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*[translated by Martin Voelker]*

[3]

## I.

The unchangeable principles and changeable real conditions (*Wirklichkeitsbedingungen*) of the law are equally indispensable for the realisation of justice, which is the ultimate goal of all law. Whereas natural law thinking and other, more precise conceptions are interested in its highest principles, the following small contribution seeks to address those reality conditions, which lie in the subjective conception of justice found in the great European codes that still dominate our application of law today.

This task is not easy. The social anthropology and substantive social ethics of a given legal order are harder to gather from the great private law codes than from other public documents. Their technical aspects, namely a highly developed conceptual language, the difficulty of concretely understanding abstract norms and the neutral, objective nature of modern codes make the ethical and social assumptions of the legislature unintelligible for the unprepared observer. As a result of these formal features, described by Max Weber, a society can even be radically altered without the external appearance and legal technicalities of codification altering with it; indeed, ultimately the same style of codification, the same legislation can equally serve completely contradictory ways of life or perspectives. To a certain extent, this is both the blessing and the curse of any highly developed and rationalised professional jurisprudence. Accordingly, the *Corpus Iuris Civilis* claimed the same authority in the coercive and corporatist Byzantine state, in the hierarchical, corporatist High Middle Ages, in the monetarism and overseas trade of the early modern period, in the mercantilism of absolutist territorial states and finally in the classical liberalism of the last century. Equally, the modern private law codes, such as the French or German civil codes, were able to be applied in Western Europe, in Central Europe, in the Soviet Union, in other anti-liberal systems of government and finally in the Middle East or East Asia without any significant alteration.

The dominance of the same style of codification across wide tracts of the Earth, as well as its survival in spite of social changes, thus disguises significant factual events in legal history, [4] from early history to the present. For if legal history is indeed the true history of the entire law, then this must include uncovering the social model of a given legal order, changes therein and equally its secret design, which is initially concealed by the literary, humanistic and conceptual continuity of the academic tradition. This academic and professional tradition of course is a central topic for professional legal history and doctrine; but on its own, it does not give a comprehensive account of the legal spirit of the time. The following seeks to give such a summary, using the example of German private law. This example is also characteristic of the entire development of private law in Central and Western Europe over the last centuries; specific instances of cultural lag will be identified where relevant.

## II.

In the eyes of technical lawyers, the German Civil Code of 1900, which was in fact formed in the last quarter of the last century (1874–1896), was the fruit of the Pandectists' labour, and thus initially appears to be fundamentally different to the French *Code civil* and its descendants.<sup>1</sup> These Western European laws, by contrast, were directly derived from the rational ideas of early natural law and the concept of the unconditional legislative power of the sovereign democratic nation.<sup>2</sup> Influenced by the Napoleonic Code of 1814, even the German natural lawyer and Romanist Thibaut called for such a unitary 'national code'.<sup>3</sup> But even those who know little of our legal history know that Savigny immediately opposed this plan, influenced by political romanticism and the philosophy of Schelling, and succeeded because the European Restoration did not permit a politically unified German (or Italian) nation, fearing that a national code would lead to a national democracy, its greatest enemy.<sup>4</sup>

Meanwhile, the antithesis between the intellectual foundations of the *Code civil* and the German manner of codification begins to blur on closer inspection. Since 1848, the transition

<sup>1</sup> Radbruch, *Rechtsphilosoph.* 4 (1950) 128 et seq.; 168 et seqq.; Wieacker, *Privatrechtsgesch. d. Neuzeit* (1952) 256 et seqq.; 284 et seq.

<sup>2</sup> P. Mornet, *Les origines intellectuelles de la révolution française* (Paris 1933) 17 et seqq.; 112 et seqq.; Thieme, *Ztschr. d. Sav. -St. German. Abt.* 57 (1937) 359; Wieacker op. cit. 157 et seq.

<sup>3</sup> *Über die Nothwendigkeit eines Allgemeinen Bürgerlichen Gesetzbuches für Deutschland*, Heidelberg 1814; hierzu zuletzt Radbruch aO 108; Wieacker 234.

<sup>4</sup> Wieacker 234; 271.

from the older, Pandectistic Historical School to German national codes was made under the same liberal, democratic drive that sustained the European revolutions in France, Belgium, Italy and Switzerland. For this transition, the new legislation could draw directly on the legal culture of the Pandectists; for, contrary to external appearances, the cultural romanticism and humanism of the Historical School were not the true ethical and political core of this legal culture.<sup>5</sup> The new humanism restored the dignity and reputation of jurisprudence's classical heyday among the educated classes and inspired unparalleled academic enthusiasm, but played little part in producing its systematic results. Neither did the historical metaphysics of romanticism provide private law theory with a framework for normative legal ethics or with the closed conceptual system that it requires. Just like the Western European codes, the nineteenth-century law of the Pandectists, which found its classical, European expression in textbooks from Puchta through to Windscheid, was rather based on the rationalistic branch of natural law; in turn, the intellectual foundations of this branch of natural law, which was systematised by Hobbes, Pufendorf and Christian Wolff, consist in Galileo's physical world view and Descartes' critical rationalism. The Pandectistic system can be traced back to the work of Christian Wolff's pupils, in particular Nettelbladt and Darjes;<sup>6</sup> although they borrowed methodology from Hegel, the concepts used by the Pandectists did not significantly differ from the tautological rationalism of Christian Wolff.

The Pandectistic school only differed from the postulates of the natural law *ius commune* in its substantive ethics. It abandoned the uncritical anthropology of all pre-Kantian natural law, which always followed the Aristotelian-Thomistic tradition of social science. As philosophical jurists, the founders of the historical school do not fail to provide us with the difficult insight into these foundations. When it comes to rights that are based only on practical tradition or an autonomous, technical expertise, one cannot ascertain the theory behind their ethics – unless one engages in a more or less intuitive interpretation of the 'spirit' of a historical legal order, as ethicists such as Montesquieu, historical metaphysicists such as Hegel and Gans or positivists such as Jhering and Max Weber have undertaken. Philosophical legal science, however, happily furnishes an account of its premises. Above all, Savigny's 'System of the Modern Roman Law' (*System des heutigen römischen Rechts*) leaves no doubt that his concept of individual rights was based on Kant's formal ethics of duties and freedom. When he describes them as representing 'the power of will'

<sup>5</sup> (Stintzing-)Landsberg, *Gesch. d. dtsh. Rechtsw.* III, 1, 257; Koschaker, *Europa und das römische R.* (1947) 261; Erik Wolf, *Große Rechtsdenker* 3 (1952) 585 in contrast with seqq.

<sup>6</sup> Above all A. B. Schwarz, *Ztschr. d. Sav-St. Roman. Abt.* 42 (1921) 578 et seqq.

