Articles

On the German History of Method in Civil Law in Five Systems

*By Hans-Peter Haferkamp**

Abstract

Germany is the country of legal methodology.[1] No other country saw such an intense academic discourse on the question of what jurists are able, allowed, and supposed to do when interpreting and applying the law. This German peculiarity is tightly linked to the history of the German Civil Code (BGB). Carefully worded and systematically precise, this codification had the potential to significantly limit judicial freedom; thus, its advent marked the beginning of the German methodological debates. The following Article examines this relationship, starting with the year 1874 (when preliminary work on the Civil Code began) and continuing with an analysis of the five political systems during which the BGB was in force: the German Empire (1900–1914), the Weimar Republic (1918–1933), the National Socialist period (1933–1945), the GDR (1949–1989), and the Federal Republic (1949–today). With the exception of the GDR, the methodological debates consistently show attempts to enable judges to adapt the law to real life conditions, or to political ideas in conflict with the BGB, without formally moving beyond extant law. At the roots of 20th century methodological debates, one can thus discern a profound mistrust of German legal academia with regard to both the legislature and the judiciary. Jurists had no confidence in the BGB, which was criticized for being inflexible, outdated, and politically unsound. They did not trust in the freedom of judges either, trying instead to somehow bind them, be it to "life," "reality," "justice," "sense of justice," "national order," or "Christian Natural Law." It was not until 1958 that the Federal Constitutional Court was entrusted with the task of dynamically shaping the guiding values of society, thus forcing both the legislator and the courts to adapt the BGB to these principles. As a consequence, the heyday of German methodological debates surrounding the BGB slowly came to an end.

---

* Hans-Peter Haferkamp is the director of the Institute for the Modern History of Private Law, German and Rhenish Legal History at the University of Cologne. The author wishes to thank the editorial team of the GLJ for their helpful remarks.

[1] The following is a transcript of a presentation held at the 2013 Congress of Private Law Scholars in Würzburg. It remains faithful to the original style of the presentation. I wish to thank Jan Schröder, Jan Thiessen, Michael Stolleis and Marju Luts-Sootak for their advice, Joachim Rückert for the permission to use his highly instructive lecture materials and Carsten Fischer, Angelika C. Mohr, Michaela Moll, Susanne K. Paas, Jörg G. Schöpper, Christof Steinforth, Jacqueline Weertz, Miriam Wolter, and Eric Zakowski for their work on the manuscript.

A. Introduction

Anyone comparing the symposia and essays marking the centennial of the BGB—German Civil Code—in 1996 and 2000[2] with the *Bicentenaire* celebrations of the Code Civil in 2004, would immediately notice the distinction between the two: French euphoria in stark contrast to sober German analysis. Unlike its French counterpart,[3] German jurisprudence decided against publishing an official *Festschrift,* and instead only released a four-volume commemorative publication, to mark the 50 year anniversary of the Bundesgerichtshof, the Federal High Court of Justice, in 2000.[4]

From the publication of the first draft of the BGB in 1888, the German codification,[5] at first so keenly anticipated, eventually thwarted all hopes in legislators; hopes, moreover, that would not return during the twentieth century.[6] The BGB failed to counter its reputation for

---

[2] Essays: HANS SCHULTE-NÖLKE, NEUE JURISTISCHE WOCHENSCHRIFT 1705–10 (1996); MATHIAS SCHMOECKEL, NEUE JURISTISCHE WOCHENSCHRIFT 1697–705 (1996); ROLF *STÜRNER,* JURISTENZEITUNG 741–52 (1996); Rudolf Wassermann, DEUTSCHE WOHNUNGSWIRTSCHAFT 270–72 (1996); HANS-WOLFGANG STRÄTZ, ZEITSCHRIFT FÜR DAS GESAMTE FAMILIENRECHT 1553–67 (1998); EBERHARD *WAGNER,* JURA 505–15 (1999); NORBERT HORN, NEUE JURISTISCHE WOCHENSCHRIFT 40–46 (2000); *KONSTANZE PLETT & SABINE BERGHAHN*, Barrieren und Karrieren: Die Anfänge des Frauenstudiums in Deutschland, 363–82 (Elisabeth Dickmann & Eva Schöck-Quinteros eds., 2000); see also the contributions in 200 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS (2000); monograph: ROLF KNIEPER, GESETZ UND GESCHICHTE: EIN BEITRAG ZU BESTAND UND VERÄNDERUNG DES BÜRGERLICHEN GESETZBUCHS (1996); edited volumes: Das deutsche Zivilrecht 100 Jahre nach Verkündung des BGB: Erreichtes, Verfehltes, Übersehenes. Rostocker Tagung 11.–14. September 1996 (Armin Willingmann et al. eds., 1997); Auf dem Weg zu einem gemeineuropäischen Privatrecht: 100 Jahre BGB und die lusophonen Länder: Symposium in Heidelberg 29.–30.11.1996 (Erik Jayme & Heinz-Peter Mansel eds., 1997); 100 Jahre BGB – 100 Jahre Staudinger: Beiträge zum Symposion vom 18.–20. Juni 1998 in München (Michael Martinek ed., 1999); 100 Jahre BGB: Vortragsreihe der Juristischen Gesellschaft Hagen (Ulrich Eisenhardt ed., 2001); 100 Jahre Bürgerliches Gesetzbuch – 50 Jahre Bundesgerichtshof (Karlmann Geiß & Hermann Lange eds., 2001); 100 Jahre BGB: das Bürgerliche Recht – von der Vielfalt zur Einheit: Vortragsreihe anläßlich einer Sonderausstellung des Landgerichts Flensburg zum 100. Geburtstag des Bürgerlichen Gesetzbuches (Gerd Walter ed., 2000); Das BGB und seine Richter, Ulrich Falk & Heinz Mohnhaupt eds., 2000).

