Beyond the State
Rethinking Private Law

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The Science of Private Law and the State in Nineteenth Century Germany

Hans-Peter Haferkamp*

About 1800, the concept of a strict separation between private and public law arose in German doctrine. The debate dealt with two questions. How should this private autonomy be defended against stately interests? Some argued philosophically (*Volksgeist*), others frankly politically. The second and decisive question was to know which legal institution was reliable enough to receive the task to protect the private law from the State. Unlike in other European states, the idea to protect private law with the help of the constitution was not the first choice for many jurists in Germany. Members of the Historical School preferred the judges to be entrusted with the above mentioned task. In the context of private law, jurists thought in national dimensions without a national state. Private law relied therefore on the *ius commune*, a law without a state legislator. When the German states were unified to form the Reich in 1871, for the first time, private law was associated with the entire state. With the social question arising, a new discussion about the relationship between private law and the state emerged.

* I thank *Dominik A. Thompson* for his assistance.

I. Introduction

In Europe, the idea of "private law" as an area of individual freedom that the state has to respect and to protect is about two hundred years old. The concept was not generally accepted in legal doctrine before 1800[1]. Its emergence is closely connected to a new understanding of the traditional division between public and private law[2] that had already existed in antiquity[3].

II. From Private Law to Public Law and Back to Private Law

German legal doctrine adopted a systematic separation between private and public law around 1790 when the state was concentrating more and more powers in its hands. Before this time, only constitutional law (*Staatsverfassungsrecht*) had been considered *ius publicum* in the strict sense[4]. In a society organized in estates, the central power was faced with competing authorities – especially from the high nobility – who were not part of the respective executive branch. Their jurisdiction included matters which we would consider part of public law today, such as criminal law or procedure[5]. Around 1790, when the old social order was put more and more into question, the view prevailed that all power was now concentrated in the hands of the state and that the estates retained no independent jurisdiction[6]. Before 1790, there had been much more private law than public law but the newly established state monopoly on the legitimate use of force led to the opposite result: the emphasis shifted increasingly to public law[7]. Thus the German philosopher *Fichte* concluded that there was no law without or beyond the state[8]. It was this massive expansion of public law which triggered the debate about "private law" as a means of protecting the freedom of the citizens against the state around 1800.

In discussing this problem, contemporary legal authors offered three different conceptions of private and public law:

(1) Some declared openly that public law was subordinate to private law. The only function of public law was to protect private law. "Securing the common enjoyment of innate freedom [is the only] purpose of the state", *Ernst Gottlob Morgenbesser* wrote[9]. This implied a democratic constitution and sounded dangerously revolutionary; it was a radical idea that remained rare.

(2) Other writers refrained from drawing their own distinction between private and public law and left that task to the legislator. This meant that private law was subject to public law. *Gustav Hugo* pointed to "most obvious contradictions" if one chose to put private law above the state[10]. The idea was especially appreciated by those who claimed that every single German state should have a constitution and a legislature of its own[11]. With respect to the constitution of Württemberg (1819), *Carl Georg von Wächter* defined private law nega-

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[1] On the general debate about freedom of contract and the broader notion of *Privatautonomie* in the late eighteenth and nineteenth century, see *Joachim Rückert*, Natürliche Freiheit – Historische Freiheit – Vertragsfreiheit, in: Recht zwischen Natur und Geschichte, ed. by *Francois Kervégan/Heinz Mohnhaupt* (1997) 305; *id.*, Zur Legitimation der Vertragsfreiheit im 19. Jahrhundert, in: Naturrecht im 19. Jahrhundert. Kontinuität-Inhalt-Funktion-Wirkung, ed. by *Diethelm Klippel* (1997) 135; *Sibylle Hofer*, Freiheit ohne Grenzen? Privatrechtstheoretische Diskussionen im 19. Jahrhundert (2001); *Diethelm Klippel*, Politische Freiheit und Freiheitsrechte im deutschen Naturrecht des 18. Jahrhunderts (1976); *id.*, Die Theorie der Freiheitsrechte am Ende des 18. Jahrhunderts in Deutschland, in: Rechtsgeschichte in den beiden Deutschen Staaten (1988–1990), ed. by *Heinz Mohnhaupt* (1991) 348; *Damian Hecker*, Eigentum als Sachherrschaft. Zur Genese und Kritik eines besonderen Herrschaftsanspruchs (1990) 225.

[2] For an analysis of the changes in the relationship of public law and private law around and since 1800, see *Jan Schröder*, Privatrecht und öffentliches Recht. Zur Entwicklung der modernen Rechtssystematik in der Naturrechtslehre des 18. Jahrhunderts, in: Festschrift für Joachim Gernhuber zum 70. Geburtstag, ed. by *Hermann Lange* (1993) 961; *Paolo Cappellini*, Systema Iuris II (1985) 175; *Pio Caroni*, Privatrecht. Eine sozialhistorische Einführung (1988) 101 ff.; *Dieter Grimm*, Zur politischen Funktion der Trennung von öffentlichem und privatem Recht in Deutschland, in: Studien zur europäischen Rechtsgeschichte, ed. by *Walter Wilhelm* (1972) 224; *Joachim Rückert*, Das BGB und seine Prinzipien, in: Historisch-kritischer Kommentar zum BGB I, ed. by *Mathias Schmoeckel/Joachim Rückert/Reinhard Zimmermann* (2003) vor § 1, p. 79; *Sten Gagnér*, Über Voraussetzungen einer Verwendung der Sprachformel "Öffentliches Recht und Privatrecht" im kanonistischen Bereich (1966), reprinted in: *id.*, Abhandlungen zur europäischen Rechtsgeschichte (2004) 121; *Gerhard Immel*, Typologie der Gesetzgebung, in: Handbuch und Quellen und Literatur der neueren europäischen Privatrechtsgeschichte II, ed. by *Helmut Coing* (1976) 70; *Reinhard Zimmermann*, The Civil Law in European Codes, in: The Civilian Tradition and Scots Law, ed. by *David L. Carey Miller/Reinhard Zimmermann* (1997) 262.

[3] See *Max Kaser*, Ius publicum und ius privatum: SavZ/Rom. 103 (1986) 1.

[4] See Großes vollständiges Universal-Lexicon aller Wissenschaften und Künste, ed. by *Johann Heinrich Zedler* (1740) col. 676; *Daniel Nettelbladt*, Systema elementare universae iurisprudentiae naturalis, Pars III: Iurisprudentia naturalis civilis (1762) 176: *Ius publicum* would contain the "leges publicae seu fundamentales"; on this issue, see also *Michael Stolleis*, Geschichte des öffentlichen Rechts in Deutschland I: 1600–1800 (1988) 291.

[5] On the nineteenth century dispute whether the rights of the patrimonial judge belonged to public or private law, see *Sabine Werthmann*, Vom Ende der Patrimonialgerichtsbarkeit (1995) 82.

[6] *Loc. cit.*

[7] The increasing dominance of public law in legal treatises is described by *Lars Björne*, Deutsche Rechtssysteme im 18. und 19. Jahrhundert (1984) 106; *Stolleis*, Geschichte I (*supra* n. 4) 75, 142 ff.; *id.*, Geschichte des öffentlichen Rechts in Deutschland II (1992) 48.

[8] *Johann Gottlieb Fichte*, Rechtslehre. Vorgetragen von Ostern bis Michaelis 1812, ed. by *Hans Schulz* (1920) 23; see also *Schröder*, Privatrecht (*supra* n. 2) 967.

[9] "Sicherstellung des gemeinschaftlichen Genusses der angeborenen Freiheit (ist der einzige) Endzweck des Staates": *Ernst Gottlob Morgenbesser*, Beiträge zu einem republikanischen Gesetzbuche enthalten in Anmerkungen zum allgemeinen Landrechte und zur allgemeinen Gerichtsordnung für die preußischen Staaten (1798), reprint ed. by *Wolfgang Schild* (2000) no. X, 19; see *Rückert*, Das BGB und seine Prinzipien (*supra* n. 2) 81.

[10] *Gustav Hugo*, Lehrbuch des Naturrechts als einer Philosophie des positiven Rechts[3] (1809) §§ 142, 144.

[11] For the peculiarities of German constitutional history, see *infra* III 1.

tively: private law was all law that did not belong to public law[12]. After German unification in 1871, this concept became enormously more popular – now against the backdrop of a unified imperial legislature[13].

(3) Yet, the dominant view in German legal science was a different one. Although German jurists thought and constructed private law as being independent from the state, they avoided any open political conflict. Their position was advocated originally by *Savigny* and his followers who formed a circle commonly called the "Historical School"[14]. Their concept of private law essentially built on seven connected strategies to keep private law protected from the state.

