionen (brandenburgische -), Landesobrigkeit, Landhofmeister, Landtaiding, Lasterstein, Laten, Laube, Lebensmittelpolizei, Leges Upstalsbomicae, Lehnsadel, Lehnsanwartschaft, Lehnsaufgebot, Lehnsauftrag, Lehnsdienst, Lehnseid, Lehnserneuerung, Lehnsfähigkeit, Lehnskuss, Lehnspflichten, Leibfall, Leibherr, Limburger Chronik, Lohnkämpfer, Lohnvertrag, Majestätsbeleidigung, Manu firmare, Markt und Stadt, Medizin (gerichtliche -), Meeresküste, Mehrheitsprinzip, Merowingerreich, Messertrager, Kriegsgericht, Militärkabinett, Militärkonventionen, Militärseelsorge, Militärstrafrechtswissenschaft, Militärstrafverfahren, Minoriten, Monarchomanen, Münsterlander Landrecht, Münzstoff, Münzwert, Musterherr, Nachbar (sprachlich), Nachbarlosung, Nationalitätenstaat, Natürliche Grenze, Neustrien, Niedere Vogtei, Niederer Adel, Notstand (zivilrechtlich). New geographical names include: Königsberg, Konstantinopel, Kopenhagen, Kosovo, Krakau, Kroatien, Kulm, Landshut, Leiden, Lemberg, Letland, Liechtenstein, Litauen, London, Löwen, Lübeck, Lund, Lüneburg, Lüttich, Malta, Marburg, Mazedonien, Mecklenburg-Vorpommern, Meiß, Moldau (Republik), Monaco, Naumburg, Niedersachsen, Nordrhein-Westfalen, Norwegen, Nowgorod. New (or repositioned) entries for persons: Konrad II., Konrad von Megenberg, Konstantin der Grosse, Koschaker (Paul), Krause (Hermann), Kunigunde, Kunkel (Wolfgang), Kuttner (Stephan), Landsberg (Ernst), Larenz (Karl), Lasch (Agathe), Laski (Jan), Leopold III. (Friedrich Franz), Leyser (Augustin von), Liermann (Hans), Litten (Hans), Locke (John), Lotmar (Philipp), Luca (Giovanni Battista de), Ludwig der Deutsche, Luhmann (Niklas), Machiavelli (Niccolò), Martens (Friedrich Fromhold), Martini (Karl Anton Frhr. von), Maunz (Theodor), Maximilian I. von Bayern, Maximilian III. (Joseph), Mayer (Theodor), Meinhard III., Metternich (Klemens Wenzel Fürst von), Michael de Leone, Mittermaier (Karl Joseph Anton), Mommsen (Theodor), Montesquieu (Charles de), Murray (William, 1st Earl of Mansfield), Nipperdey (Hans Carl), Noodt (Gerhard), Nottarp (Hermann), Novalis. The reader will have noticed the appearance of Luzifer, but may be reassured by the fact that Michael (heiliger) has kept his entry, though now transfigured as archangel. Volume III only provides very few sayings in the form of a separate new entry: ‘Mitgegangen, mitgehangen’; ‘Ne crimina remaneant impunita’, ‘Nemo pro parte testatus’.

The list shows that some complex entries have been streamlined. In this third volume, this is specifically the case for the many entries in the first edition consisting of a compound noun

starting with Lehn- or Militär-. Apart from the main entry on Lehnrecht (*jo.* Lehnwesen), several compound nouns relating to feudal terms and notions have nonetheless been upheld. The same can be said for the military terms, with in addition a substantial entry on war (Krieg). The selection of geographical names and persons remains comparatively limited and therefore inevitably to some extent arbitrary. The problem is, as ever, that if one includes some names, it begs the question why other names have been left out. Now, for example, the HRG has John Locke, but not Thomas Hobbes (who continues to inspire much valuable scholarship, certainly relevant for legal history). One may be grateful for those entries which have been added, but for such a dictionary, places and names are like Pandora's box.