[3] *CODE CIVIL*, COLLOQUE DU BICENTENAIRE (Association Henri Capitant et al. eds., 2004).

[4] 50 JAHRE BUNDESGERICHTSHOF: FESTGABE AUS DER WISSENSCHAFT (Claus-Wilhelm Canaris et al. eds., 2000).

[5] BERNHARD WINDSCHEID, GESAMMELTE REDEN UND ABHANDLUNGEN 70–80, Preface to § 1, Margin 9 (Paul Oertmann ed. 1904); on this: REINHARD ZIMMERMANN, HISTORISCH-KRITISCHER KOMMENTAR ZUM BGB, preface to § 1 margin number 9 (vol. I, 2003).

[6] *SCHULTE*-NÖLKE, *supra* note 2, at 9–21; JOACHIM RÜCKERT, HISTORISCH-KRITISCHER KOMMENTAR ZUM BGB, preface to § 1 (vol. I, 2003); even the debate on the BGB as a "monument" during the reform of the law of obligations was not so much powered by a sudden appreciation of the BGB but rather that the contemporaneous legislator was even less trustworthy than the historical one. See, e.g. HORST HEINRICH JAKOBS, JURISTENZEITUNG 27–30 (2001).

having a flawed design with respect to both content and method.[7] Evidently, changing this circumstance was a task entrusted to judges trained by jurisprudence, rather than legislators.

Hence, it was during the debates on codification around 1900 that the great era of German methodology commenced.[8] This was in no small part due to a tangible sense of inferiority pervading the field of jurisprudence. After the struggle against conceptual jurisprudence initiated by Rudolph von Jhering in 1884,[9] German private law began forfeiting its confidence in the existence of an academically sound method for the construction of law. Conceptual deduction, syllogistic subsumption, formal logic, the method of inversion, and conceptual pyramids became the slogans of what was considered a misguided method.[10] Consequently, legal doctrine as a whole became suspect. What was the alternative?

After 1900, a fear of descending into judicial subjectivism and free case law emerged. The debate on method signaled an attempt to create sufficient freedom for judges to facilitate the necessary modernization of civil law, while, at the same time, binding them with something beyond mere logic. The result became what was referred to in the twentieth

---

[7] JAN THIESSEN, JAHRBUCH JUNGER ZIVILRECHTSWISSENSCHAFTLER 29–50 (Gundula Maria Peer & Wolfgang Faber eds., 2004) (compiling the most important notions).

[8] JAN SCHRÖDER, RECHT ALS WISSENSCHAFT (2d ed. 2012); JOACHIM RÜCKERT, METHODIK DES ZIVILRECHTS – VON SAVIGNY BIS TEUBNER 501–50 (Joachim Rückert & Ralf Seinecke eds., 2d ed. 2012) (showing modern overviews of the history of methodology).

[9] RUDOLF VON JHERING, SCHERZ UND ERNST IN DER JURISPRUDENZ 330–31 (1st ed. 1884) (coining the term "conceptual jurisprudence").

[10] The notion of a conceptual jurisprudence has its own history. See HANS-PETER HAFERKAMP, Enzyklopädie zur Rechtsphilosophie (retrieved Sept. 23, 2013), http://www.enzyklopaedie-rechtsphilosophie.net/inhaltsverzeichnis/19-beitraege/96-begriffsjurisprudenz.

century as[11] "value for real life,"[12] "human interests,"[13] "the social ideal,"[14] "the reality of the idea,"[15] the "national order,"[16] the "highest principles of law,"[17] or the "right law."[18]

The greater one's certainty with the depiction of these values of legal life, or with leaving the embodiment of these values to the judge by way of methods, the greater one's confidence when positioning truths with respect to the BGB. The greater the uncertainty with respect to such values, the more reasonable it seemed to subject oneself more strictly to the legislator and, thus, grant no decisive voice to the "jurist as such."[19]

It was in this field of tension that debates on method emerged in Imperial Germany, during the Weimar period, the National Socialist era, and in the Federal Republic, although not in the German Democratic Republic (GDR). In the GDR, this method perspective as a whole was ill-suited. At least since[20] the Babelsberg Conference (1958),[21] one largely refrained in the

---

[11] For a compilation of relevant popular key phrases around 1900, see JAN SCHRÖDER, FESTSCHRIFT FÜR ULRICH EISENHARDT 125–37 (2007) (quoting reprint in RECHTSWISSENSCHAFT IN DER NEUZEIT 591 (Jan Schröder, ed., 2010)). See also HANS-PETER HAFERKAMP, GEDÄCHTNISSCHRIFT FÜR VALTAZAR BOGIŠIĆ 301–13 (2011) (writing on various conceptions of a value for real life).

[12] ERNST ZITELMANN, DIE GEFAHREN DES BÜRGERLICHEN GESETZBUCHES FÜR DIE RECHTSWISSENSCHAFT 14, 19–20 (1896).

[13] PHILIPP HECK, DEUTSCHE JURISTEN-ZEITUNG 1460 (1909); see also SIBYLLE HOFER, JURISTISCHE SCHULUNG 113 (1999).