First, they defined private law autonomously, i.e., without any connection to public law or the state. In *Savigny's* words, in private law "the individual human being is his own purpose"[15]. Accordingly, the source of private law was about "the individual's full and unconditional sovereignty"[16], "subjection", and "power of the will"[17]. The strict separation in two bodies of law (private and public) was intended to facilitate economic freedom which was finally achieved in 1869[18]. This, of course, was not to be confused with *political* freedom. In the distinct area of public law, the individual citizen was subject to the state and "directed to obey the authorities"[19]. Thus, the monarchy as the prevailing form of government was not put into question[20].

Second, the members of the Historical School saw the origin of law in its emanation from the *Volksgeist* ("spirit of the people")[21]. This common spirit –

[12] *Carl Georg von Wächter*, Geschichte, Quellen und Literatur des Württembergischen Privatrechts I (1839) § 1.

[13] *See infra* VI.

[14] See *Hans-Peter Haferkamp*, Historische Rechtsschule, in: Enzyklopädie der Neuzeit V (2007) 498 ff.

[15] "[I]st der Mensch sich selbst Zweck": *Friedrich Carl von Savigny*, System des heutigen Römischen Rechts I (1840) 22.

[16] "[V]olle und unbedingte Herrschaft": *Georg Friedrich Puchta*, Cursus der Institutionen II (1842) 556.

[17] "Unterwerfung" and "Willensmacht": *Georg Friedrich Puchta*, Cursus der Institutionen I (1841) 10; On the systematical implications, see *id.*, Betrachtungen über alte und neue Rechtssysteme (1829), reprint in: Georg Friedrich Puchta. Kleine zivilistische Schriften, ed. by *Adolph August Friedrich Rudorff* (1851).

[18] See *Harald Steindl*, Die Einführung der Gewerbefreiheit, in: Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte III 3, ed. by *Helmut Coing* (1986) 2969.

[19] *Puchta*, Cursus der Institutionen I (*supra* n. 17) 61.

[20] The central proponents of the Historical School (Savigny, Puchta, Stahl, Bethmann-Hollweg, Rudorff) belonged to the inner circle of the Prussian King Friedrich Wilhelm IV in Berlin, see *Fritz Fischer*, Moritz August von Bethmann-Hollweg und der Protestantismus (1938) 157.

[21] On the philosophical concept of the *Volksgeist* see *Joachim Rückert*, Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny (1984) 237, 309.

not individuals, politics or the state – created the law. "The *Volksgeist* creates the state"[22] – not the other way around.

Third, the scope of private law was defined nationally, i.e., as a common German private law. Since between 1806 and 1871, Germany was not a unified nation state, private law had no unified (national) legislature. It was not entirely coincidental that the only kind of private law that could claim to be somewhat national was the *ius commune* which was favored by *Savigny*.

Fourth, therefore, *Savigny* advocated a body of private law that had developed since antiquity with almost no intervention by the legislator[23].

The fifth strategy centered on methodology. German common law had been cultivated by university jurists since the Middle Ages[24]. *Savigny* now wanted to refine their methods further[25]. He envisaged an extremely high level of sophistication which was intended to establish even greater juridical autonomy towards the political sphere than before.

Sixth, legal education should be "scientific". This meant that the law should be learned at universities only, conceived as independent institutions[26]. The syllabus consisted primarily of *ius commune*, thus avoiding any conflict with the various state legislators. Students were not supposed to memorize the positive rules enacted by the state but instead to become proficient in doing scientific work on their own[27]. Legal textbooks were to be based on academic reasoning only.

The last strategy concerned the question of competence (in the sense of jurisdiction): *Savigny's* approach envisaged a scientific judge as the guardian of private law. In that sense, independent judges were to substitute the missing constitution.

[22] *Puchta*, Cursus der Institutionen I (*supra* n. 17) 28.

[23] This was the program of Savigny's *Geschichte des Römischen Rechts im Mittelalter*; see *Hans-Peter Haferkamp*, Die Bedeutung von Rezeptionsdeutungen für die Rechtsquellenlehre zwischen 1800 und 1850, in: Usus modernus pandectarum. Römisches Recht, Deutsches Recht und Naturrecht in der frühen Neuzeit. Klaus Luig zum 70. Geburtstag, ed. by *Hans-Peter Haferkamp/Tilman Repgen* (2007) 25.

[24] For an overview, see *Peter Stein*, Roman Law in European History (1999) 71; *Franz Wieacker*, A History of Private Law in Europe (1995, trans. of Privatrechtsgeschichte der Neuzeit [1967]).

[25] On Savigny's reform program for methodology and jurisprudence, see *Joachim Rückert*, Der Methodenklassiker Savigny (1779–1861), in: Fälle und Fallen in der neueren Methodik seit Savigny, ed. by *id.* (1997) 33; *id.*, Savigny's Hermeneutik – Kernstück einer Jurisprudenz ohne Pathologie, in: Theorie der Interpretation vom Humanismus bis zur Romantik – Rechtswissenschaft, Philosophie, Theologie, ed. by *Jan Schröder* (2001) 288; *Stephan Meder*, Mißverstehen und Verstehen. Savignys Grundlegung der juristischen Hermeneutik (2004).

[26] For more detail, see *Friedrich Carl von Savigny*, Rezension von Schleiermacher über Universitäten (1808); *id.*, Wesen und Werth der Deutschen Universitäten (1832), reprinted in: *id.*, Vermischte Schriften V (1850) 255, 270.

[27] See *Ulrich Kühn*, Die Reform des Rechtsstudiums zwischen 1848 und 1933 in Bayern und Preußen (2000) 22 ff. and *passim*.

III. The Problem of Competence

The last point is important: without institutional support, the concept of an autonomous private law was merely an idea. In the contemporary discourse, the question ultimately boiled down to an issue of institutional competence. To whom should the task of protecting individual economic freedom be assigned? There were three candidates for the job: the legislator, the judges, and the people.

1. *The Legislator: The Monarch and the Estates of the Realm*

Broadly speaking, one can say early nineteenth century Germany was marked by a north-southwest divide in constitutional matters[28]. In 1815, Article 13 of the founding act of the German Confederation (*Deutscher Bund*) had promised, somewhat obscurely, that the *Landstände* (the estates of the various states) were to be considered in constitutional matters[29] – but the Article did not say exactly how, nor did it spell out who was to be included in the notion of *Landstände*[30]. As it happened, the various princes assumed a very dominant position in the aftermath of the Vienna Congress. Even the states where a constitution had been promulgated experienced a reestablishment of *ancien regime* practices in pseudo-constitutional disguise. The German constitutions of the time lacked a *pouvoir constituant*[31].

Only in parts of Southern Germany did the *Stände* manage to establish effective representation in matters of taxation, property, and liberty[32], and only in Württemberg, a unicameral parliament strong enough to oppose the monarch was constituted[33]. As a consequence, public law was dominant in that region; both the public and the jurists were opposed to the *ius commune* and favored codification[34].

[28] For an overview, see *Dieter Grimm*, Deutsche Verfassungsgeschichte 1776–1866 (1988) 68, 110.

[29] Art. XIII: "In allen Bundesstaaten wird eine landständische Verfassung statt finden"; see *Dietmar Willoweit/Ulrike Seif*, Europäische Verfassungsgeschichte (2003) 556.

[30] On the discussions about the constitutional function of the *Landstände* since the sixteenth century, see *Adalbert Podlech*, Repräsentation, in: Historische Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland V, ed. by *Otto Brunner/Reinhart Koselleck* (1984) 516.

[31] See *Hasso Hofmann*, Repräsentation. Studien zur Wort- und Begriffsgeschichte von der Antike bis ins 19. Jahrhundert[4] (2003) 416.

[32] Outside of Southern Germany only Kurhessen managed to establish a strong parliament for a short time, see *Ewald Grothe*, Verfassungsgesetzgebung und Verfassungskonflikt. Das Kurfürstentum Hessen in der ersten Ära Hassenpflug 1830–1837 (1996) 338.

[33] See *Grimm*, Deutsche Verfassungsgeschichte (*supra* n. 28) 111.

[34] See *Christoph Mauntel*, Carl Georg von Wächter (1797–1880). Rechtswissenschaft im Frühkonstitutionalismus (2004) 64, 125; *Joachim Rückert*, August Ludwig Reyschers Leben und Rechtstheorie 1802–1880 (1974) 267, 343.