(*Willensmacht*), this is not to be understood in terms of the older, Western European concept of freedom, such as Locke's concept, but in terms of Kant's concept of moral [6] freedom. Entirely in contrast with the General State Laws for the Prussian States, yet in accordance with Zeiller's Austrian Civil Code and Feuerbach's Bavarian Criminal Code, the Pandectists no longer followed the pre-critical doctrine of obligation found in older natural law, but rather favoured the formal concept of duty and power derived from the unconditional, eternal autonomy of Kant's concept of moral personality; its fundamental principles were that one's own freedom should be optimally reconciled with the freedom of all others, and that individual maxims of behaviour should conform to a general rule, i.e. the categorical imperative.<sup>7</sup>

This great ethical model of the Pandectists could find no lasting success in the economic society of the nineteenth century, which by no means saw freedom only as moral freedom, as subjective idealist philosophers did. At least in practice, the concept of freedom used by the Historical School was understood in the sense of classical European individualism. This reveals another, even more significant way in which German and Western European models of codification converged in the nineteenth century. In spite of the idealistic and politically rather conservative attitude of its founders, the premises of the Pandectists overwhelmingly accorded with the political and economic ideals of those classes that saw themselves as pioneers of social progress in the nineteenth century, in particular the class of bourgeois industrialists. This emancipated bourgeoisie saw themselves both as representing the endeavours of the political nation and as models of proper economic and socially ethical behaviour. This class was both celebrated and challenged in German novels of the time, such as the aggrandising works of Stavenhagen and Gustav Freytag (*'Soll und Haben'* ('Debit and Credit')) or the gentle yet incisive social critique of Fontane – just as they are in Balzac's *Comédie humaine* or in English social novels of the Victorian era.

If one analyses the two strands of political thought to which these pioneers of progress and the industrial revolution in Germany and other Western and Central European countries adhered, it becomes apparent that the cause of instability in the basic socio-ethical concepts of the private law codes lies in the deep contradiction between liberalism and democracy. Having achieved dominance through their common struggle against the absolute state, the

<sup>7</sup> On their influence on Savigny, see Coing, *Dtsch. Landesref. z. III. Intern. Kongr. f. Rechtsvgl.* (London 1950) 199 et seqq.; on the relationship to older natural law, see Welzel, *Naturr. u. mat. Gerechtigk.* (1950) 165 et seqq.

two strands of thought were from the outset both irreconcilable and yet closely intertwined. This applies even to their intellectual origins: Liberalism has its origins in the religious and political freedoms of the old classes that [7] asserted themselves against absolutism in the old European republics, above all in England, England's colonies in North America, the Netherlands, the Swiss Confederation prior to 1848 and some towns and rural areas in our own country; in contrast, modern democracy is the direct heir of the absolute sovereign, whose power Rousseau transferred to the collective will of citizens. Their fundamental views on the relationship of the individual to the state are opposed: Liberalism demands freedom of the individual or autonomous corporations from the state, democracy demands as much participation as possible of citizens in the functions of government, citizens being both the governed and those governing. They are also opposed as regards their views on the limits of social tasks: on the one hand, the greatest possible restriction of state functions to prevent the development of the individual being inhibited;<sup>8</sup> on the other hand, the greatest possible expansion of state tasks, from universal duties such as military service, compulsory education and taxation to universal public services and political education.

Today, this early contradiction between the two ideals of nineteenth century society has come to prominence once more, in the form of the Western and Central European welfare and 'administrative' state; in particular, in the difference between the two great political parties in England and the similar situations in Italy, France and West Germany. In the nineteenth century itself, the contradiction often appeared to be reconciled or concealed, because liberalism and democracy considered themselves allies in the fight against feudalism or absolutism, or later in their common fear of revolutionary socialism. The great private law codes of that century rely on this semblance of reconcilability, and herein lies the reason for the precarious state of current European society, in which this semblance has proved to be an illusion. For freedom and equality, which are indeed reconcilable as regards the citizen's political status in an integrated democracy, cannot in practice be reconciled as regards possession of economic goods; the more the constitutional state becomes an administrative and welfare state that makes the ordering of property rights its main task, the more questionable the ideals of the great old codes become. The industrialist class' liberal yearning for freedom and the unmoneyed classes' yearning for equality could even then only be reconciled provided that the 'educated and propertied', i.e. those adhering to the ideal of

<sup>8</sup> A typical example is the famous youth text of Wilhelm von Humboldt, 'Versuch, die Grenzen der Wirksamkeit des Staates zu bestimmen'; as to particular requirements, see Schaffstein, Wilh. v. Humboldt (1952) 74 ff.

economic and cultural liberalism, saw themselves as representatives of the population and were largely able to realise this claim against other classes. The [8] classic manifestation of this was the French Revolution, whose eventual victors, after the overthrow of Hébert's socialism by Robespierre and above all the fading of the Terror, were the bourgeois upper class. This supremacy was established in other ways in Germany and Italy, where the revolution of money and industry took place several decades later; the supporters of this European movement in 1848 in Germany and Italy were predominantly democratic liberals, while in France they were in part already revolutionary socialists. It was at this point that the claims of the old liberal society first began to become fiction.

Throughout the process of codification from 1848 to 1896, the close but temporary alliance of liberalism and democracy within the nineteenth-century political *Zeitgeist* manifested itself in key events:<sup>9</sup> in the national, democratic demands for codification of Thibaut or Georg von Beseler; in § 64 of the Constitution of the German Empire of 1848 providing for legislative competence 'to create legal unity for the German people'; in the legislation of the German Confederation and North German Confederation (1867–1871), in particular for commercial law, trade law, exchange law and the law of obligations; later, after 1871, in the struggle of the national liberal faction for competence on all civil law, which Bismarck had reserved to individual states yet was granted in the Lex Lasker of 1874; and finally in the restriction of rural exemptions (EGBGB Art. 55–152). Corresponding developments can be seen in the later Swiss codification movement.<sup>10</sup>

The Pandectist School and this legislation satisfied the demands liberal democracy made of private law in a specific, unique way:

- a) In terms of national politics, the pan-German Pandectist movement advocated unitary legal education and development throughout Germany, indeed in the entire German-speaking area, and thus brought the idea of German unity to fruition.
- b) In terms of economic policy, the freedom to shape one's legal relations, which manifests itself in the three fundamental concepts of personal autonomy, in freedom of contract, of ownership and of testament, precisely corresponds to the expectations of the expansive and extensive industrialist society of early and high capitalism, which as a pioneering society

<sup>9</sup> The most recent overview can be found in Wieacker op. cit. 273 et seq.; 265 et seq.; 279 et seqq.