[14] RUDOLF STAMMLER, THEORIE DER RECHTSWISSENSCHAFT 620–21 (1911).

[15] JULIUS BINDER, 19 LOGOS 32 (1929).

[16] KARL LARENZ, ÜBER GEGENSTAND UND METHODE VÖLKISCHEN RECHTSDENKENS 11 (1938).

[17] HELMUT COING, DIE OBERSTEN GRUNDSÄTZE DES RECHTS. EIN VERSUCH ZUR NEUBEGRÜNDUNG DES NATURRECHTS (1947).

[18] KARL LARENZ, RICHTIGES RECHT: GRUNDZÜGE EINER RECHTSETHIK 12–23 (1979) (term inspired by Stammler).

[19] WINDSCHEID, *supra* note 5, at 111–12; analyzed in ULRICH *FALK*, RECHTSHISTORISCHES JOURNAL 598–633 (1993).

[20] On early signs of a renunciation of traditional methodological concepts in favor of openly political decision making against the BGB in the judicature of the Oberstes Gericht (Supreme Court), see HANS-PETER HAFERKAMP, ZIVILRECHTSKULTUR DER DDR 15–50 (Rainer Schröder ed., vol. 2, 2000); VERENA KNAUF, DIE ZIVILENTSCHEIDUNGEN DES OBERSTEN GERICHTS DER DDR VON 1950–1958 (2007) (concerning the now-rejected application of general clauses); Jens Wanner, *Die Sittenwidrigkeit der Rechtsgeschäfte im totalitären Staate: Eine rechtshistorische Untersuchung zur Auslegung und Anwendung des § 138 Abs. 1 BGB im Nationalsozialismus und in der DDR*, 1996 (doctoral thesis) (believing this to be an eternal problem of "totalitarian" legal systems, Wanner commits a fallacy in this thesis); HANS-PETER HAFERKAMP, HISTORISCH-KRITISCHER KOMMENTAR ZUM BGB § 138 n.27 (vol. I, 2003). On the situation of the somewhat less politically controlled lower courts, see INGA MARKOVITS, GERECHTIGKEIT IN LÜRITZ (2006).

[21] On this conference and the contested interpretations thereof after 1989, see ULRICH BERNHARDT, DIE DEUTSCHE AKADEMIE FÜR STAATS- UND RECHTSWISSENSCHAFT "WALTER ULBRICHT" 1948–1971, 118–23, 142–44 (1997); see also MICHAEL STOLLEIS, GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND 289–304 (vol. 4, 2012).

GDR from attempting to commit the judge to the state through a program of methods.[22] Democratic centralism was about direct judicial control.[23] On one hand, arriving at politically desired decisions was of utmost importance, but on the other hand, methodical arguments possessed no legitimacy.[24] Interestingly, Gregor Gysi's 1975 dissertation endeavored to introduce West German methodology into the discussion within the GDR, but failed to make any inroads.[25]

Dealing with the still vast narrative scope of the four remaining systems carries the risk of getting lost in abstractions. Thus, in order to secure a sensible narrative equilibrium between event and structure and to gain a panoramic vantage point, this Article gives a brief description of the German history of method by way of a few stops in a sort of "hop on/hop off" fashion, as it were. These stops focus on five central events in the years 1905, 1925, 1933, 1958, and 1970.

B. 1905: Emil Lask, Legal Philosophy

Emil Lask, the hope of south-west German neo-Kantianism, delineated the contemporary scope of jurisprudence in his 1905 Habilitation. A student of Windelband, he elucidated the dilemma in which jurisprudence now found itself. The renunciation of Pandectist scholarship prompted questions of a new methodology.

---

[22] KARL A. MOLLNAU, RECHT IM SOZIALISMUS 69 (Gerd Bender & Ulrich Falk eds., 3d ed., 1999) (quoting "Henceforth, methodology wasn't considered an important subject in the academic training of jurists anymore").

[23] On methods of judicial control in the GDR, see HUBERT ROTTLEUTHNER, EINFLUßNAHME DER POLITIK AUF RICHTER, STAATSANWÄLTE UND RECHTSANWÄLTE 9–66 (Hubert Rottleuthner & Bundesministerium der Justiz eds., 1994); see generally MARKOVITS, *supra* note 20; RAINER SCHRÖDER, ZIVILRECHTSKULTUR DER DDR 29–44 (4th ed., 2008).

[24] The "Socialist idea of Law" demanded a certain partiality which did not mean studying Marx in private, but was instead a demand to arrive at a politically mandated decision. Polak's conception of jurisprudence as a political science proved influential. NILS REICHHELM, DIE MARXISTISCH-LENINISTISCHE STAATS- UND RECHTSTHEORIE KARL POLAKS, 97–104 (2002); KARL A. MOLLNAU, RECHT IM SOZIALISMUS 59–195; MICHAEL STOLLEIS, SOZIALISTISCHE GESETZLICHKEIT STAATS-UND VERWALTUNGSRECHTSWISSENSCHAFT IN DER DDR 28–42 (2009).

[25] GREGOR GYSI, THESEN ZUR VERVOLLKOMMNUNG DES SOZIALISTISCHEN RECHTS IM RECHTSVERWIRKLICHUNGSPROZEß (1975). Gysi paired the "Socialist Consciousness" required of judges —which served as an inhibitor of free judge-made law—with legal methodology, primarily marked by four levels of interpretation: lexical, systematical, teleological, and historical. Gysi's study draws heavily on Western German literature, using Kriele and Esser, but also on older texts like those by Fuchs, Düringer, Manigk, and Isay. I would like to thank Karin Raude for her advice. On Gysi's dissertation, see JAN SCHRÖDER, RECHTSWISSENSCHAFT IN DIKTATUREN 80–81 (2016).