2. *The Judiciary*

The Historical School preferred a judiciary consisting of highly trained specialists[35]. Again, the *Volksgeist* idea played an important role here as a defensive instrument in disguise. The legislature was expected to promulgate as law only the norms that already existed in the form of the "Common national belief"[36]: "[T]he statute is the organ of the people's law"[37]. Regarding the codifications of civil law existing in certain territories (mainly the Prussian *Allgemeines Landrecht* and the Code civil in territories occupied by France, i.e., West of the Rhine), the Historical School refrained from postulating the *Volksgeist* as a corrective standard. Political reasons made such a claim impossible. Instead, the Historical School took a defensive position: "Once enacted, the validity of a statute is no longer subject to an examination regarding its accordance with the true will of the people. Establishing this accordance would require some sort of higher power, which in turn would be the true legislator, but then, the same question would arise again"[38]. In other words, a law enacted in due form was no longer open to judicial review or any other criticism (not to mention resistance), whether it violated the *Volksgeist* or not. Nor did the Historical School argue for the establishment of administrative courts. *Puchta* opined that a judge should only verify whether a statute had been passed in due form[39]. As a result, this approach did not threaten the position of the legislator in the territories, but at the same time, it weakened it in the area of national private law. Since the scope of the *Volksgeist* was national, and since there was no national legislator in private law, it was possible to establish a national private law without a legislator and without offending the regimes of the various territorial states.

Thus key to *Savigny's* concept of private law is the combination of *ius commune* and *Volksgeist*. Since the *Volksgeist* remained obscure at best – *Puchta* called it a "dark workshop" – the law always had to remain uncertain[40]. It had to be inevitably dynamic, just like the *Volksgeist*. Accordingly, there was no immutable natural law, e.g., in the form of human rights. Furthermore, a constitution was a mere contract between a monarch and his subjects, not a result of the

[35] For details, see *Hans-Peter Haferkamp*, Georg Friedrich Puchta und die 'Begriffsjurisprudenz' (2004) 141.

[36] "[G]emeinsame Überzeugung der Nation": *Puchta*, Cursus der Institutionen I (*supra* n. 17) 32.

[37] "[D]as Gesetz ist das Organ des Volksrechts": *Savigny*, System I (*supra* n. 15) 39.

[38] "Ist nun aber das Gesetz einmal gegeben, so kann seine Gültigkeit nicht von einer Untersuchung seiner wirklichen Uebereinstimmung mit dem Volkswillen abhängen. Diese Untersuchung würde eine höhere Gewalt voraussetzen, die dann eben gesetzgebend wäre, und bey der dieselbe Frage wieder entstehen würde": *Puchta*, Cursus der Institutionen I (*supra* n. 17) 32.

[39] *Puchta*, Cursus der Institutionen I (*supra* n. 17) 32.

[40] See *Haferkamp*, Puchta (*supra* n. 35) 183.

Volksgeist[41], which by its very nature did not allow the infallible deduction of rules. The special twist in this combination of *ius commune* and *Volksgeist* was that the *ius commune* had been established in Germany neither by the state nor by the citizens, but rather by a scientific community, in a foreign language, and according to a scientific method. Only specialists prepared by long and intensive training could hope to grasp the subject – and thus to represent the *Volksgeist*. Even for them, however, there was no real hope to achieve complete legal certainty. Their quest was that of an infinite approach. The goal was a division of labor of sorts. *Savigny* and his followers did not want judicial power for themselves as academics. The old tradition of courts referring difficult court records to law faculties for a decision (*Aktenversendung*) was not part of *Savigny's* program[42], nor did he intend to resurrect the *ius respondendi* of Roman times by shifting the balance towards a kind of professoriate-judiciary[43]. Accordingly, *Puchta* wrote in 1828 that "I cannot imagine anything more bleak than the mere authority of a public office; its authority is assigned and not carried by a single thought"[44]. Professors should convince practitioners by the force of their arguments. Judges should decide the cases, but they should do so only after having been subjected to the scientific rigor of strict pandectist training at the university. In 1834, *Savigny* stressed that everything depended on bringing the judiciary (*Richterstand*) into a position "in which they [the judges] pursue their business not mechanically, but by way of vivid reflection; and this means to educate and train them"[45].

Accordingly, the first step undertaken was the reform of university curricula[46]. New textbooks were developed in compliance with the new goals and methods[47]. The pandectist treatise was to provide practicing lawyers with the guidance they needed to administer the *ius commune* in a consistent, practical, and modern way. The aim was a highly rational, but also elastic, private law with the judge as the central figure.

3. *Justice Administered by Laymen*

In the 1840s, a short-lived movement demanded that laymen have a stronger voice in court. *Beseler* wanted to define the *Volksgeist* in a direct, realist fashion. Jurists should listen to the people at large and find the law among them[48]. Especially with respect to private law, this idea was no longer supported after the failed revolution of 1848[49].

IV. The Political Context

It is obvious that the various approaches outlined above are politically motivated. The liberal concept of private law advanced by the Historical School found great acceptance among German jurists precisely because it also provided

[41] "Abstractes Menschenrecht": Savigny in his draft for para. 52 of his *System des heutigen Römischen Rechts*; see *Hans-Peter Haferkamp*, Die Bedeutung der Willensfreiheit für die Historische Rechtsschule, in: Willensfreiheit und rechtliche Ordnung, ed. by *Ernst Joachim Lampe/Michael Pauen* (2008) 196 ff.; on Savignys opinion about constitutions ("leblose Formen"), see *Rückert*, Methodenklassiker (*supra* n. 25) 394.

[42] Neither Savigny nor Puchta made any reference to *Aktenversendung*. For an account of Savigny's dislike of participating in academic decision bodies (*Spruchkollegien*), see *Rückert*, Methodenklassiker (*supra* n. 25) 34, 151 ff. (Savigny even started a *Spruchkollegium* in Berlin, see *Ernst Landsberg*, Geschichte der Deutschen Rechtswissenschaft III/2 [1910] 138). Puchta, too, disliked *Spruchkollegien*, cf. his letter to Savigny from April 18, 1837, about his negotiations with the university of Leipzig (Universitätsbibliothek Marburg, MS 838/51): "In Beziehung auf die Actenarbeiten habe ich mir freie Hand stipuliert ..., um der Wissenschaft recht ungestört leben zu können". ("Regarding the work on court records I was asserted full discretion ... in order to live for science quite undisturbed"); in the same vein, *James Q. Whitman*, The Legacy of Roman Law in the German Romantic Era (1990) 149. The contemporary discussion about *Aktenversendung* was outlined by *Johann Baptist Sartorius*, Revision der Lehre von der Aktenversendung, in: Zeitschrift für Civilrecht und Prozeß 14 (1840) 219. Many examples are provided by *Ulrich Falk*, Consilia. Studien zur Praxis der Rechtsgutachten in der frühen Neuzeit (2006).

[43] *Whitman*, Legacy (*supra* n. 42) 120, 125, 128, again overstates the argument that the professors of the Historical School, in their "backward looking" (98) sentiment, tried to revive Rome. Neither Puchta (see *Haferkamp*, Puchta [*supra* n. 35] 173, 121) nor Savigny (see *Savigny*, System I [*supra* n. 15] 156) were interested in obtaining a *ius responendi*, because in their eyes this would resemble an "external" authority, in contradiction to their personal ideal to persuade by "inner truth". For a convincing critique of Whitman's book, see *Dieter Nörr*: RJ 11 (1992) 163; *Maximiliane Kriechbaum*: Ius Commune 19 (1992) 237.

[44] "... nichts trostloseres ..., als eine solche Autorität, welche lediglich einem äußern, von keinem Gedanken beseelten Factum beigelegt wird": *Georg Friedrich Puchta*, Das Gewohnheitsrecht I (1828) 164.

[45] "... in welcher er mit lebendigem Denken und nicht auf mechanische Weise sein Geschäft vollbringe, [d. h.] ihn zu erziehen": Savigny to Wilhelm von Gerlach on March 1, 1834, reprinted in: Materialien zur preußischen Eherechtsreform, ed. by *Hans Liermann/Hans-Joachim Schoeps* (1961) 490.

[46] See *Jan Schröder*, Wissenschaftstheorie und Lehre der "praktischen Jurisprudenz" auf deutschen Universitäten an der Wende zum 19. Jahrhundert (1979) 213. A comprehensive overview is still missing. For more particular studies about the changes in university education after 1810, see *Cornelie Butz*, Die Juristenausbildung an den preußischen Universitäten Berlin und Bonn zwischen 1810 und 1850 (1992); *Kühn*, Reform (*supra* n. 27); *Andreas Röpke*, Die Würzburger Juristenfakultät von 1815 bis 1914 (2001); *Stefan Strasser*, Die Geschichte der juristischen Fakultät der Universität Landshut 1800–1826 (2001).