<sup>10</sup> Egger, Entstehung und Inhalt des Schweizer ZGB (Zürich 1908); cf. also Wieacker 294.

depended on concluding contracts, making loans and freedom of testament.

c) In terms of social politics, the classless unity of codification was an expression of the disempowerment and levelling of the old class hierarchies of birth and occupation. The apparent exception made for commercial law, as [9] a special law for traders, is not truly a class right. Given that it is open to anyone engaged in trade, it is rather a special law governing the activity of trading. Indeed, where one engages in trade, the formalism and rationalism of private law is in fact heightened; tellingly, precisely these features make it a 'pioneer' of the law of obligations. It is precisely its technical rules for conclusion and execution of contracts that in 1900 passed from the German Commercial Code into the Civil Code (§§ 130 ff; §§ 325 ff BGB).<sup>11</sup> The type of transactions that commercial law both privileges and subjects to special discipline is also telling: it is the occupation of the industrialist class, as already encouraged by Napoleon's Code de Commerce.<sup>12</sup>

In particular, the Civil Code of 1896 is the overdue child of the Pandectistic school and the national democratic and since 1848 primarily liberal movement. Coming into force in the first days of this century, already in the evening twilight of high capitalism, it was conceived at a time that was barely foreseen by the European revolutions. It is thus self-evidently soberly and without the pathos of a recent victory or a looming threat that it adheres to the three fundamental freedoms of private law: freedom of contract in § 305, freedom of ownership in § 903 and freedom of testament in § 1937 – the last of these less egregiously and with an exception creating admittedly weak rules on mandatory legacies. If this comes across as pale and expressionless, then it is all the more important to note which substantive ordering principles private law expressly rejects: e.g., consideration of the *iustum pretium* (just price), *laesio enormis* (lesion beyond moiety) or a cap on interest, as manifested in the subjective rules on duress in § 138 II; through the silence of §§ 241 ff and the exceptions in § 321 and § 621, the *clausula rebus sic stantibus* ('things thus standing', i.e. the doctrine of fundamental change of circumstances), a fundamental problem of any system of substantive private law ethics is addressed; finally, it implicitly treats monetary debts as debts of a nominal value, the amount of which is independent of fluctuations in monetary value. All these decisions put the law in contrast both with the old *usus modernus pandectarum* ('modern customary law of the

<sup>11</sup> In doing so, the fundamental questions of civil contract law were evidently incorrectly depicted by the generalisation of a very specific solution. The peculiar fall of the central concept of breach of contract and the rise of the recognisably definitive concept of inability to perform (*Nichterfüllung im Unvermögen*) can only be explained in this way.

<sup>12</sup> Cf. Wieacker 212; 275.

Pandects’) and with the progressive natural law codes. In a specific liberal sense, namely to serve a particular selective function of private law, it serves as a *leges vigilantibus scriptae* (‘law written for the watchful’).

This spirit of the Civil Code is still the same as that of the *Code civil*, which admittedly is less liberal in this respect, or the *Codice civil* [sic] of 1865. Even the humanism of the Historical School, which did leave its mark, does not distinguish it from the older codes. For beside [10] the nationalist revolutionary and liberal components, Napoleon’s code was after all also based on a humanist, Romanist tradition: the tradition of elegant jurisprudence.<sup>13</sup>

### III.

The social model of Western and Central European codifications thus rests on a single economic class’ usurpation; it made the ‘propertied citizen’ the primary representative of the national legal order, and was necessarily only able to do so to the detriment of other classes and occupations. If it has already been shown that the formal ideals of the civil legal order were tailored precisely to the needs of the expansive, entrepreneurial and rich pioneers of the industrial revolution, then it is equally clear that these ideals were imposed to the detriment of those classes whose living conditions did not fit these ideals. These classes were highly varied, including large-scale landowners, traditional labourers such as farmers or craftsmen and finally the class of salaried workers, who during the Industrial Revolution were composed, also in Germany, of the sons of those in such traditional occupations. For these occupations and classes, freedom of contract, ownership and testament, which became such crucial prerequisites for the trade and business of the industrialist class, were at best not a vital interest, and often moreover a threat to their usual living conditions. This is true not only for the weakest of these occupations and classes, but equally for the strongest.

Even for the governing nobility, such as sovereign princes and lords, the law of persons and family law would have constituted a severe interference in family inheritance and aristocratic privilege, were it not for exemptions in the form of a special private law for the aristocracy. Large-scale landowners, who retained their privileged position and public power above all in

<sup>13</sup> Sagnac, *La législation civile dans la révolution française 1789—1804* (1898); most recently e.g. Thieme, *Naturrecht u. europ. Privatrechtsgeschichte* (1947) 26 et seq.



Prussia, found that the freedom to dispose of land, whether inter vivos or by testament, interfered with their system of undivided inheritance, which was the economic lifeblood of their public power. Freedom to grant security over land, which suited the industrialist class' need for capital, threatened large-scale landowners in economic difficulties or debt with overindebtedness and eviction from their inherited lands. Acrimonious conservatives were ultimately successful in countering these dangers through the preservation of entailed estates and the *fideicommissum*.

No other classes or occupations sufficiently succeeded in creating a special legal order to [11] insulate them from the dangers of civil law. Even large- and medium-scale farmers were threatened by division of their estates due to freedom of testament and, in cases of personal profligacy, overindebtedness and eviction from taking credit. The manorial law of the states and regions tried to counter these dangers, but did not inhibit freedom of disposition over agricultural property. For small-scale farmers directly neighbouring large-scale farms, overindebtedness and division of estates were a deadly danger. Where there was no state legislation protecting farmers (as in Mecklenburg and parts of East Elbian Prussia), small-scale farmers disappeared exactly after the end of serfdom, under a legal order founded on economic freedoms.<sup>14</sup>

Craftsmen, who were poor in terms of capital and threatened by industrial competition, which rendered traditional business models and antiquated means of production incapable of competing, were subject to the industrial upheaval of economy and society in manifold ways. Their sons would form the core of future skilled labour and the political elite of the working classes. In other cases, craftsmen themselves became great entrepreneurs and industrial pioneers. To the present day, artisan businesses have been integrated into the new means of production, by themselves becoming workshops for larger production facilities.

In which way the newly developing class of salaried workers was endangered by the freedoms of the old liberal order has been described by socialist, in particular Marxist, social critics, in classic analyses and texts, which have now passed into public consciousness. The legal institution that allowed the exploitation of salaried workers in early and high capitalism was freedom of contract, in particular the 'freedom' to shape contracts of employment, which was originally indeed the freedom to oppress others by dint of great economic power. Such

<sup>14</sup> Max Weber, *Wirtschaftsgeschichte* (1923) 54 et seqq.

freedom found all the more derision because its necessary counterpart, freedom of association, which later became such a powerful weapon, was long consciously and partially tendentiously rejected. The defective nature of the unincorporated association (*Verein ohne Rechtsfähigkeit*) is evidence of this fundamental injustice; tellingly, it was remedied by recourse to the personal autonomy of articles of association, i.e. to contractual freedom.<sup>15</sup> The discrepancy between freedom of contract and lack of freedom of association is one of the few sad elements that support the interpretation of the [12] civil law order as a tool of class oppression.