Ernst Zitelmann's 1879 monograph on error triggered a debate over the hazards of borrowing from the natural sciences.[26] Jurisprudence increasingly began searching for a method beyond observation, hypotheses, and causality, whether in the humanities with Dilthey, in the cultural sciences with Windelband, or in the social sciences with Stammler.[27] Well-received by jurists, Heinrich Rickert contrasted meaningful culture with meaningless nature in 1899. Cultural sciences, such as jurisprudence, proceeded according to values, whereas natural sciences were indifferent to values.[28]

Lask went on to emphasize that this reference to values running through all juridical activity, its "teleological tissue,"[29] could not be grasped merely by observing legal realities. The same was true for "jurisprudence," regarded by Lask's dualist method as legitimate, which sought the abstract "significance of norms" in legal rules, as well as a "social theory of law" which enquired into the *de facto* reality of legal life.[30] He exposed the notion that "empirical research, by simply intensifying and generalizing systematization, would suddenly emerge as 'philosophy'" was naïve.[31] General jurisprudence,[32] but also Eugen Ehrlich's empirical sociology of law[33] and Arthur Nußbaum's research on legal facts,[34] were, from this perspective, simply ancillary disciplines from the outset. Lask emphasized that the controversy over the methods of empirical cultural sciences points beyond the question of

---

[26] HANS-PETER HAFERKAMP, PSYCHOLOGIE ALS ARGUMENT IN DER JURISTISCHEN LITERATUR DES KAISERREICHS 215–23 (Mathias Schmoeckel ed., 2009).

[27] HANS-PETER HAFERKAMP, 115 UNIVERSITÄT ZÜRICH ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE BEIHEFT 105, 105–20 (Marcel Senn & Daniel Puskás eds., 2008) (article from Kongress der Schweizerischen Vereinigung für Rechts- und Sozialphilosophie on June 15–16 2007).

[28] An overview can be found in HERBERT SCHNÄDELBACH, PHILOSOPHIE IN DEUTSCHLAND 1831–1933, at 219–32 (5th ed. 1994).

[29] EMIL LASK, GESAMMELTE SCHRIFTEN 316 (Eugen Herrigel ed., 1923) (quoting EMIL LASK, RECHTSPHILOSOPHIE (1905)). For an overview of the debate on teleology and causality, see HEINRICH RICKERT, DIE GRENZEN DER NATURWISSENSCHAFTLICHEN BEGRIFFSBILDUNG 336–37 (2d ed. 1913). Rickert later rejected this terminology in HEINRICH RICKERT, KULTURWISSENSCHAFT UND NATURWISSENSCHAFT 101–09 (3d ed. 1915); Stammler spoke of a "teleological science," RUDOLF STAMMLER, THEORIE DER RECHTSWISSENSCHAFT 291 (1911).

[30] ALFRIED KRUPP VON BOHLEN, NEUKANTIANISMUS UND RECHTSPHILOSOPHIE 286 (Robert Alexy et al. eds., 2002).

[31] LASK, *supra* note 29, at 307.

[32] For an overview, see ANDREAS FUNKE, ALLGEMEINE RECHTSLEHRE ALS JURISTISCHE STRUKTURTHEORIE 126 (2004).

[33] STEFAN VOGL, SOZIALE GESETZGEBUNGSPOLITIK, FREIE RECHTSFINDUNG UND SOZIOLOGISCHE RECHTSWISSENSCHAFT BEI EUGEN EHRLICH (2003); SCHRÖDER, *supra* note 8, at 341.

[34] On this general subject, see ARTHUR NUßBAUM: DIE RECHTSTATSACHENFORSCHUng 9–17 (Manfred Rehbinder ed., 1968); JOCHEN EMMERT, 19 NEUE DEUTSCHE BIOGRAPHIE 377 (1999); JIRO REI YASHIKI, 38 HITOTSUBASHI JOURNAL OF LAW AND POLITICS 13, 13–30 (2010).

mere methodology and seeks its definitive determination in a "system of supra-empirical values."[35] Herein lay both the difficulties and the appeal for a jurisprudence which was unwilling to merely subjugate itself to legislative prerogative and which had, for this purpose, long since created sufficient freedom for the judge.

The objective theory of interpretation which appeared from 1885 to 1886 emphasized the independence of the text's objective spirit from the drafter's will.[36] According to Josef Kohler, the judge could choose from the thoughts behind the law those "which appeared to offer the most reasonable, salubrious meaning, and exerted the most beneficial effects."[37] The harmonization between mere application and further development of the law ensured the greatest possible freedom for the judge without formally infringing the law's binding nature. The subjective interpretation, oriented to the will of the historical legislator and championed above all by Philipp Heck, compelled the judge to acknowledge an intention to make laws—an acknowledgement which granted the judge an astonishingly far-reaching authority.[38] Subjective interpretation failed to gain widespread acceptance for this reason.[39] Alongside the objective theory of interpretation, Gustav Rümelin adopted the subsumption model in 1891, emphasizing that legal activities do "not only involve logical operations, but also considerations of expediency and other such value judgments."[40] This freedom within

---

[35] LASK, *supra* note 29, at 277.