[47] See *Haferkamp*, Puchta (*supra* n. 35) 389.

[48] See *Georg Beseler*, Volksrecht und Juristenrecht (1843) 58, 109; *Bernd-Rüdiger Kern*, Georg Beseler. Leben und Werk (1982) 371; *Klaus Volk*, Die Juristische Enzyklopädie des Nikolaus Falk (1970) 83.

[49] *See Jan Schröder*, Savignys Spezialistendogma und die "soziologische" Jurisprudenz: Rechtstheorie 7 (1976) 28 (Beseler), 31 (on the conventions of the Germanists), 45 (aftermath: *Freirechtler*). The contemporary debate concerned primarily penal law, see *Alexander Ignor*, Geschichte des Strafprozesses in Deutschland 1532–1846 (2002) 249.

answers to several urgent political questions. Two of these aspects were of particular importance.

1. National Private Law

After the Vienna Congress, the hope of achieving a uniform German civil code had to be abandoned. In his book *The History of the Roman law in the Middle Ages*, *Savigny* tried to prove in a detailed fashion that since antiquity, Roman law had never really disappeared but instead had survived "glowing under the ashes" during the Middle Ages[50]. According to *Savigny*, it had always been the *Volksgeist*, not the state, which carried forward the *ius commune*. This was a highly political position. After 1806, when the *ancien regime* had collapsed, there was a major discussion in Germany about whether the *ius commune* could be imagined without the nation state[51]. Arguing against territorial codifications, *Savigny* stated: "Everywhere and every time when a state collapsed, private law was held to have survived. This is the history of Roman law in the Middle Ages"[52]. This great, mythical story of a national private law without a state was warmly received by many groups in society who longed for a unified Germany and who saw *Savigny's* position as an important intermediate step towards future unification. As *Puchta* put it: "[I]f national unity is strong enough, it will succeed in overcoming this accidental political separation"[53].

2. Private Law Without Politics

There is another reason why *Savigny's* concept was so attractive during the years leading up to the German revolution of 1848. The alternative, i.e., protection of private rights by a constitution, had proven to be dangerous. In 1837, the King of Hanover declared the constitution of his country, adopted four years earlier, to be null and void. When the *Göttinger Sieben*, a group of seven local professors, protested, they were sacked[54]. Academics throughout Germany

[50] See *Joachim Rückert*, Friedrich Carl von Savigny (1779–1861). Geschichte des Römischen Rechts im Mittelalter, in: Hauptwerke der Geschichtsschreibung, ed. by *Volker Reinhardt* (1997) 560.

[51] See *Andreas Daniel*, Gemeines Recht (2003) 86; *Haferkamp*, Rezeptionsdeutungen (*supra* n. 23) 25; *Joachim Rückert*, Heidelberg um 1804, oder: die erfolgreiche Modernisierung der Jurisprudenz durch Thibaut, Savigny, Heise, Martin, Zachariä u.a., in: Heidelberg im säkularen Umbruch. Traditionsbewußtsein und Kulturpolitik um 1800, ed. by *Friedrich Strack* (1987) 83.

[52] *Friedrich Carl von Savigny*, Pandektenvorlesung 1824/25, ed. by *Horst Hammen* (1993) 6.

[53] "... wenn die nationale Einheit mächtig genug ist, wird es ihr ... gelingen, die zufällige politische Trennung zu überwinden": *Puchta*, Cursus der Institutionen I (*supra* n. 17) 27.

[54] See *Hans Gerhard Husung*, Protest und Repression im Vormärz (1983) 95; *Whitman*, Legacy (*supra* n. 42) 146.

were shocked, not least because several members of the group – the *Grimm* brothers, *Albrecht* and *Dahlmann* – enjoyed nationwide fame[55]. In a letter, *Puchta* made clear that in the eyes of the Historical School, protection against royal autocracy was only to be had through a judiciary that worked scientifically and that was protected by its autonomy as a specialized profession; protection could not be expected by way of a constitution:

"Between you and me, I personally see a kind of nemesis in the fact that Dahlmann's constitution got back at him; it seems he was driven too much by the new politicians' disaffection for lawyers and a juridical handling of the issue. Now we can see what happens when you rely on estates that are really built on sand; ... How curious that the first volume of Dahlmann's *Politics*, which already contains the foundations of a state constitution, does not mention the courts at all"[56].

After 1848, a new generation of jurists, *Jhering*, *Gerber*, *Kuntze* and *Windscheid* among others continued *Savigny's* program with some minor changes which are of no interest here[57]. The 1848 revolution, as a result of which *Savigny* had to resign from his position as a minister[58], made many conservative jurists even more suspicious of politics meddling in matters of private law. In 1848, politically minded law professors like *Carl Friedrich von Gerber* feared that "the present excitement [might lead] to the uprooting of healthy plants as well"[59]. They continued to cultivate the notion of a legal method that guided a strictly professional legal science as well the concept of a national private law devoid of any politics[60].

[55] The iconic status of the *Göttinger Sieben* as a symbol in the years leading up to the 1848 revolution led to remarkably different historiographic interpretations, see recently *Miriam Saage-Maaß*, Die Göttinger Sieben – demokratische Vorkämpfer oder nationale Helden? (2007).

[56] "Unter uns gesagt, ich finde eine Art Nemesis darin, daß sich an Dahlmann seine Constitution rächt, bey der er auch von der Abneigung der neueren Politiker gegen die Juristen und die juristische Behandlung der Sache geleitet worden zu seyn scheint. Nun sieht man, was dabey heraus kommt, wenn man alles auf solche in die Luft gebauten Stände baut; ... Es ist merkwürdig, daß in dem ersten Band der Politik von Dahlmann, der doch schon die Grundlage der Staatsverfassung enthält, die Gerichte nicht vorkommen": Unpublished letter to Hugo of February 14, 1839; see *Haferkamp*, Puchta (*supra* n. 35) 438.

[57] On the turning points in legal science after 1848 ("Wendepunkte" as coined by Kuntze), see *Sten Gagnér*, Zielsetzung und Werkgestaltung in Paul Roths Wissenschaft (1975), reprinted in: Abhandlungen zur Europäischen Rechtsgeschichte (*supra* n. 2) 387, 395.

[58] See *Rückert*, Methodenklassiker (*supra* n. 25) 33; *Friedrich Ebel*, Savigny officialis (1986) 25; *Wolf-Christian von Arnswaldt*, Savigny als Strafrechtspraktiker. Ministerium für die Gesetzesrevision (2003) *passim*.

[59] "[D]ie Aufregung der Gegenwart [, bei der] die Axt ... auch an gesunde Stämme gelegt wird": *Carl Friedrich von Gerber*, System des Deutschen Privatrechts I (1848) XVII.

[60] Recent research discusses this topic primarily in the area of public law; see *Walter Pauly*, Der Methodenwandel im deutschen Spätkonstitutionalismus. Ein Beitrag zu Entwicklung und Gestalt der Wissenschaft vom Öffentlichen Recht im 19. Jahrhundert (1993) 228; *Christoph Schönberger*, Das Parlament im Anstaltsstaat. Zur Theorie parlamentarischer Repräsentation in der Staatsrechtslehre des Kaiserreichs (1871–1918) (1997) 85. For the time before 1848

V. The Judicial Perspective

All these factors led to a fundamental reshaping of German private law between 1806 and 1871. The nineteenth century usually is seen as a century of legal science. But one can see matters also in a very different light and conceive of the period as the century of the judiciary.

The image that legal science ruled over the judiciary was based on the view that the highly condensed pandectist textbooks held answers for virtually all questions arising in real cases. But contrary to this position, a retired appellate judge lamented in 1834: "There is no such thing as a German *ius commune* ... there is a general legal uncertainty instead"[61]. He put forward several reasons for this malaise: the complex and fragmentary body of rules; the excessive freedom in interpreting them; the uncertainties regarding the existence of customary law and case law, etc. All this, he said, had only been worsened by the Historical School.