If it is indeed true that the apparent reconciliation of individual freedom, i.e. liberalism, with the complete integration of national society, i.e. democracy, was only possible while the exponents of economic liberalism simultaneously considered themselves the champions of national democracy, then this recognition that one economic class usurped power over all others also suggests that the civil law order of the nineteenth century would not succeed in socially integrating all of national society in future. Given that it was above all in Western Europe, particularly in France, that propertied citizens fully identified themselves with the state, no one more acutely expressed this inevitable conflict than the French revolutionary socialists and communists in their conflicts with the bourgeoisie, which reached their bloody pinnacle in 1848 and 1871. In *'Le Lys Rouge'*, Anatole France, the heir of the great ethicists, expresses a personal truth, as is the poet's prerogative, when his character Choulette, an old Communard who represents Verlaine, says: *'Comme cette révolution a été faite par des fous et des imbéciles au profit des acquéreurs des biens nationaux et qu'elle n'aboutit en somme qu'à l'enrichissement des paysans madrés et des bourgeois usuriers, elle eleva, sous le nom d'égalité, l'empire de la richesse. Elle a livré la France aux hommes d'argent, qui depuis cent ans la dévorent. Is y sont matres et seigneurs.'*<sup>16</sup> What follows is his even more famous quotation about the law, in its majestic equality, forbidding the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread.

In Central Europe, where propertied citizens shared power with the older classes or never gained it at all, the conflict between propertied society's legal ideals and the unpropertied classes' ideals of justice did not always show itself as incisively or express itself as

<sup>15</sup> On discrimination against unincorporated associations, see most recently Boehmer, *Grundlagen d. bürg. Rechtsordn.* II 2 (1952) 168 et seqq.; further references can be found therein, 167; in particular Stoll, *Die Praxis d. RG II* (1928) 61.

<sup>16</sup> *Le Lys rouge*, ch. VII, 1.

dramatically. As a matter of fact, however, it did also exist here. Given that this contradiction lies at the root of the current crisis of the old social model underlying our code, we shall next examine the model's opponents in the last century. They were no longer driven by the urge for freedom, but by the urge for order and security, which was to become the great temptation of our age. These opponents consisted primarily in the idea of socialism and the practice of state intervention in the economy. Nevertheless, its other opponents should not be overlooked. [13]

#### IV.

1. The ideological opposition of the disadvantaged occupations and classes to the fundamentals of the liberal legal order was weaker than one would presume from the extent of nineteenth-century social critique. Macroeconomists, sociologists and social critics often tend to underestimate the influence of formal legal ideals on social reality, while legal philosophers and technically trained lawyers are rarely critics of their society.

a) The social doctrines of European conservatism, which became a conscious force in light of the French revolution, tend to disregard liberal private law's task of delivering justice, because they see tradition, authority or state commands as instruments of a proper social order. Conservatism thus does not primarily engage with the question focused on in this article, namely to what extent freedom and just disposition over economic goods can be reconciled.

b) Socialist critique, above all familiar in the works of Karl Marx and French socialists' critique of ownership, identifies private law as a social model and thus realises that it can be abused as a tool of class dominance. However, it sees law entirely as a social phenomenon, and thus refuses to direct social reform using the formal legal ideals of private law; it underestimates the prospects of creating a more just social order, in particular regarding the distribution of goods, using the tools of private law. Although it recognises, most clearly in Lasalle's *'System der erworbenen Rechte'* ('The System of Acquired Rights'), that positive law, as a means of keeping the peace, cannot bring about a more just redistribution of goods, it refuses to recognise that the ability of any legal system to be a means of keeping the peace excludes carrying out radical social reform while staying true to legal ideals. However, this

does nothing to change the fact that socialist critique of private law (above all the Viennese academic socialist Menger's book on civil law and the unpropertied classes and the works of his compatriot Renner) irrefutably showed that where there is economic inequality, private law's freedom to shape one's legal relationships, to the extent that it is only an opportunity, tends in the long term to reduce the freedom of those with fewer opportunities.<sup>17</sup>

c) Independently of conservative and socialist critique, Otto von Gierke, in his famous critique of the first draft of the Civil Code (1888/89), called liberal private law to account. It [14] is not easy to grasp the fruits of his critique; for it is necessary to look beyond the nationalist and romantic overtones, the metaphorical language and finally the positivistic prejudices of his social theory, to recognise that Gierke was indeed the most promising, deepest critic of private law of his time.<sup>18</sup> It is also impossible to go into all the details of his extensive social theory here.<sup>19</sup> However, by the end of this article we will have recognised that there was perhaps no nineteenth-century legal conception that more clairvoyantly predicted the social spirit of the liberal legal order in the twentieth century than Gierke's exposition of law's social function.

2. Civil law liberalism did not only encounter limits set by ideological opponents, but also limits set by tangible, political opponents. Especially in Germany, the legislature and executive never permitted unrestricted implementation of its ideals. Given that this was the result of particular constitutional conditions in Central Europe in the nineteenth century, and was not reflected in Anglo-Saxon or Romance countries, it must be explored a little further.

In all German states, but above all in Prussia, Saxony, Austria and the southern German states, the government considered public order, the advancement of welfare and economic development to be its duty, to perhaps an even greater extent than in the declining absolutism of Spain, France and the foreign dynasties of Italy. The disagreeable aspects of the authoritarian German state's tendency to regulate, which especially on foreign soil could degenerate into petty despotism, should not deceive Western European observers, for the German state largely owed its almost unfathomable approval among German citizens to its promotion of public welfare.

<sup>17</sup> First in 1890, directly opposing the first draft of the Civil Code.

<sup>18</sup> On von Gierke, see most recently Erik Wolf, *Große Rechtsdenker* 3 663 et seqq.; extensive references to literature can be found at 706 et seq.; somewhat contra, see Wieacker 267 et seq.

<sup>19</sup> *Genossenschaftsrecht I-IV; Die Genossenschaftstheorie und die Praxis des Reichsgerichts* (1887); Althusius (1880); *Das Wesen der menschlichen Verbände* (1902).

The authoritarian German state accordingly put tighter limits on the dominance of liberal private law than any other Western or Central European country. These exceptions were both reactionary and welfare-based in nature.

a) Reactionary exceptions served to protect the interests and perspectives of the ruling classes. Exceptions to the liberalism and equality of general private law existed: in family and inheritance law, for the dynasties and nobility through a special private law for sovereigns (*Privatfürstenrecht*); in land law, through the preservation of entailed estates and the *fideicommissum*; and in labour law, through paternalistic laws of servitude for household servants and agricultural labourers, until 1918<sup>20</sup>. [15]

b) Moreover, the German state had long altruistically realised the interests of classes not represented through citizenship. This included farmers, craftsmen and, later, workers.

1. Wherever the state was not dependent on the military and political cooperation of large landowners (as in Prussia, for example), it sought to protect farmers against large landowners and to encourage an economically free society. It prohibited enclosures, i.e. the removal of peasants from their lords' lands. It prevented fragmentation of estates through undivided systems of inheritance of farms. It organised the provision of agricultural credit through credit unions and limited the debt that could be secured by a charge.