[36] JAN SCHRÖDER, GESETZESAUSLEGUNG UND GESETZESUMGEHUNG 49–51, 93–102 (1985) (referring to the philosophical context). Now, with a partly altered stance, see SCHRÖDER, *supra* note 11, at 585–98.

[37] JOSEF KOHLER, LEHRBUCH DES BÜRGERLICHEN RECHTS 126 (vol. 1, 1904).

[38] MARIETTA AUER, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 530 (2008) (writing on the astonishing liberties Heck grants the judge in these cases).

[39] SCHRÖDER, *supra* note 8, at 342. Recent intense debates suggest a renewed interest in subjective interpretation. See HOLGER FLEISCHER ET AL., MYSTERIUM "GESETZESMATERIALIEN" 1–135 (2013) (including Holger Fleischer excerpt at 1–44, Jan Thiessen excerpt at 45–74, Christian Waldhoff excerpt at 75–93, Gerhard Hopf excerpt at 95–109, Ulrich Seibert excerpt at 111–126, and Frauke Wedemann excerpt at 127–135); see also Christian Baldus et al. in GESETZGEBER UND RECHTSANWENDUNG 5–231 (Frank Theisen et al. eds., 2013) (including Christian Meyer-Seitz excerpt at 29–41, Frank Theisen excerpt at 43–62, Walter Fischedick excerpt at 63–74, Ralph Alexander Lorz excerpt at 87–110, Stefan Schneider excerpt at 111–124; Peter Krebs & Stefanie Jung excerpt at 125–152, Tim Maxian Rusche excerpt at 153–166, Bernd Mertens excerpt at 167–174, Andreas Funke excerpt at 175–188, Chris Thomale excerpt at 189–194, Lena Kunz & Thomas Raff excerpt at 195–231).

[40] GUSTAV RÜMELIN, WERTURTEILE UND WILLENSENTSCHEIDUNGEN IM CIVILRECHT 29 (1891). A jurist thus makes "decisions . . . which resemble the acts of will by which the legislator creates new law." Rümelin welcomed the implications this had with regard to a new judicial authority and argued for an explicit allocation of this power to the Reichsgericht—as compensation for the possible abolition of legal custom as a source of law, which he feared. He referred to the

positive law was since Eugen Ehrlich's 1888 treatise[41] supported by the judge's free discretionary powers to identify and fill gaps in the law, which the majority of legal scholars prior to 1914 advocated.[42]

Critical to placing trust in the judge's freedom was that he fulfill his role as a medium for existing modernization requirements yet not adjudicate as a politically partial subject. The so-called crisis of trust in the judiciary which erupted in two phases, from 1895 to 1897 and from 1909 to 1913, illustrated the pitfalls.[43] It spawned a flood of literature on the role of the judge in legal process—an amount which remains barely manageable today.[44] Left-wing pundits criticized class-based justice, while the right demanded a more politically stringent and assertive judge. A particular demand at that time was that the judge possess not merely dogmatic, but also social and political competencies.[45] In this context, frequent reference to the principle of collegiality or the judicial oath[46] did not allay the caveats directed at judicial class ideologies.[47] Thus, writings on method prior to 1914 frequently demanded judicial reforms, whether articulated as a truer-to-life judicial training[48] or as demands for a different composition of the judiciary.[49]

The alternative would have been to axiologically bind the judge to values produced by legal philosophy, which, for neo-Kantians, failed due to an unavoidable separation between Sein

---

Roman model of the praetor and seems to have been skeptical with regard to an "augmentation of parliamentary power." *Id.* at 57.

[41] EUGEN EHRLICH, DIE LÜCKEN IM RECHTE (1888), *reprinted* in EUGEN EHRLICH: RECHT UND LEBEN 80–169 (Manfred Rehbinder ed., 1976). This did not involve the "discovery" of the notion of gaps in the law, but merely a new and more liberal approach to filling these gaps. SCHRÖDER, *supra* note 8, at 373–88.

[42] SCHRÖDER, *supra* note 11, at 572–87. According to Schröder, this phenomenon cannot be meaningfully distinguished from the so-called Free Law Movement. SCHRÖDER, *supra* note 8, at 338–41.

[43] GERD LINNEMAN ET AL., DEUTSCHE JUSTIZKRITIK 1890–1914, 134–50 (1989); RAINER SCHRÖDER, FESTSCHRIFT FÜR RUDOLF GMÜR 206–253 (1983).

[44] "Overwhelming," according to RAINER SCHRÖDER, 19 RECHTSTHEORIE 322 n.1 (1988) (delivering what is probably the most thorough analysis since 1983).

[45] SCHRÖDER, *supra* note 43, at 204–24.

[46] See GNAEUS FLAVIUS (HERMANN KANTOROWICZ), DER KAMPF UM DIE RECHTSWISSENSCHAFT (1906), *reprinted* in GNAEUS FLAVIUS (HERMANN KANTOROWICZ), RECHTSWISSENSCHAFT UND SOZIOLOGIE 34 (1962).

[47] Cf. LUDWIG BENDIX, DIE IRRATIONALEN KRÄFTE DER ZIVILRECHTLICHEN URTEILSTÄTIGKEIT 230–31 (1927).

[48] SCHRÖDER, *supra* note 43, at 207–18; SCHRÖDER, *supra* note 8, at 378.