Some of the new entries entailed for me surprises. As with von Jhering in volume II of the new edition, I had to double-check whether, indeed, Mommsen had been left out in the first edition. However, the entry in this volume which was a cause of great merriment to me was that by our excellent colleague Albrecht Cordes, who is also general editor of the HRG (and who, like his fellow editors, has once again contributed with several entries himself to the project). The entry I am referring to is the one on Lex Mercatoria, and yet again, I was surprised that it was absent from the original edition. The reason of my amusement is of course that, for several years now, it has become highly unfashionable among legal historians to mention the Lex Mercatoria, or to profess any belief that any such transnational merchant law really existed in Medieval or early-modern commercial practice, when the term was coined. One of the major authorities for justifying the evanescing fate of the lex mercatoria in present-day historiography is… none other than Albrecht Cordes himself! The very scholar who now has given the phrase a new lease of life and a sizeable showcase in his own great project! All jest aside, this is a good example of what the HRG can contribute beyond the conventional purpose of providing a merely explanatory outline of a concept or term. In twelve dense scholarly columns (including an essential short bibliography), Cordes traces the fate of the phrase from the late thirteenth century until the present day. His survey starts with a pointed analysis of the use of the phrase in an English treatise from the 1280s following the tradition of the *ordines iudiciarii*, where *lex mercatoria* refers to specific procedural arrangements in commercial litigation. On the continent, too, there is evidence of both institutional actors and civil law scholars acknowledging the need to meet the demands of merchants for a more informal and swift handling of litigation in which they were involved. None of that, however, amounted to some universal (i.e. pan-European) body of commercial law created by the merchant communities. The body of laws which did emerge was the product of interaction between public authorities and merchant interest groups, i.e. they reflected the public governance of rulers in connection with these interest groups. They were, in other words, particular laws. During the early-modern centuries, commercial laws continued to develop within the framework of territorial states. In England, the phrase was used in the context a conflict of jurisdictions, where the ascendancy of competing political and judicial actors was at stake. In due course, the controversy caused a semantic shift, so that *lex mercatoria* ended up referring to a purported universal substantive law of merchants. The idea was picked up by continental scholars during the nineteenth century. Cordes points out that Levin Goldschmidts work fell short of wiping out the particular strands of commercial law, but that later writers would often play down or ignore such nuances in order to bring forward more assertively the idea of a universal merchant-made *lex mercatoria* from medieval times onwards. More recently, such writings have paved the way to a shortcut in Harold Berman's work, which in turn has been used as an historical justification by authors who instrumentalise the phrase in order to advocate the agenda of a 'new *lex mercatoria*' (not unlike, one may suggest, the instrumentalisation of a so-called 'new *ius commune'* in attempts to build a European private law). The reference to a *lex mercatoria* as an autonomously produced legal system produced through the interaction of merchants Europe-wide, is no more, Cordes argues, than "a romantic projection to the past of liberal conceptions from the 19th century and our present time" (col. 896). The entry is thus informative in a lexicographical sense, as it includes the meanings of the phrase, however ill-founded, in history and historiography, but it also provides a summary of its long-term

development and use. It provides a welcome concise scholarly clarification, but whether that will turn the tide of references in the ongoing discussion of a 'new lex mercatoria' is doubtful: as Cordes observes, repeated critical historical assessments since the 1970s of the spurious meaning it is credited with have had little impact on its enthusiastic use by supporters of the new merchant law (col. 891).

Among the other notable new entries, mention ought to be made of Literatur und Recht, which, together with a couple of other new entries (Kriminalroman, Novalis) confirm that Law and Literature themes are now increasingly well integrated in German legal history culture. Having said that, old entries which make an appearance in a rewritten form also remind us that, not least thanks to the Grimm brothers and the *Germanistik*, German legal historiography has a long and respectable tradition of Law and Literature (cf. the entry Nibelungenlied, in this new edition written by Christa Bertelsmeier-Kierst, who as general editor of the HRG also acts as the Board's philological adviser, no mean task).

I started this review with a general quantitative comparison between the first and the second edition. I would like to finish with a plea in favour of a continuing effort to keep reading both editions. For all the merits of the new edition, which offers the state of the art after several decades of intensive research and publications in many areas of legal history, that first edition was a formidable achievement and may often help to appreciate even better the new insights which the new edition provides. This suggestion also has a practical side: I fear that in many reading rooms, the new edition will simply replace the old one, which in the best of cases, will then be relegated to a storeroom and in effect become far less accessible. At least legal history departments or seminar libraries should keep the two editions readily available on their open shelves. While reviewing the first three volumes of the new edition, and each time making the collation of entries in both editions, I have been time and again convinced of the value of reading the entries 'then and now'. To give but one example which particularly struck me in this third volume: the entry Methode der Rechtsgeschichte. Back in 1980, it was written by Franz Wieacker. In the 22nd issue which appeared in 2015, the same entry was authored by Michael Stolleis.