2. Wherever it clashed with the demands of orderly agriculture, freedom to dispose of land was limited by public law on hunting, fishing, water and construction.

3. Public law has also generally adhered to freedom to trade since 1869. However, at least as regards craftsmanship, mining and other qualified professions, the German welfare state did not abandon its exceptions to freedom to trade.<sup>21</sup> In these core areas controlled by the old town guilds, the concept of the welfare state and communal ordering of the means of sustenance of individual businesses has survived to the present day. The attempts of the American occupiers of our country to introduce extreme freedom of trade after 1945 in their zone never found the approval of the bureaucracy or the relevant professions.

4. Revolutionary socialism made Bismarck aware of the dangers that the liberal employment

<sup>20</sup> It was repealed by an order of the Council of the People's Deputies of 12 November 1918.

<sup>21</sup> Overview can be found in M. Wolff, *Sachenrecht* 9 (1932) §§ 96 et seq.; Heck, *Sachenrecht* § 114; and Weigelt, *Die preußische Bergbaugesetzgebung* (1933).

contract posed for public order. This great statesman was not capable of foreseeing that the working classes did not merely want to be compensated, but rather demanded integration into national society. However, the old aristocratic tradition resided in him that kings should protect their poor subjects from the trespasses of the rich and powerful. In this vein, and in the face of resistance from the unsympathetic industrialist class, he created a system of social security that would in future usher in new justice, by constructively combining the ideas of state intervention and neighbourliness. That an adherent of an already outdated feudal way [16] of life created something that pioneered the positive aspects of the twentieth-century revolution is an illuminating testament to his historical and moral greatness.<sup>22</sup>

Nevertheless, social security is most telling of how very much the old authoritarian, law and order state (*Ordnungsstaat*) lives on in the social and socialist institutions of the modern state. The strength of this tradition explains why the state-run, socialist elements of modern social reform are so strong. In his dramatic style, it can be seen even from the title of Oswald Spengler's highly insightful treatise on 'Prussianness and Socialism'. Observers from those countries in which the third estate triumphed over the authoritarian state once and for all will not note this link without fear and aversion. German liberals will feel the same sentiments, and with good reason.

## V.

If, in the above, we described the Civil Code as an overdue child of classical liberalism, this is thus only true with the proviso that the authoritarian and welfare-based exceptions of the old German states did not permit the full realisation of the liberal social model; instead, they favoured special laws for the aristocracy, measures to protect feudal and agricultural landholdings, public land law, restrictions on freedom of trade and public labour law. The monumental extent of these countless exceptions becomes clear in the Introductory Law to the Civil Code; it has been referred to as 'legal unity's list of casualties'; an even more apt name would be 'liberalism's list of casualties'.

Nevertheless, it remains true that the Civil Code codified the ideals of bourgeois nineteenth-century society. This conclusion is not impinged upon by the fact that some elements

<sup>22</sup> Otto Voßler, Bismarcks Sozialpolitik, Hist. Ztschr. 167, 43 et seqq.

preserve authoritarian or paternalistic traits and other elements preserve room for future social needs.<sup>23</sup>

a) First and foremost, such paternalistic traits dominate family law: both as regards personal marriage law, in the predominance of husbandly power of decision-making, as well as the matrimonial property regime, which is only now undergoing radical reform. Equally, the law relating to children and guardianship is based on paternalistic ideas; incidentally, these are ethically sound and realistic. Authoritarian elements can be seen in the law on charities and, in the pre-1918 version, the law of associations. [17]

b) The editors of the Civil Code were proud of its social elements, which were stimulated above all by Gierke's critique of the first draft. In this sense, the code truly was thoroughly superior to the older European codes. However, these elements have highly heterogeneous origins. They arose partly from the interest of ethically grounded liberalism in the probity of the rules of economic competition (cf §§ 138 II, 243, 1229 and 1136), partly from the interests of particular occupations that were able to make their voices heard in parliament, above all agriculture (the law of bees, liability for defective livestock and liability for animals in the 1908 version). Landlord and tenant law at least recognises the need to protect the socially weaker party, i.e. the tenant. The provisions protecting workers in employment contracts (§§ 616–619 and 626 Civil Code), which are sound and progressive, still echo paternalistic attitudes in their current form. On the other hand, the acquisition of property by the manufacturer of goods in § 950, adhering to the Germanistic 'principle of production', constitutes a highly impractical homage to political romanticism, in contrast to the Romanist tradition. In conclusion, then, this much-celebrated 'drop of social oil' in the Civil Code is more a testimony to the moral soundness of this bourgeois piece of legislation than a prelude to the future welfare state.

The Civil Code should thus be seen as the last victory of the old bourgeoisie, albeit a Pyrrhic victory. The equalisation of bourgeois society with the entire nation underlies all European codes of the nineteenth century, and allowed even individualistic codes to be seen as documents to integrate the entire modern nation – however, this unique situation disappeared as the prestige and economic dominance of this class was shattered. Even as the Civil Code was in its infancy, the first shadows of the coming European revolutions began to loom, and

<sup>23</sup> The following can be found in Wieacker op. cit. 289 et seqq.

these shadows grew to giant proportions after the First World War, which marked the outbreak of those revolutions. What followed was a quiet yet complete transformation of the social model upon which modern private law is founded.

This transformation is familiar, to even the least unknowledgeable of our contemporaries, in the form of persuasive or cautionary slogans. However, historians and interpreters of the recent development of private law have a more modest and less thankful task than repeating these banalities. Once one resigns oneself to the recognition that slogans can be taken to mean entirely opposite things, one rather leaves such slogans aside and asks what specific legal changes have been made to the social order and, ignoring political fluctuations, considers the long-term trends. For it is these, rather than the words spoken, that evidently constitute the lasting, enduring events of our time. Accordingly, we will track the quiet transformation of private law through case law and those pieces of post-First World War legislation that have proved to be enduring.

## VI.

Perhaps the most significant achievement of civil law jurisprudence, which is often criticised as unworldly, is the transformation that ascribed a new social model to the great codification of 1900 without giving up its traditions. Led by the *Reichsgericht* (Imperial Supreme Court of Justice) and barely noticed by the public, the case law of the last half-century has transformed the formal ethics of freedom on which the private law order was based back into substantive ethics of social responsibility; transformed ‘back’, because it thus, largely unconsciously, returned to the ethical foundations of the older European *ius commune* and natural law. This observation can be shown by reference to four examples, with which experts have long been familiar: the treatment of declarations of intent; the concept of obligations as organisms; the *clausula rebus sic stantibus*; and the development of duties of ownership.