[49] SCHRÖDER, *supra* note 43, at 212–24.

and Sollen, the actual and the nominal, and reality and value. This was especially true for Heck, who, in contrast to Stammler, emphasized in 1914 that the right law does not constitute an "object of sociological knowledge, but rather an object of social struggle."[50] For Heck, law emerged not as the discharge of some kind of predetermined meaning, but as political compromise.[51] Admittedly, not everyone before 1914 was content with Heck's trust in political structures. Even Lask was unable to conceal a certain yearning for substance, and he made recondite references to the "supra-empirical significance of empirical law."[52] This seemed to convince very few. Prior to 1914, the judge, with his hermeneutic subtlety and experience, remained, to a great extent, alone with the BGB.[53]

C. 1925: Julius Binder, Philosophy of Law

The second major event is the publication in 1925 of Julius Binder's "*Philosophie des Rechts*" [Philosophy of Law]. Binder,[54] who personally remained a perennial outsider, exerted his influence primarily through his students and friends from the Weimar period, notably through Karl Larenz, Gerhard Dulckeit, Martin Busse, Karl Michaelis and Walter Schönfeld.[55]

---

[50] PHILIPP HECK, GESETZESAUSLEGUNG UND INTERESSENJURISPRUDENZ 13 n.32 (1942); *see also* MARIETTA AUER, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 524 (2008).

[51] JAN SCHRÖDER, FESTSCHRIFT FÜR PICKER 1315 (2010).

[52] LASK, *supra* note 29, at 280.

[53] To clarify, it would be a fallacy to make assumptions about individual judicial decisions just by looking at methodological programs issued by academic jurisprudence. All attempts—"legal positivism of the Reichsgericht prior to 1914" and so on—to conceive of judicature as a mere implementation of a somehow unified method have hitherto failed. Judges made their decisions in a variety of ways: Sometimes objectively, sometimes subjectively, sometimes by simply excluding norms, sometimes accompanied by in-depth methodological justifications, sometimes by strictly adhering to "conceptual jurisprudence," sometimes in a liberal manner reminiscent of the "Free Law School," sometimes "just so." Part of the reason for this is the fact that, ever since their frustrating experiences in the debates on Free Law, judges have all but ceased to take part in methodological discussions. Even today, the rare utterances on methodology issued by judges demonstrate the deep chasm between academic jurisprudence—with its highly differentiated and complex scientific methodology—and the everyday lives and methodological thoughts of many judges, in a chasm that has probably always existed. See generally THOMAS HONSELL, HISTORISCHE ARGUMENTE IM ZIVILRECHT (1982); MARKUS KLEMMER, GESETZESBINDUNG UND RICHTERFREIHEIT (1996); DAS BGB UND SEINE RICHTER (Ulrich Falk & Heinz Mohnhaupt eds., 2000); THORSTEN BERNDT, RICHTERBILDER: DIMENSIONEN RICHTERLICHER SELBSTTYPISIERUNGEN (2010); see also JOACHIM RÜCKERT, GEISTESWISSENSCHAFTEN ZWISCHEN KAISERREICH UND REPUBLIK 267–313 (Knut Wolfgang Nörr et al. eds., 1994), JOACHIM RÜCKERT, FESTSCHRIFT FÜR STEN GAGNÉR ZUM 3. MÄRZ 1996 203–27 (1996); JAN SCHRÖDER, ZUM GESETZESPOSITIVISMUS DES REICHSGERICHTS (2008), *reprinted* in JAN SCHRÖDER, RECHTSWISSENSCHAFT IN DER NEUZEIT 523–33 (2010).

[54] On Binder, see RALF DREIER, RECHTSWISSENSCHAFT IN GÖTTINGEN 435–55 (Fritz Loos ed., 1987).

[55] On Binder's supporters and his contemporaneous reception, see *id.* at 440.

As late as 1991, Larenz continued to cite Binder as one of the decisive sources of inspiration for his own, and thus the most familiar methodology after 1945.[56] This lasting influence makes Binder an important figure.

Binder liberated himself from neo-Kantianism in 1925 and began connecting reality and value which found many parallels in the "geisteswissenschaftlichen," or humanistic turn of jurisprudence, introduced by Erich Kaufmann around 1921.[57] Once again, values were idenitifiable everywhere. Heck, with his jurisprudence of interests (Interessenjurisprudenz),[58] was forced to concede that this disregarded the "fundamental categories of moral, religious and social imperative ideas."[59] In widely read treatises, his friend Max Rümelin[60] discussed contemporary aspirations. Rümelin wrote "On Moral Law" in 1918,[61] "On Justice" in 1920,[62] "Fairness in Law" in 1921,[63] "On the Sense of Justice and Legal Awareness" in 1925,[64] and "On the Binding Force of Legal Customs" in 1929.[65] Those jurists unpersuaded by the efficiency of the Weimar legislative body remained beset by a yearning for material values.[66] In this climate, Heck himself considered it preferable in 1929 to refer to "evaluative jurisprudence" as opposed to his jurisprudence of interests.[67] For

---

[56] KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 103–10 (6th ed. 1991).

[57] Summarized in MICHAEL STOLLEIS, GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND 171–86 (vol. 3, 1999).

[58] In 1928, Alfred Manigk argued against Heck that "[t]he law is not primarily concerned with interests; it is only through morality that it receives its higher purposes, which it then, in turn, employs to solve matters of conflicting interests," ALFRED MANIGK, HANDWÖRTERBUCH DER RECHTSWISSENSCHAFT 314 (1928).

[59] PAUL OERTMANN, INTERESSE UND BEGRIFF IN DER RECHTSWISSENSCHAFT 34 (1931). All in all, Oertmann was naturally rather skeptical of judicial value judgements. See RÜDIGER BRODHUN, PAUL ERNST WILHELM OERTMANN 1865–1938, 350–65 (1999).