Wieacker's angle for the entry was that of hermeneutics, for which he looked for inspiration in other historical disciplines and in the humanities (including theology). While he was aware of the importance of non-textual sources for legal history ('Überresten'), it is clear that in his view, texts provided the main source-material for legal historians. The hermeneutical angle allowed him to stick to the conventional distinction between external and internal legal history. The former, he said, was barely a hermeneutical science. With regard to internal history, he differentiated between the history of norms and institutions, on the one hand, and, on the other, the history of the intellectual treatment, through scholarly argumentation and reasoning, of the (mainly) textual foundations of legal history. The study of that legal science in its broad sense appears in Wieacker's entry as the true hermeneutical vocation of legal history. It had to remain focused on the past in order to remain a proper historical discipline, lest it would 'merge the horizons' of the original producers of the source and its interpretative tradition. The entry was published shortly before I embarked on my doctoral research about the use of civil law learning in the practice of higher courts during the transition between the medieval and early-modern times, and I remember that at the time, the entry seemed to give the general background of one of the most widely discussed themes of Wieacker's textbook on the early-modern history of private law, *viz.* the *Verwissenschaftlichung* of the law and legal practice.

Stolleis' new entry focuses more on current challenges facing the legal historian. These challenges are linked to the broadening of legal history's fields of interests, its extension to contemporary and present-day history, the increased inter-dependence with other areas of scholarship. European legal history can no longer be a yardstick for global legal history. Traditional specialisms within legal history by subject-matter (private law, public law, criminal law…) need to be overcome if legal history seeks to contribute to our understanding of the

interactive workings of normative thinking and human behaviour (col. 1478). The distinction between external and internal history is no longer sustainable, for external history also is based on constructs which cannot be reached without its hermeneutical share (a point, I would have thought, which could already have been made in Wieacker's time). Constructs, moreover, shift with time, and so also legal historians' readings of their source-material from one generation to the next. Even concepts (*Begriffe*), so dear and seemingly essential to *Dogmengeschichte*, are not timeless Ideas. What then, may be a stable methodological compass? First, Stolleis refers to the control function, in addition to all the conventional rules of the trade, of the scholars' community (col. 1479). Secondly, he seems to accept that language is an irreducible feature of the human condition. In a critical note addressed to the 'iconic turn', he argues that "images also need to be translated into language". In legal history, along this view, this also applies to "images as instruments of communication, court-rooms, ceremonies and rituals a.s.o. It is obviously impossible to avoid the language by referring to speechless facts or images" (col. 1481). Perhaps Stolleis' view is still overall correct at present, but the fast-developing forms of communication based on imagery without words, combined with various devices and techniques of so-called artificial intelligence, makes one wonder whether his reliance on language, however broadly defined, as a necessary form of social interaction will still be warranted in another forty years' time. More problematic in the short run may be Stolleis' reliance on the 'scholars' community' combined with his (no doubt correct) assessment of *Begriffe* as variable entities in history. He does briefly acknowledge in this entry the need for legal dogmatics to rely on the fairly stable meaning given to words for the sake of the law-based political order (the *Rechtsstaat*). This, however, may be an instance where Stolleis' profound humanity and optimistic outlook may have overruled the legal historian in him: for in answer to his final call for legal history to provide insights in the historical variability of legal forms and solutions with the assistance of law, the reader may wonder what to make of (to mention but two areas which Stolleis was well familiar with) the consensus of the 'scientific community' which was supposed to prevail in nazi and later communist Germany, for example in re-interpreting the general concepts and provisions of the BGB. We may believe that we are well advanced in meeting standards of methodology, but the beacons of the legal historian's professional ethics remain elusive as ever.

This example of a single entry may, I hope, convince the reader how rewarding it remains to keep track of both editions of the HRG. As I fear that my appeal to retain both copies in reading rooms will not elicit much sympathy from most librarians, I extend the call to the publishers, Erich Schmidt Verlag, who once again deserve full praise for their handling of this long-term project. Perhaps that, when the end of this second edition is in sight, they could ensure that the on-line version of the HRG (which, one may hope, will later be converted into an ongoing updated work of reference) would include a direct link to a digitalized form of the first edition. The HRG is a tool which is not only useful for legal historians, but for historians and scholars of the humanities at large. The relatively modest costs of ensuring the second life of the first edition, along the new one, may therefore even be considered worth a DFG grant.

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