If we move the focus of our attention away from the pandectist textbooks and towards the Historical School's definition of legal sources, this criticism becomes quite plausible[62]. If all law emanated from the obscure realm of the *Volksgeist*, nobody could be certain whether a decision, an opinion or a Roman text actually qualified as law. Without a seal of approval by the *Volksgeist*, all the traditional legal rules were nothing more than indications; this was true for the *Corpus Iuris* itself but also for the *communis opinio doctorum*, the *usus fori*, and even for the systematic context of a rule. First and foremost, this meant that a rule which had been followed in the past was not necessarily binding in the future. Law could only be made for the case at hand and had thus to be made over and over again. In order to do this correctly, a jurist was required to know the whole history of a specific rule of law. Moreover, in order to gauge its force, he had to construe the rule according to its correct place within the system of the whole legal order. This was an enormous scientific challenge. Furthermore, a jurist could only employ the *Volksgeist* by way of intuition. *Savigny* spoke of "finding by feeling" and a "sense of truth"[63]. In the end, administering the law was transformed into a very complicated hermeneutic process. It gave the judges great scientific responsibility but also huge discretionary powers regarding the interpretation of rules. Research done by others supports the assumption that judges indeed developed a highly scientific style of reasoning. At the same

the caricature of a "conceptual jurisprudence" ("Begriffsjurisprudenz") is historically wrong, see *Haferkamp*, Puchta (*supra* n. 35) 443.

[61] *H.J. Siegen*, Juristische Abhandlungen vorzüglich den Zustand Deutscher Gesetzgebung und Rechtspflege betreffend, Abhandlung XIII: Über das sogenannte Deutsche gemeine Recht und Einfluss auf die Justiz (1854) 239, 262; see *Joachim Rückert*, Autonomie des Rechts in rechtshistorischer Perspektive (1988) 41.

[62] The following material is based on *Haferkamp*, Puchta (*supra* n. 35) 141, 165.

[63] *Savigny*, System I (*supra* n. 15) 94; see *Meder*, Mißverstehen (*supra* n. 25) 85.

time, however, they knew very well how to use the resulting freedom of interpretation[64].

The strong position assigned by the methodical program of the Historical School to the judges supported the rise of an independent, self-confident judiciary that easily entered into a scientific discourse with legal science on equal terms. Between 1801 and 1803, about sixty-six percent of all Bavarian judges had never received any legal education but instead had bought their office or received it through patronage[65]. We can see here that around 1800 the monopoly on legal education held by the universities – it was actually much older – did not mean that judges had to be university educated lawyers[66]. Yet, with the nationwide establishment of the *Staatsexamen* (state examination) and the subsequent rise in the quality of legal education, judges gradually formed a distinct social group that defined its boundaries by way of specialist knowledge[67]. It was characteristic for the new self-confidence of the courts that they now, for the first time, published their decisions themselves, including reasons, and that they thus started to talk back to the law professors[68]. Previously, it had been the academic authors who had collected and published court decisions in order to prove the practical relevance of their own teachings[69], and the courts had not actively taken part in this discourse[70]. During the nineteenth century, liberal

[64] See *Regina Ogorek*, Richterkönig oder Subsumtionsautomat? (1986) 278 *et passim*.

[65] See *Reinhard Wendt*, Die bayerische Konkursprüfung in der Montgelas-Zeit. Einführung, historische Wurzeln und Funktion eines wettbewerbsorientierten, leistungsvergleichenden Staatsexamens (1984) 30.

[66] Further examples are provided by *Erich Döhring*, Geschichte der Deutschen Rechtspflege seit 1500 (1953) 50.

[67] The state examinations had already existed for some courts in several territories since the seventeenth century. In the nineteenth century, this concept became a general practice in all territories, see *Kühn*, Reform (*supra* n. 27) 148 f. For an account of the various self-perceptions of German judges, see *Ulrich Falk*, Von Dienern des Staates und von anderen Richtern. Zum Selbstverständnis der deutschen Richterschaft im 19. Jahrhundert, in: Europäische und amerikanische Richterleitbilder, ed. by *André Gouron et al.* (1996) 251.

[68] On the following arguments, see *John P. Dawson*, The Oracles of the Law (1968) 213, 218, 228; *Heinrich Gehrke*, Die privatrechtliche Entscheidungsliteratur Deutschlands (1974) 20; *Heinz Mohnhaupt*, Sammlung und Veröffentlichung von Rechtsprechung im späten 18. und 19. Jahrhundert in Deutschland. Zu Funktion und Zweck ihrer Publizität, in: Geschichte der Zentraljustiz in Mitteleuropa. Festschrift für Bernhard Diestelkamp zum 65. Geburtstag, ed. by *Friedrich Battenberg/Filippo Ranieri* (1994) 403. Collections of court decisions after 1800 are documented in: Gedruckte Quellen der Rechtsprechung in Europa (1800–1945) I, ed. by *Filippo Ranieri* (1992) 102. The same argument is made by *Karl Kroeschell*, Deutsche Rechtsgeschichte III[3] (2001) 163.

[69] A typical example of the eighteenth century was *Friedrich Esaias von Pufendorf*, Observationes iuris universi I-IV (1744–1770); one of the last representatives of this genre was *Friedrich von Bülow/Theodor Hagemann*, Practische Erörterungen aus allen Theilen der Rechtsgelehrsamkeit I-IX (1798–1831).

[70] The edition of decisions of the *Oberappellationsgericht Kassel* by its president *Leonhard H.L.G. Canngiesser*, Collectio notabiliorum decisionum (1768 and 1771) had remained an early, singular, exception.

pressure for the publicity of proceedings, as well as judges who had grown confident in the advantages of a public discussion of their judgements, led to the acceptance of a general requirement that courts give reasons for their decisions[71]. From 1820 onwards, the courts increasingly published their judgments, including the reasons, in edited form[72]. The year of 1847 saw the beginning of "Seufferts Archiv"[73], a journal that systematically presented the case law of various courts. Around the same time, case law began to play a role in legal scholarship as well, and especially *Bernhard Windscheid* began to analyze court decisions in a systematic fashion, beginning in 1862[74]. The resultant intensive systematic and scientific discourse between theory and practice[75] put *Savigny's* original ideas into action.

VI. The Turning Point of 1871

In 1871, the political framework for a national codification of private law was available for the first time since 1815. Perhaps even more important was the change in mentality that accompanied the political unification.

An example of this change is provided by *Rudolf von Jhering*, who had been skeptical at first but who now felt, as he put it, "tears of joy"[76] when contemplating *Bismarck's* success in foreign affairs from 1866 onwards. In 1888, he sent a letter to *Bismarck* explaining his change of mind. *Jhering* wrote that he had witnessed the constitutional conflict in Hanover as a student in 1837 and that he had experienced bad kings and misgovernment ever since. But Emperor *Wilhelm* (I.) made him believe in the state and the monarchy, and this led to "a change in my whole way of thinking and in my attitude"[77]. *Jhering* then coined a key sentence that aptly summarized the general sentiment after 1871: "Having seen the bland glorification of principles and dead formulae, I now hope to see the blessings of having a great leader"[78].

The project of a private law that was safeguarded against political influence by way of scientific doctrine and the leading role of specialized jurists came into crisis soon after 1871. In a talk delivered on "Power and the Law" in 1879[79], *Roderich von Stintzing* claimed that from now on legal science, formerly held in high esteem for its autonomy, was to be measured by its effectiveness in terms of *Realpolitik*, i.e., its ability to truly promote socio-political reform. Henceforth, the moral judgments hidden beneath a painstakingly refined specialist terminology were openly questioned about their political positions. At the same time, the legislature as one of the central institutions in the newly formed *Reich*, received increased attention. The task of unifying the nation was no longer the task of legal science. Instead, scientific legal discourse retreated from the limelight, while the legislature and the judiciary moved to the front of the stage. Open criticism of the Historical School gained momentum and expressed itself in a variety of ways:

(1) The *Volksgeist* was attacked as "mystic" and metaphysical[80].

(2) The concept of a scientific dogmatic law was vilified as "Begriffsjurisprudenz" and as formalism[81] as well as denounced as out-dated and impractical[82].

(3) The Historical School's concept of law – law as based on volition – was accused of being too individualistic. Instead, the critics claimed, law should be more community-oriented. Asserting one's rights was allowed only where the state had created the possibility to do so or where the enforcement of a legal right was based on a justified interest[83].

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[71] See *Stephan Hocks*, Gerichtsgeheimnis und Begründungszwang. Zur Publizität der Entscheidungsgründe im Ancien Régime und im frühen 19. Jahrhundert (2002) 130; *Mohnhaupt*, Sammlung (*supra* n. 68) 405.