[60] On Rümelin's methodology, see generally NIKOLAS HAßLINGER, MAX VON RÜMELIN 1861–1931 UND DIE JURISTISCHE METHODE (2014)

[61] *See generally* MAX VON RÜMELIN, DIE VERWEISUNGEN DES BÜRGERLICHEN RECHTS AUF DAS SITTENGESETZ (1920).

[62] *See generally* MAX VON RÜMELIN, DIE GERECHTIGKEIT (1920).

[63] *See generally* MAX VON RÜMELIN, DIE BILLIGKEIT IM RECHT (1921).

[64] *See generally* MAX VON RÜMELIN, RECHTSGEFÜHL UND RECHTSBEWUSSTSEIN (1925).

[65] *See generally* MAX VON RÜMELIN, DIE BINDENDE KRAFT DES GEWOHNHEITSRECHTS UND IHRE BEGRÜNDUNG (1929).

[66] KURT SONTHEIMER, ANTIDEMOKRATISCHES DENKEN IN DER WEIMARER REPUBLIK 141–92 (1962). *See generally* OLIVER LEPSIUS, DIE GEGENSATZAUFHEBENDE BEGRIFFSBILDUNG (1st ed. 1993).

[67] See the fundamental treatise by JOACHIM RÜCKERT, 125 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE GERMANISTISCHE ABTEILUNG 199–255 (2008); Anke Sessler, DIE LEHRE VON DEN LEISTUNGSSTÖRUNGEN: HEINRICH STOLLS BEDEUTUNG FÜR DIE ENTWICKLUNG DES ALLGEMEINEN SCHULDRECHTS 92 n.334 (1994) (discussing the quote by Heck).

Heck, it was evident that the legislator, not the judge, practiced evaluation. The latter's procedure focused primarily on analyzing this evaluation. Hence, evaluation failed to address the "core features of recent methods."[68] Thus when, in 1931,[69] Heck's comrade-in-arms Heinrich Stoll argued in favor of "evaluative jurisprudence" (Wertungsjurisprudenz) as opposed to a jurisprudence of interests,[70] he implicitly conceded to Heck's opponents. Stoll abandoned Heck's material reserve and cited "the idea of justice" as constituting the cornerstone of a judicial sense of law.[71]

At this point, Binder went one step further and substantiated a political concept of private law by way of philosophy. His "trans-personalism"[72] constituted the alternative to the BGB, which was now labeled liberalist-individualist. He claimed that a subjective right was an "act of social trust" by the "community,"[73] and thus an "office,"[74] and its exercise a "social and thus moral task."[75] Property was "in the service of the community,"[76] and even the contract was based on the "foundation of the community."[77] The individual lost its subjective rights. This was also quite characteristic of the period. The Weimar era witnessed theories adopted

---

[68] PHILIPP HECK, GRUNDRIß DES SCHULDRECHTS 473 n.1 (1929).

[69] HEINRICH STOLL, FESTSCHRIFT FÜR HECK 60–117 (1931), quoted from Winfried Ellscheid & Günter Hassemer, Interessenjurisprudenz 153–210 (1974).

[70] *Id.* at 60 n.13 & 68 n.35.

[71] *Id.* at 67–68 (referencing, quite surprisingly, Walter Schönfeld).

[72] JULIUS BINDER, PHILOSOPHIE DES RECHTS 282–83 (1925); *see also* ECKART JAKOB, GRUNDZÜGE DER RECHTSPHILOSOPHIE JULIUS BINDERS 40–47 (1995).

[73] BINDER, *supra* note 72, at 448.

[74] On the contemporaneous influence of similar notions beyond Neo-Hegelianism, see MICHAEL STOLLEIS, GEMEINWOHLFORMELN IM NATIONALSOZIALISTISCHEN RECHT 39–75 (1974); JAN SCHRÖDER, KOLLEKTIVISTISCHE THEORIEN UND PRIVATRECHT IN DER WEIMARER REPUBLIK AM BEISPIEL DER VERTRAGSFREIHEIT (1994), henceforth quoted from the reprint in JAN SCHRÖDER, RECHTSWISSENSCHAFT IN DER NEUZEIT 599–623 (2010).

[75] BINDER, *supra* note at 72, at 449.

[76] *Id.* at 474.

[77] *Id.* at 482.

across political divides, in socialist[78] as well as in conservative circles,[79] which dismissed the concept of private law as being a pre-state sphere of freedom and conceived private autonomy as allocated by the state and ancillary to the interests of the community.

Two particularities about Binder are worth noting: First, typical of his neo-Hegelian approach[80] was the fact that he looked to history to ground the idea of law. In Binder, we first witnessed the teleological notion of intellectual history emerging as the master of the private law method. To counter what he characterized as a defunct historiography now "meaningless and void of merit,"[81] Binder introduced his own intellectually replete history of a de-ethicization of civil law in the nineteenth century that started from Kant via Savigny, Puchta, and Windscheid to a conceptual jurisprudence, which amounted to nothing but ethical nihilism.[82] In its later development, through Walther Schönfeld,[83] Erik Wolf,[84] Karl Larenz,[85] Georg Dahm,[86] and Franz Wieacker,[87] there emerged a grand didactic narrative of

---

[78] As early as 1919, Justus Wilhelm Hedemann—still in view of war time socialism—used his keen sense of the zeitgeist to identify the present as a time of a "subjugation of the individual . . . by an unchanging will of the community." JUSTUS WILHELM HEDEMANN, DAS BÜRGERLICHE RECHT UND DIE NEUE ZEIT 12 (1919).