a) The interpretation of declarations of intent has been characterised by the transition from the Pandectists’ intention-based dogma – or its simple opposite, the so-called ‘declaratory theory’ – to a theory based on the promisee’s expectations: declarations of intent are interpreted from the perspective of a reasonable recipient. This is a return to the core function that natural law ascribes to human declarations. A related tendency to objectivise the legal



effect of social facts can be seen in the increasing impact of the concept of the *Rechtsschein* ('appearance of validity') in the widest sense of the word, and in the harmonisation of the legal effect of 'factual' and intentionally created legal relationships. What these tendencies all share is that they no longer see contract as an individual, spontaneous exercise of intention, but as the execution of a typical, supra-individual social function; they all take place against the same backdrop, namely that of a change from an individualistic economic society to a society structured around socially typical behaviour, a society of public services and welfare ('*Daseinsvorsorge*') that incorporates the substantive goals of a modern administrative state.<sup>24</sup>

b) Legal theory and case law have recognised that obligations, which are seen as individual obligations in the Civil Code, exist as an organism, [19] i.e. they consist in the entire contractual nexus, in a social set of facts, which can result in obligations arising for both parties that extend beyond merely carrying out the performance agreed upon. Tellingly, this can also result in contractual duties arising for the promisee under a unilateral contract, e.g. the recipient of a cheque. The development of the concept of *culpa in contrahendo*, found in the late *ius commune*, rests on the same idea. The doctrine of 'positive breach of contract' ('*positive Vertragsverletzung*') harks back to the same conception; ultimately, the more comprehensive central concept of breach of contract has replaced the fragmentary categories of default and impossibility that were characteristic of the sale of goods in the free economic society. Any adept of natural law knows that this whole perspective was generally foreign to the Pandectists, although it was established in the natural law tradition; then as now, it is an ethicisation of legal thought that can only be understood if one considers the social function of the exchange of goods.<sup>25</sup>

c) This return to substantive contractual ethics can be seen even more clearly in the limits on duties of performance. As we have seen, the Pandectists, after some hesitation, ultimately rejected incorporating the concepts of common mistake or of a change in the economic basis of a transaction *inter vivos*; it also rejected the *iustum pretium*, the *laesio enormis* and more generally the principle of substantively adequate consideration. Already during the manufacturing crises of the First World War, case law began to engage in adjustment of

<sup>24</sup> The word '*Daseinsvorsorge*' was first used by Forsthoff in *Verwaltung als Leistungsträger* (1938) 1 et seqq.

<sup>25</sup> e.g. Grotius, *De jure belli ac pacis libri III*; II, 11 § 6; S. Pufendorf, *De jure nat. et gentium*, Book V passion; on the medieval tradition, cf. Thomas Aquinas, *Summa theol.* II 2 quaest. 77 art. 2.

performance or counterconsideration to match the changed circumstances; in the turbulent period after the war, Oertmann's doctrine of the economic basis of a contract was fully adopted, in a revised form. Given the inflation of the German currency, case law departed from the legislature's nominal stance and opted instead for a moderate, balanced, socially ethical form of valorism. One need not repeat that this, too, was in principle a switch from the individualist ethics of freedom and intention, encapsulated in the classical, Roman and Pandectist principle *pacta sunt servanda*, to the ethics of social responsibility found in the European natural law tradition, above all in medieval social doctrines.<sup>26</sup>

d) In 'liberal' private law, nullity of transactions contrary to public morals and liability for acts contrary to public morals had a precisely defined rationale in individualist ethics: it saw morally reprehensible behaviour of an individual as an abuse of moral freedom. As case law began to exploit these rules ever more, for example in order to impose particular [20] ethical rules on mortgages, or to objectively abuse rules on formalities or even judgments, it also thus began to delineate ethics of social responsibility.<sup>27</sup>

e) A final example will be presented here. The editors of the Civil Code did not even wish to discuss private law duties of landowners. Case law soon established strict liability for dangers emanating from an owner's premises. As regards emissions from neighbouring properties that are typical of the area, the Civil Code, in § 906, followed the Roman principle *qui suo iure utitur, neminem laedit* ('she who exercises her legal rights harms no one'); nevertheless, as regards the large-scale emissions of primary manufacturing and of the chemicals industry, case law imposed reciprocal duties, of consideration and to offset of losses, on neighbouring pieces of land: industry had to reduce its emissions to the lowest possible level, while agriculture for its part had to choose the least sensitive strains of plant.<sup>28</sup> There is no more characteristic expression of the transformation in private law's concept of ownership, from unrestricted individual ownership to ownership of land as a social function in a given economic sphere.

Further examples can be added almost *ad infinitum*. The overall net picture would show that

<sup>26</sup> e.g. Grotius II, 12 §§ 11 sq.; Pufendorf op. cit.; on the canon law tradition, see op. cit., quaest. 110 art. 3; Osti, Riv. di div. civ. 1912, 420 ff.; on theories of monetary value, see Stampe, Zahlkraftrecht der Postglossatorenzeit (1928).

<sup>27</sup> Cf. Lehmann, Der Haftungstatbestand der Sicherungsübereignung (1936); Zahn, Grenzen der Kreditsicherung durch Sicherungsübereignung (1937); as regards doctrine and legal policy: H. Lehmann, Reform der Kreditsicherung an Fahrnis und Forderungen (1937).

<sup>28</sup> First RG 154, 161; RG 159, 131: a summary can be found in Westermann, Sachenrecht (1951) 287.

modern interpretation of civil law often does not see the private law system as the aggregate of individual rights or as protecting the autonomous will of individuals, in accordance with private law's origins; in effect, it rather sees legal relationships as social functions, which are exercised according to prescribed or contractually assumed responsibilities. This process is all the more striking because it was not influenced or imposed by any form of collective, political or socio-ethical ideology. It reveals the true *nomos* of our legal development, be it for better or worse.

## VII.

A look at the legislation of all German governments since the First World War reveals the same story, repeating itself with impetuous urgency and little maturity; this can be seen precisely when we disregard excrescent propagandistic legislation, in all its secret unprogressiveness and romantic deception, and focus primarily on those trends that were almost grudgingly imposed, as a response to the exigencies of commerce. Even where this legislation in fact lay in the hands of academically trained bureau[21]crats, it abandoned classic private law concepts as a matter of course: free individually negotiated contracts, free ownership of land, a *numerus clausus* of property rights, the distinction between obligatory and dispositive contracts, the personal nature of contractual rights. Each one of these changes constitutes a departure from the civil law system, although each relates to legal relationships that appertain to basic concepts of civil private law, i.e. general private law. If one seeks an overall description for the field of law in which this occurred, then the phrase 'social law', in the technical sense given it by Otto von Gierke, is the simplest and most fitting. This process, too, will be considered by reference to a few generally familiar main examples:

a) The development of German labour law is so well-known that I will restrict myself to brief references. Since the Collective Agreement Regulation of 1918, the model of individual employment contracts has been replaced by the sovereignty of contracting groups; through the labour courts' jurisdiction on civil law, employment contracts have become a transparency against which the silhouette of a different construct, the collective agreement, is imposed. In other areas, by contrast, such collective, mass contract provisions have not been formally extricated from the standard, civil law contractual model: e.g. regarding postal services, carriage of freight or of persons or private insurance.