[72] Probably first was *Oberhofgericht Mannheim*, Jahrbücher des Großherzoglich Badischen Ober- Hofgerichts zu Mannheim I–VII. Gesammelt und mit Genehmigung des Großherzoglichen obersten Justizdepartements herausgegeben vom Staatsrath von Hohnhorst, Kanzler des Oberhofgerichts (1824–1832); next, there were *Oberappellationsgericht Wiesbaden:* Sammlung der merkwürdigeren Entscheidungen des Herzöglich Nassauischen Oberappellations-Gerichts zu Wiesbaden. Herausgegeben von Wilhelm von der Nahmer (Advokat und Procurator bei dem Herzöglichen Oberappellations-Gerichte, so wie bei dem Herzöglichen Hof- und Appellations-Gerichte in Wiesbaden), I-II (1824–1825); *Oberappellationsgericht Lübeck*: Juristische Abhandlungen mit Entscheidungen des Oberappellationsgerichts der vier freien Städte Deutschlands. Von A. Heise (Präsidenten) und F. Cropp (Rath bei dem Oberappellationsgerichte) I-II (1827–1830); *Obertribunal in Berlin*: Entscheidungen des Königlich Geheimen Ober-Tribunals, herausgegeben im amtlichen Auftrage von August Heinrich Simon (geheimer Ober-Justiz- und Revisions-Rathe), und Heinrich Leopold von Strampff (Kammergerichts-Rathe), I–LXXXIII (1837–1879).

[73] Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten, ed. by *Johann Adam Seuffert* (as of vol. IX named "Seufferts Archiv für Entscheidungen ...").

[74] *Bernhard Windscheid*, Lehrbuch des Pandektenrechts I (1862).

[75] This is emphasized by *Hocks*, Gerichtsgeheimnis (*supra* n. 71) 175.

[76] See *Falk*, Dienern (*supra* n. 67) 275.

[77] "Umschwung in meiner ganzen Anschauungsweise und Gesinnung": letter to Bismarck of September 15, 1888, in: Rudolf von Jhering in Briefen an seine Freunde, ed. by *Helene Ehrenberg* (1913) 442.

[78] "Gegenüber der öden Verherrlichung von Prinzipien und toten Formeln hoffe ich auf den Segen einer gewaltigen Persönlichkeit".

[79] See *Ogorek*, Richterkönig (*supra* n. 64) 247; *Peter Landau*, Die Rechtsquellenlehre in der Deutschen Rechtswissenschaft, in: Juristische Theoriebildung und Rechtliche Einheit, ed. by *Claes Peterson* (1993) 82.

[80] See *Karl Magnus Bergbohm*, Jurisprudenz und Rechtsphilosophie. Kritische Abhandlungen I (1892) (the only published volume) 502; *Rudolf Stammler*, Über die Methode der geschichtlichen Rechtstheorie, in: Festgabe zu Bernhard Windscheids fünfzigjährigen Doktorjubiläum, 1. Abhandlung, ed. by *id./Theodor Kipp* (1888) (reprint 1979) 6; *Ernst Zitelmann*, Gewohnheitsrecht und Irrtum: AcP 66 (1883) 323.

[81] See *Rückert*, Autonomie (*supra* n. 61) 88.

[82] Primarily by *Rudolf von Jhering*, Scherz und Ernst in der Jurisprudenz (1884); on the ensuing contemporary debate, see *Haferkamp*, Puchta (*supra* n. 35) 58.

[83] See the analysis by *Hofer*, Freiheit (*supra* n. 1) 107, 132.

After 1871, most jurists felt at ease with the new empire. Protecting private law against political intervention ceased to be a primary objective. The new attitude was supported by the experience that in this highly liberal period, private law suffered almost no intervention by the state. This, of course, changed in 1878–79 with *Bismarck's* "conservative turn"[84] which introduced a new policy of state interventionism[85]. The liberal credo was put into serious doubt and private law was confronted with the so-called "social question"[86]. Again, an intensive discussion ensued about the relationship between private law and the state but now it took place in a different atmosphere: private law was no longer construed as independent of the state and it enjoyed no independence, neither as an emanation of the *Volksgeist* nor by virtue of the autonomy of legal science. Private law was now law of the *Reich*. The balance between private autonomy and state control was discussed in light of the challenges posed by the "social question". Was liberal private law itself flexible and powerful enough to mitigate the pressure created by changing social conditions or should public law take the lead and direct the development of private law? For the contemporary jurists again this question was linked to the issue of competence: if private law assumed the task of solving the "social question", who should supervise this process – legal science, judiciary or legislature?

Around 1890, with the first draft of the German civil code published, a lively discussion about this issue emerged[87]. Many jurists were increasingly worried about ending up with the legislature as the sole dominant power. *Windscheid*, the leading legal scholar of his time, sided with the legislature, probably to save the "legal works of centuries"[88] (now resulting in the codification) for the future. Yet, while the drafting of the new civil code made good progress, many jurists became increasingly frightened of the "prison cells of the civil code"[89]. They feared the loss of the creative freedom the *ius commune* had offered them. While the legislature prepared the new code, an increasing number of statements supported the strengthening of either legal science or the judiciary. In this context, four different approaches need to be mentioned.

[84] See *Hans-Ulrich Wehler*, Deutsche Gesellschaftsgeschichte III, 1849–1914 (1994) 934.

[85] See *Michael Stolleis*, Geschichte des Sozialrechts in Deutschland (2003) 44.

[86] Introduction by *Thomas Nipperdey*, Deutsche Geschichte 1866–1918 I (1990) 335; the legal discussion is analyzed by *Tilman Repgen*, Die soziale Aufgabe des Privatrechts (2001) 24.

[87] For an overview, see *Hofer*, Freiheit (*supra* n. 1) 132, 186; *Repgen*, Aufgabe (*supra* n. 86).

[88] *Bernhard Windscheid*, Die geschichtliche Schule in der Rechtswissenschaft (1878), reprinted in: Bernhard Windscheid. Gesammelte Reden und Abhandlungen, ed. by *Paul Oertmann* (1904) 75; see also *Rückert*, Autonomie (*supra* n. 61) 68.

[89] *Hans Wüstendörfer*, Die Deutsche Rechtswissenschaft am Wendepunkt: AcP 110 (1913) 224; see *Heinrich Honsell*, Historische Argumente im Zivilrecht (1982) 23; *Reinhard Zimmermann*, Roman law, Contemporary Law, European Law. The Civilian Tradition Today (2001) 53.

1. Traditional Pandectist Solutions

Most jurists had long recognized that in private law, the rich could take advantage of the poor as easily as the smart could outdo the less intelligent. These jurists knew that "freedom" and "equality" were ideals but not what descriptions of reality[90]. These concerns manifested themselves in several contexts in German private law, such as *laesio enormis*, intercession, standards of care in negligence (the standard of *culpa levissima* had been abolished), *bona fides* and *boni mores*, as well as the issue of strict liability (introduced for some contexts by special statute, the *Reichshaftplichtgesetz* of 1871). Still, the basic idea of a private law that treated everybody as free and equal was left unmodified. To be sure, social inequalities should not be reinforced but they should be dealt with through public law: "A rich man can throw a poor man into peril by denying him support or through a harsh execution of his rights as a creditor, but the remedy against this is not to be found in private law, but in public law only", *Savigny*[91] wrote. For him, the "unfettered rule of morality"[92] was not put into doubt by private law. *Puchta* spoke of a *ius singulare*, i.e., legal exceptions adopted by the government for the benefit of specific persons[93]. Therefore, while the basic morality of an argument was irrelevant within the sphere of private law, it was not irrelevant in the law generally.

Private law presupposed the freedom and equality of market actors and public law was meant to guarantee these conditions. In political terms, the problem concerned the interplay of rule and exception, freedom and correction. Ultimately this was meant to be decided *in dubio pro libertate*. As a result, private law was thought decidedly liberal. In order to restrict market participants under private law, one used the doctrines of *boni mores* and *bona fides*, but not public welfare, public order or public interest. In 1878, for example, a German court had to decide a case involving the buying of votes in a local election[94]. In a similar case, the French courts had assumed a violation of the *ordre public*. The

[90] The view that the Pandectists advocated a free market with no checks and balances whatsoever is disproved today, see *Hofer*, Freiheit (*supra* n. 1) *passim*; their position included an important religious undertone, see *Hans-Peter Haferkamp*, Die Bedeutung der Willensfreiheit für die Historische Rechtsschule, in: Willensfreiheit und rechtliche Ordnung, ed. by *Ernst Joachim Lampe et al.* (2008) 196ff.

[91] "[Es könne der] Reiche den Armen untergehen lassen durch versagte Unterstützung oder harte Ausübung des Schuldrechts, die Hülfe, die dagegen Statt findet, entspringt nicht auf dem Boden des Privatrechts, sondern auf dem des öffentlichen Rechts": *Savigny*, Sytem I (*supra* n. 15) 371; see *Joachim Rückert*, "Frei" und "Sozial". Arbeitsvertragskonzeptionen um 1900 zwischen Liberalismen und Sozialismen: ZfA 1992, 225, 246.