b) Social landlord–tenant law, too, has become an issue in all European legal systems since the First World War. It was necessitated by a direct state of emergency and thus long misunderstood by the public as a stopgap solution; however, from the emergency measures of 1931 ‘to the development of social landlord–tenant law’, it has proved to be an enduring institution and following the Second World War appears to be even more firmly established than ever before, both in Germany and other European countries.<sup>29</sup> In this context, we are not interested in public, largely communal control of the housing market, but in the changed nature of the landlord–tenant relationship itself.<sup>30</sup> As regards its most important element, rent, which is usually subject to maximums set by the authorities, it is from the tenant’s perspective still a normal, freely terminable lease under civil law; from the landlord’s perspective, however, the tenant is protected against termination, as part of a public relationship regarding the use of land, which is controlled by social law. If one considers that ‘housing management’ in most cases forces homeowners, or even main tenants, to form such a relationship, then it appears that all the fundamental elements of the free civil law order have been set aside here. [22]

c) Public housing has in many cases led to situations for which the Pandectists had no model, but for which models rather exist only in the older, historical legal order; as regards its social function, it amounts to a division of ownership of buildings into underlying, public allodial ownership and an estate held by the private owner. Until 1918, civil law contained a form of emphyteutic lease that adhered closely to the types found in Roman law.<sup>31</sup> The movement towards land reform instigated plans for bold modernisation of older forms of shared ownership, which came to fruition in the Emphyteusis Regulation (*Erbbaurechtsverordnung*) of 1919 and the Homestead Act (*Heimstättengesetz*) of 1920. The former regulation achieved separation of ownership through the peculiar device of treating the emphyteutic lease itself, a *ius in re aliena*, as a piece of land, to enable it to be subject to a mortgage. By providing both for forfeiture in case of mismanagement and proprietary effect of the contract vis-à-vis third party purchasers, it departs from the basic concepts of civil land law, which, in the interests of unlimited power of disposition and commercialisation of land, permits only a *numerus clausus* of property rights and thus for such contracts only to create obligations *inter partes*.<sup>32</sup>

<sup>29</sup> On its political history, see Wieacker, *Bodenrecht* (1938) 237 et seq., 246 et seqq.

<sup>30</sup> Löning, *De Grundstücksmiete als dingliches Recht* (1931) as regards its effect against buyers; the first clear discussion of right of abode (*Insitzrecht*) can be found in Hedemann, *Sachenrecht* (1924) § 33 VI; cf. also Wieacker, *Bodenrecht* 262.

<sup>31</sup> For an in-depth and comparative account Wieacker, *Bodenrecht* 250 et seqq.: 249 et seq.

<sup>32</sup> On this question Strecker, *Recht* 1920, 227 et seqq; on the theoretical context Wieacker, *DRRechtsw.* 1941, 49

The owner's ability to impose suitable restrictions, pre-emption rights and rights of forfeiture in case of mismanagement combine to create an underlying form of ownership that the legislature could not possibly have integrated into the classical categories of the land register and of property law.

Both forms sought to encourage communal housing development. In fact, they are only rarely encountered, because local authorities mostly used the more practical, less elaborate devices of the old law. Even here, however, related anomalies appear, in particular the idea that social housing tenants have a form of estate, whereupon causal agreements, which are often fixed en masse by the authorities, must be transferred to new tenants.<sup>33</sup> Finally, again to encourage housing development and to psychologically bond occupiers to their residence, the verbose West German law of 15 March 1951 created 'ownership of a flat' and a proprietary 'permanent right of residence' in which the same antinomies of modern housing law return. Seen strictly in a private law light, the corporate organs of a homeowners' association and its 'administrators' stand in contradiction to one another; and the departure of this new type of right from classical private law can clearly be seen in the fact that jurisdiction is non-contentious (§§ 43 et seqq).

[23] No modern forms of residence fit in the internal system of civil law; externally, this manifests itself in the fragmentation of legal materials across various specific laws separate from the Civil Code.<sup>34</sup>

d) We have already seen how German state law always reserved extensive public restrictions of ownership. However, it was only after 1918 that a consistent, collective and social blueprint for the use of the nation's land was drawn up, through ever-increasing public control over transfer and use of land.<sup>35</sup> Whether regarding settlement of land, agricultural land, housing developments or rebuilding of land, the need for regulatory approval and permission for transfers or division of land, pre-emption rights, taxes and forced relocation have led to ever stricter control of the use of land. These phenomena did not disappear with the Third Reich and its colossal economic plans, but rather increased with the added task of rebuilding destroyed areas.

et seqq.

<sup>33</sup> On forced transfer of such agreements through local authority construction supervision, see Wieacker, *Bodenrecht* 243.

<sup>34</sup> Wieacker, *Vielfalt u. Einh. d. Bodenrechtsw. d. Gegenw.* (Stuttgart-Berlin 1942) 7 et seqq.

<sup>35</sup> Most recently, see Westermann, *Sachenrecht* 278 et seqq.

These examples, too, could be repeated endlessly. The lesson to be taken from this is that all spheres of life that affect the welfare of economically dependent persons, which make up the bulk of the population of all European countries, civil law's claim to validity and legal ideals have vanished. Areas that once formed the core of a legal order, which was binding on all citizens, have been removed from this order, to be governed by what we have described as 'social law'; this reflects the disintegration of the unity of the old private law system and its fundamental, classic concepts. In lectures and examination halls, they live a somewhat unreal existence; legal practitioners increasingly lose mastery of them. The economic context and the bourgeois, civic ethics upon which this creation of European liberalism was based have in many ways crumbled away.

But what has taken their place? We would neglect our duty as servants of justice if we did not seek to search for the as yet invisible legal values that are beginning to sprout amongst the rubble of the old system. For given that we have restricted ourselves to manifestations not of power or the interests of individual political classes, but of the enduring, legitimate legal consciousness of present society, such values must indeed exist; the task of a true theory is to find them and to express them so that they can be received in public consciousness. If there were no such values, then we would at least have to recognise that [24] the examples above constitute an unavoidable threat to the idea of law itself. History and our own sentiments are inconsistent with such a bleak conclusion.