[92] "[U]nbedingte Herrschaft sittlicher Gesetze": *Savigny*, System I (*supra* n. 15) 371.

[93] See *Haferkamp*, Puchta (*supra* n. 35) 416.

[94] On the following arguments, see *Hans-Peter Haferkamp*, Der ordre public interne in der Rechtsprechung zum Rheinischen Recht, in: Richterliche Anwendung des Code civil in seinen europäischen Geltungsbereichen außerhalb Frankreichs, ed. by *Barbara Dölemeyer/Heinz Mohnhaupt/Alessandro Somma* (2006) 125.

German court, however, declared the contract of sale void because it was *contra bonos mores*. In other words, the German judiciary favored arguments that regarded a conflict as the disagreement between utterly private legal subjects, avoiding the dangerous political sphere as much as possible.

The German civil code has often been characterized as a modernized version of the traditional pandectist doctrine[95]. Especially, *Gottlieb Planck*, part of the second BGB-Commission, insisted on freedom and equality as the basic principles of private law[96]. However, demands that public law provide the framework for ensuring equal participation in the market were now more frequent and forceful than before. A radical view was held by *Julius Baron*[97]: The only function of private law was to assign a sphere of individual freedom; private law had no social responsibilities beyond that at all, and private autonomy should be kept strictly free of any interference by the state. Where serious problems arose and the public interest required it, *Baron* saw the only solution in removing the respective legal rights from private law, for example in transferring the relevant property rights to the state.

2. *Merging Private Law with Public Law*

Another proposal pointed in the direction of a fundamental change: merging private law with public law. A minority of thinkers combined this proposal with radical consequences, such as *Karl Marx* and *Friedrich Engels*, *Ferdinand Lassalle*[98] or *Anton Menger*[99], who saw it as part of the amalgamation of state and society but found themselves on the margins of the debate. *Otto von*

[95] Important for this picture *Franz Wieacker*, Das Sozialmodell der klassischen Privatrechtsgesetzbücher, in: *id.*, Industriegesellschaft und Privatrechtsordnung (1974) 15: "spätgeborene Kind der Pandektenwissenschaft".

[96] *Gustav Planck*, Zur Kritik des Entwurfs eines bürgerlichen Gesetzbuchs: AcP 75 (1889) 327; see also *Repgen*, Aufgabe (*supra* n. 86) 68, 112.

[97] *Julius Baron*, Das römische Vermögensrecht und die soziale Aufgabe, Jahrbücher für Nationalökonomie und Statistik 19 (1889) 225; on his concept, see *Rainer Schröder*, Abschaffung oder Reform des Erbrechts. Die Begründung einer Entscheidung des BGB-Gesetzgebers im Kontext sozialer, ökonomischer und philosophischer Zeitströmungen (1981) 356 n. 4; *Pio Caroni*, Kathedersozialismus an der juristischen Fakultät (1870–1910), in: Hochschulgeschichte Berns 1528–1984. Zur 150-Jahr-Feier der Universität Bern 1984, ed. by *Ulrich Im Hof* (1984) 212; *Cappellini*, Systema Iuris II (*supra* n. 2) 337; *Hofer*, Freiheit (*supra* n. 1) 141, 148.

[98] On Lassalle, see *Thilo Ramm*, Ferdinand Lassalle (1825–64). Der sozialistische nationale Revolutionär, in: Deutsche Juristen jüdischer Herkunft, ed. by *Helmut Heinrichs et al.* (1993) 127; *Hofer*, Freiheit (*supra* n. 1) 99.

[99] *See Pio Caroni*, Das "demokratische Privatrecht" des Zivilgesetzbuches. A. Menger und E. Huber zum Wesen des sozialen Privatrechts, in: Festgabe Henri Deschenaux, ed. by *Universität Freiburg* (1977) 37; *Pio Caroni*, Anton Menger, in: Juristen in Österreich 1220–1800, ed. by *Wilhelm Brauneder* (1987) 212 (including marxist critics of Menger such as Karl Kautzky).

Gierke's interpretation enjoyed more influence. According to him, the private law enshrined in a civil code had to give clear answers to the great questions of public issues and daily life[100]. *Gierke's* criticism was directed primarily at the combination of a liberal civil code and particular statutes providing for exceptions. If the system of liberal rules and exceptions was dropped altogether, however, the judges could balance individual and social interests on their own, and thus would enjoy too much discretion[101].

3. *The Emergence of Material Positions*

From a third point of view, combining elements stemming from various positions, statutory law was attacked via references to extra-legal notions. In 1883, *Gierke* spoke of an "ideal content", of "life", of an "immortal idea of law"[102]. Other terms became popular as well, such as the "Bedürfnisse des Verkehrs" ("needs of commerce") or "die Praxis" ("the practice of law")[103], "Natur der Sache" ("the nature of the matter at hand"), and "cultural norms" as opposed to statutory norms[104]. Here as well, the abstract notion of justice would have to be filled with concrete meaning by the judiciary.

4. *Judge-made Law*

Fourth, some jurists explicitly demanded that the judges be given greater flexibility. They did so by either pointing out that a legal order could never be gapless[105] or by emphasizing that any decisionmaking process inevitably included

[100] *Otto von Gierke*, Der Entwurf eines bürgerlichen Gesetzbuches und das deutsche Recht (1889) 109.

[101] See *Repgen*, Aufgabe (*supra* n. 86) 54, 99; *Hofer*, Freiheit (*supra* n. 1) 141; *Otto Depenheuer*, Grundrechte und Konservatismus, in: Handbuch der Grundrechte, ed. by *Detlev Merten et al.* (2003) no. 52.

[102] *Otto von Gierke*, Labands Staatsrecht und die deutsche Rechtswissenschaft, in: (Schmollers) Jahrbücher für Gesetzgebung, Verwaltung und Volkswirtschaft 7 (1883) 85, 93, 98; for further comments, see *Rückert*, Autonomie (*supra* n. 61) 92.

[103] On the notion of "the needs of (commerce)" in the nineteenth and twentieth centuries, see *Hans-Peter Haferkamp*, Der Jurist, das Recht und das Leben, in: Fakultätsspiegel Sommersemester 2005, ed. by *Verein zur Förderung der Rechtswissenschaft* (2005) 83 ff.; *Repgen*, Aufgabe (*supra* n. 86) 109.

[104] See, e.g., *Max Ernst Mayer*, Rechtsnormen und Kulturnormen (1903); for further details, see *Hans-Peter Haferkamp*, Neukantianismus und Rechtsnaturalismus, in: Rechtswissenschaft als Kulturwissenschaft?: ARSP supplement B 115, ed. by *Marcel Senn/Dániel Puskás* (2007) 105.

[105] For a good overview of this debate, see already *Lorenz Brütt*, Die Kunst der Rechtsanwendung. Zugleich ein Beitrag zur Methodenlehre der Geisteswissenschaften (1907) 73; on the myth that before 1900, legal science had assumed a gapless legal order, see *Haferkamp*, Puchta (*supra* n. 35) 88.

a subjective component[106]. Some also emphasized the institutions of the *ius commune* that were judicically created to begin with, such as *bona fides* or the *exceptio doli generalis*[107].

VII. The Era of the Judges

On the whole, a broad anti-liberal movement got underway around 1880, and it remained strong in Germany for much of the twentieth century[108]. It was only around 1880 that the notion of *Privatautonomie* surfaced for the first time[109]. From the very beginning, it was mostly seen as a danger, not as a chance. "Social", not "free", was the leitmotif of private law[110]. The predominant question at the time was not whether private law should be made more social at all, but only how. The German civil code did not live up to these expectations and remained unloved by the many jurists throughout the twentieth century[111]. The end of the nineteenth century saw a very strong judiciary. In 1902, *Dernburg* rightly observed that the judiciary now enjoyed greater confidence than in earlier times[112]. While working on a case at hand, the judges should decide about how to bring together the diverse aspects of community interests, social and practical needs, legal culture, the idea of law and various other elements[113].

[106] The inevitably subjective component of any decision making process was emphasized by the newer hermeneutics of Schleiermacher and others, cf. *Meder*, Mißverstehen (*supra* n. 25) 17. The argument surfaced around 1900, in a debate about the question whether it is possible to identify a will of the legislator at all, see *Honsell*, Historische Argumente (*supra* n. 89) 42.

[107] *Hans-Peter Haferkamp*, Die exceptio doli generalis in der Rechtsprechung des Reichsgerichts vor 1914, in: Das Bürgerliche Gesetzbuch und seine Richter, ed. by *Ulrich Falk/Heinz Mohnhaupt* (2000) 1.