## VIII.

This silent process not only involves the destruction of the ethical and economic ideals of nineteenth-century bourgeois society, but also the growth of ideals of a new, not yet fully consolidated society – one barely understood by legal theory, and even less so by blind and hasty legislation, but one whose psychological and functional type every contemporary observer is already familiar with. When inquiring into the ethics of this new society, our conclusions must be more modest and cautious than when analysing the decline of the old society. The former society was a society of legally free economic actors bound by individual ethical rules, whose relationships were symbolised and in fact mostly shaped by the individual contract. When one considers the social and legal reforms that our new society spontaneously brought about, without pressure from some great ringleader, one can guess

what its representative archetype and its representative form of relationship might be. First, we should free ourselves of a burdensome perception. The true archetype is certainly not that of a robot, coerced by the state; and the fundamental relationship is certainly not that of unconditional submission to authority, an atom under the command of a leviathan that it, along with countless millions of other atoms, helps to form. In the most ethically vibrant elements of social law's development, such as employment contracts, industrial relations, leases, housing development and above all the criteria of the modern law of obligations, it is the function of cooperating to fulfil a task serving a free association of many persons, and many levels of cooperation in social and economic self-administration, that predominate; admittedly, alongside the colossal form of the modern administrative state, which has increasingly taken on a prominent role. This means that in contemporary society, there are two relationships, subordination on the one hand and associative cooperation on the other, that stand alongside each other and cry out for balance: subordination to those tasks that can in the long term be shown to the individual to be for the public good; and where it suffices to fulfil social tasks, cooperation under a reciprocal relationship of duty and protection. In the context of private law and social law developments, we are only concerned with this legal pathos of co[25]operation, which has driven back the pathos of competition. Cooperation between individuals, by forming individual contracts under civil law; cooperation through groups in businesses, companies, occupational groups and associations; and the cooperation of businesses, groups and associations with the state, who must in turn be legitimated by the mandate granted by political groups in society – this appears to be contemporary society's model of fundamental relationships in private law and social law. Expressed in catchphrases: society is not a plurality of subjects who only bind themselves through individual contracts, but an 'association' of fellow legal subjects, who are already bound together by common, prescribed tasks.<sup>36</sup> This is why we suggested that, in spite of some reservations, it is Otto von Gierke, among all the critics of the liberal legal model, who deserves praise for recognising the precursors of this new society.

The lawyer enquires as to the pathos of a society's integration in order to understand it; to realise justice within a society, one must understand its pathos. The specific ethos of

<sup>36</sup> It needs no affirmation that this is an attempt to analyse the true state of affairs, and not an assertion of old, deceptive ideals of political and social romanticism, such as the complete economic society or the organic state. Perhaps contrary to external appearances, our observations are entirely independent of the prominent discussion of the social market economy and centrally guided economy. Lawyers must first present a social model true to reality; it is only after this that one can pose the question of what the correct economic order is.

nineteenth-century bourgeois society was freedom, and the incredible self-confidence of this view arose from that class' emancipation and European pioneering spirit around the entire globe; the ethos of our time, insofar as one may dare to speak of it, is that of responsibility, which arose with the ascension of new classes and the attainment of new social insights, and also from the internal regulatory tasks of a Europe forced to turn back in on itself. This contrast is no polemic antithesis; for freedom and responsibility are both expressions of an enduring, fundamental feature of European humanity, of a condition for the personhood of publically and socially active persons. This admittedly means that the ethos of responsibility is not yet a reality, but a task; today, it is fatally endangered by the very roots of personality itself. Among these threats, the greatest are not the external threats that capture the fear and hatred of contemporaries, as if spellbound: the destruction of human society by catastrophes unleashed by lust for power or the hysteria of those governing, or return to an economic society without responsibility, that has again forgotten the bitter lessons it learned. These symptoms are all founded on a hidden, enduring threat: the silent dehumanisation and depersonalisation of interpersonal relationships, as can today be seen in the work of bureaucrats and specialised officials, in limitless economic group egotism and in the unmeasured [26] expectations individuals have of society. All these are ultimately manifestations of the deepest cause of all human vices: the lack of *caritas*, i.e. not only of active love of one's neighbour, but also of lack of interpersonal understanding at all.

These observations appear to entirely overstep the bounds of our aims and sphere of competence. Some may indignantly resort to asking what the private legal order has to do with the internal and external conditions of a society in any case – and even those who do not will object that the idea and system of private law itself are relinquished if one admits that the new 'social law' order no longer orients itself using the political and socio-ethical premises upon which, as mentioned above, the great European private law codes of the last century are based. Precisely the fear of such a misunderstanding caused me to write this piece; for it carries a twofold danger. On the one hand, it consists in the temptation of self-confident civil lawyers to deny shifts in the social model or to declare them to be irrelevant to everyday legal matters; on the other hand, it is the temptation of the lay public to see such shifts as evidencing the public irrelevance of the values of received private law culture. Historians of European private law have to decisively remind proponents of these views that the marvel of European legal culture, formed over almost a millenium, the core of which is private law doctrine, has not ceased to be our property and our responsibility. It emerged from the



passionate desire for law of the people and leaders of the Early Middle Ages; it blossomed through awestruck, misunderstanding adoption of the great Roman legal tradition; and attained adulthood through the intellectual conquest of legal reality in Middle Age and modern natural law; it was fully mature even before it reached its technical perfection in Central Europe at the hands of the Pandectists. There are no fundamental ideas in our legal culture, including new ideas in public law and social law that have not since the first centuries of their existence been repeatedly thought through in this Romanist-natural law legal culture, albeit under different names or in different contexts. The concepts of individual rights, contracts, the ethical bond on the exercise of rights, the *clausula rebus sic stantibus*, the discovery of the legal person, the precedence of objective law over instrumental desires or [27] hunger for power and above all the indispensable premises of the concept of law itself – all these concepts have at every stage of legal development been reinvented, elaborated and generalised. In a different context, this very piece gave a persuasive example of our present responsibility toward this great heritage. Precisely in view of the distinguishing socio-ethical tendencies of more recent top-level judicial decisions (see page 18 et seqq. above), it is important to note that they were by no means merely following the progressive developments of social consciousness, but also, consciously or unconsciously, restoring the bond to natural law legal ethics, which was broken by the classical Pandectistic tradition. These ethics in turn almost universally hark back to the Middle Age, and often the canon law, tradition; and these, once again, often harked back to Aristoteleian Greek or stoic Roman discussion of problems.

In contrast, we believe that a self-confident and publically responsible private law jurisprudence always remains possible precisely by observing the social reality and understanding its particular ethical nuances. Given this prerequisite, one must say that it is of course not dependent on the continuation of a particular historical social model, e.g. liberal economic society. Those who wish to deny this must, if they wish to be consistent, also denounce, for their time, the phenomenal socially-integrating accomplishments of, for example, classical Roman jurisprudence, the Italian commentators or the school of elegant jurisprudence.

At present, everything admittedly remains to be done. There is a threat of further disorientation as to method, the system and its concept among private lawyers, so long as private law theory continues to sin by not analysing and intellectually modelling reality, but rather persisting in its practice and vainly criticising the curtailment of private law by state

authority; and so long as the legislature and executive continue to sin by undervaluing ‘reason and scholarship’, i.e. true theory and method, and persisting in ad hoc solutions and brutal improvisation, instead of heeding the intellectual framework of contemporary society. European legal history shows us that situations where theoretical sentiments lag behind the needs of the time are always accompanied by detrimental losses of power and harm to public life – not to mention worse; one may consider, for example, the initial reception of Roman law in Germany. Private law academia will again extricate itself from these risks, through acts of thinkers and practitioners who take cognisance of these fundamental prerequisites for the survival of a legal culture. In future, it will then continue to have an immeasurably wide and fruitful field of discussion.