[108] See *Joachim Rückert*, Zu Kontinuitäten und Diskontinuitäten in der juristischen Methodendiskussion nach 1945, in: Erkenntnisgewinne, Erkenntnisverluste. Kontinuitäten und Diskontinuitäten in den Wirtschafts-, Rechts- und Sozialwissenschaften zwischen den 20er und 50er Jahren, ed. by *Karl Acham et al.* (1998) 144.

[109] See *Hofer*, Freiheit (*supra* n. 1) 2; *Rückert*, Freiheit (*supra* n. 1).

[110] See *Rückert*, Arbeitsvertragskonzeptionen (*supra* n. 91).

[111] *Hans Schulte-Nölke*, Die späte Aussöhnung mit dem Bürgerlichen Gesetzbuch, in: Das deutsche Zivilrecht 100 Jahre nach der Verkündung des BGB. Jahrbuch Junger Zivilrechtswissenschaftler 1996, ed. by *Armin Willingmann* (1996) 9; *Rückert*, Prinzipien (*supra* n. 2) nos. 92ff.

[112] *Heinrich Dernburg*, Das Bürgerliche Recht des Deutschen Reiches und Preußens I² (1902) 52.

[113] This is the result of a survey of about 800 texts concerning the discussion of judge made law conducted by *Rainer Schröder*, Die Richterschaft am Ende des Zweiten Kaiserreiches unter dem Druck polarer sozialer und politischer Anforderungen, in: Festschrift für Rudolf Gmür zum 70. Geburtstag, ed. by *Arno Buschmann* (1983) 201; *Rainer Schröder*, Die deutsche Methodendiskussion um die Jahrhundertwende: Wissenschaftliche Präzisierungsversuche oder Antworten auf den Funktionswandel von Recht und Justiz: Rechtstheorie 19 (1988) 323, 334.

These demands almost meant preaching to the choir. The overtly self-confident judiciary had already worked towards the unification of law since 1869, when the supreme commercial court (*Reichsoberhandelsgericht*) was founded[114]. In 1879 the independence of the judiciary was guaranteed by statute[115]. A majority of the judges appointed to the newly created *Reichsgericht* had previously sat on the supreme commercial court – a court that had been renowned for its self-confident rulings[116]. A ruling by the first senate of the *Reichsgericht* in 1882 illustrates how far this independence towards legal academia now went. When *Bernhard Windscheid*, the most influential of the contemporary pandectists, had an idea that differed from the courts, the senate flatly retorted that "then he just is not right" – without deliberating the reasons at all[117]. In the last decades of the nineteenth century, the economy generated a multitude of new problems that had to be decided. The *Reichsgericht* did not hesitate to address them by creating new law. Antitrust law, collective bargaining agreements[118], emission and nuisance law[119], and other subjects were developed through case law. The imperial *Reich* was shaped by a self-confident judiciary to an extent that is often underestimated. It came as no surprise that even after the civil code had entered into force, the judges carried on with their opinions as though nothing had happened – their willingness to submit to the newly promulgated code was quite limited[120]. The nineteenth century had indeed produced the scientifically working, self-confident, Judge *Savigny* had fought for. Yet, his hope that a strong judiciary would also prove to be a fortress against the state lost most of its mean-

[114] *Thomas Henne*, Richterliche Rechtsharmonisierung – Startbedingungen, Methoden und Erfolge in Zeiten beginnender staatlicher Zentralisierung analysiert am Beispiel des Oberhandelsgerichts, in: Kontinuitäten und Zäsuren in der Europäischen Rechtsgeschichte, ed. by *Andreas Thier/Guido Pfeifer/Philipp Grzimek* (1999) 335; *Klaus Luig*, Rechtsvereinheitlichung durch Rechtsprechung in den Urteilen des Reichsgerichts von 1879 bis 1900 auf dem Gebiet des Deutschen Privatrechts: ZEuP 1997, 762.

[115] § 1 Gerichtsverfassungsgesetz, on this provision and on the previous territorial norms, see *Thomas Ormond*, Richterwürde und Regierungstreue. Dienstrecht, politische Betätigung und Disziplinierung der Richter in Preußen, Baden und Hessen 1866–1918 (1994) 45.

[116] See *Regina Ogorek*, Privatautonomie unter Justizkontrolle: ZHR 150 (1986) 87; *Christoph Bergfeld*, Entscheidungen des Reichsoberhandelsgerichts und des Reichsgerichts zur Auslegung von Rechtsgeschäften, in: Das Bürgerliche Gesetzbuch und seine Richter (*supra* n. 107) 625.

[117] *Reichsgericht*, January 18, 1886, reference number: I 253/85 (RGZ 16, 116).

[118] On both, see *Rainer Schröder*, Die Entwicklung des Kartellrechts und des kollektiven Arbeitsrechts durch die Rechtsprechung des Reichsgerichts vor 1914 (1988); about cartels, see also *Knut Wolfgang Nörr*, Die Leiden des Privatrechts (1994) 7.

[119] See *Andreas Thier*, Zwischen actio negatoria und Aufopferungsanspruch: Nachbarliche Nutzungskonflikte in der Rechtsprechung des 19. und 20. Jahrhunderts, in: Das Bürgerliche Gesetzbuch und seine Richter (*supra* n. 107) 407, 424; *Regina Ogorek*, Actio negatoria und industrielle Beeinträchtigung des Grundeigentums, in: Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert IV, ed. by *Helmut Coing/Walter Wilhelm* (1979) 40.

[120] See the various surveys in Das Bürgerliche Gesetzbuch und seine Richter (*supra* n. 107); a summary is drawn by *Zimmermann*, Roman Law (*supra* n. 89) 56.

ing after 1871. Although conceptions of the ideal judge continued to oscillate between "servant of the state" and "servant of society"[121], further attempts to define the judge as the defender of a sphere of individual freedom vis-à-vis the state remained rare exceptions[122]. If we also take into account that the legislator since has increasingly affected private law by public regulation[123], it makes little sense to speak of a private law without the state in German legal doctrine or practice in the twentieth century.

VIII. Conclusions

Traditional understandings still determine the way many legal historians look back on the history of private law in nineteenth century Germany. To begin with, to this day the German civil code is considered a "late born child of liberalism" (*Franz Wieacker*), i.e., as the final, antisocial result of a misguided development. This view is actually the continuation of an argument that was coined as early as 1878, right in the context of the debate about how to solve the "social question". From this perspective, it is impossible to recognize the decisive elements of the development before 1871. The main problem was not the antisocial effect of private autonomy but the autonomy of private law vis-à-vis the state. Private law was to be conceived as supra-territorial, i.e., national. Neither the throne nor the altar, but legal science, was supposed to rule over private law.

What is more, it is usually overlooked that the predominance of legal science was founded on the competence of specialists, not on personal attributes. I have focused on the key figures of the Historical School like *Savigny* and *Puchta* here to illustrate this in rough outline. Their complex efforts were directed at the reform of the judiciary and at the scientification of the practice of law. They wanted merely to provide guidance for judges who worked scientifically.

After 1871, the situation had changed considerably. The identity of the nation and the state led to the collapse of the idea of a private law without the state. For most jurists, private law was now state law. The question thus became how private law should respond adequately to the "social question". How should freedom of contract and property be limited – and who should be in charge of this state interventionism: the legislature, judges or professors? The discussion about autonomous private law and state law developed into a discussion about

[121] In the twentieth century, the judiciary continued its wavering between sceptical distance towards the state (e.g., before 1933) and close cooperation (after 1933), see *Ralph Angermund*, Deutsche Richterschaft 1919–1945. Krisenerfahrung, Illusion, politische Rechtsprechung (1990).

[122] See *Rückert*, Prinzipien (*supra* n. 2) no. 105.

[123] *Michael Stolleis*, Die Entstehung des Interventionsstaates und das öffentliche Recht: ZNR 11 (1989) 129; *id.*, Sozialrecht (*supra* n. 85) 36.

state law as private law or public law. The ultimate winner in this debate about competence was the judiciary. The courts managed to establish themselves as equal partners of the legislature while legal science lost much of its influence. This was possible only because the courts had gradually learned to test and recognize their powers in adjudication throughout the nineteenth century. It therefore is wrong to say that the *Reichsgericht* favored an austere legal positivism[124], cautious not to transgress statutory boundaries. In fact, the German judiciary was a decisive political factor not only during the years of the Weimar Republic, but continuously from 1806 to 1918.

[124] *Hans Schlosser*, Grundzüge der Neueren Privatrechtsgeschichte[9] (2001) 194.