[79] SCHRÖDER, *supra* note 74, at 599.

[80] See generally DREIER, *supra* note 54, at 435–55.

[81] BINDER, *supra* note at 72, at 1014 (criticizing RODERICH VON STINTZING & ERNST LANDSBERG, GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT (vol. III.2, 1910)).

[82] HANS-PETER HAFERKAMP, ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 61–81 (2010).

[83] WALTHER SCHÖNFELD, DIE GESCHICHTE DER RECHTSWISSENSCHAFT IM SPIEGEL DER METAPHYSIK (1943), *retitled* GRUNDLEGUNG DER RECHTSWISSENSCHAFT (2d ed. 1951).

[84] ERIK WOLF, GROßE RECHTSDENKER DER DEUTSCHEN GEISTESGESCHICHTE (1st ed. 1939); ERIK WOLF, GROßE RECHTSDENKER DER DEUTSCHEN GEISTESGESCHICHTE (2d ed. 1944); ERIK WOLF, GROßE RECHTSDENKER DER DEUTSCHEN GEISTESGESCHICHTE (3d ed. 1951); ERIK WOLF, GROßE RECHTSDENKER DER DEUTSCHEN GEISTESGESCHICHTE (4th ed. 1963).

[85] KARL LARENZ, RECHTS- UND STAATSPHILOSOPHIE DER GEGENWART (1931); KARL LARENZ, DEUTSCHE RECHTSERNEUERUNG UND RECHTSPHILOSOPHIE (1934); KARL LARENZ, *SITTLICHKEIT UND RECHT: UNTERSUCHUNGEN ZUR GESCHICHTE DES DEUTSCHEN RECHTSDENKENS UND ZUR SITTENLEHRE*, in REICH UND RECHT IN DER DEUTSCHEN PHILOSOPHIE (vol. 1, 1943); Karl Larenz, *Rechtswissenschaft*, in METHODENLEHRE (1st ed. 1960).

[86] GEORG DAHM, DEUTSCHES RECHT (1st ed. 1944); GEORG DAHM, DEUTSCHES RECHT: DIE GESCHICHTLICHEN UND DOGMATISCHEN GRUNDLAGEN DES GELTENDEN RECHTS (2d ed. 1951).

[87] FRANZ WIEACKER, 12 DEUTSCHES RECHT 1440–43 (1942), *reprinted* in FRANZ WIEACKER, GRÜNDER UND BEWAHRER: RECHTSLEHRER DER NEUEREN DEUTSCHEN PRIVATRECHTSGESCHICHTE (1959); FRANZ WIEACKER, RUDOLF VON JHERING. EINE ERINNERUNG ZU SEINEM 50. TODESTAGE, *reprinted* in FRANZ WIEACKER, GRÜNDER UND BEWAHRER: RECHTSLEHRER DER NEUEREN DEUTSCHEN PRIVATRECHTSGESCHICHTE (1959); FRANZ WIEACKER, WIRKLICHKEIT UND ÜBERLIEFERUNG, in VOM RÖMISCHEN RECHT (Franz Wieacker ed., 1944); FRANZ WIEACKER, PRIVATRECHTSGESCHICHTE DER NEUZEIT UNTER BESONDERER BERÜCKSICHTIGUNG DER DEUTSCHEN ENTWICKLUNG (1st ed. 1952); FRANZ WIEACKER, PRIVATRECHTSGESCHICHTE DER NEUZEIT UNTER BESONDERER

the rise and fall of positivism.[88] This included the history of private law as a history of method—to put it bluntly, a history of private law without private law. The images outlined during this time have lost none of their intensity.[89] On one side were the "actual" positivists, adherents of naturalism, sociologists and the empiricists: Ehrlich, Nussbaum, Heck, and the psychologists Bierling and Zitelmann. On another side were the "nominal" positivists, normativists, and the jurisprudential positivists, including Puchta, Windscheid, Laband, Bergbohm and Kelsen. In contrast, there were great hopes, namely the neo-Kantians who clung to the naturalist fallacy, such as Stammler, Radbruch and, above all, the producers of values: Hegel, Husserl, Reinach, Scheler, and Hartmann.

Second, Binder was one of the first to consider the methodological implications for jurisprudential private law by asking the following: "How must empirical law be framed to be considered to fulfill the task of the idea?"[90] In this interpretation, the legal proposition in the BGB must be fused with the idea of law, which was to be derived from a rationally construed legal reality.[91] It fell to the judge to interpret the "legal norm in connection with the actual reality, with the empirical conditions and legal purpose of the immediate present."[92] A gap in the law exists whenever "we discover a legal proposition or legal institution to be lacking, which the law, taken as a whole, or the economic and moral social conditions demand should be in place."[93] It was at this point that judicial discretion[94] assumed its task as a "bearer of new ideas . . . opposing the austerity of private law now perceived as antiquated and insupportable."[95] Accordingly, judicial activity was "essentially a creative activity" and sought the "transformation of its materials."[96] Binder appealed to

---

BERÜCKSICHTIGUNG DER DEUTSCHEN ENTWICKLUNG (2d ed. 1967); see also FRANZ WIEACKER, HISTORIKER DES MODERNEN PRIVATRECHTS (Okko Behrends & Eva Schumann eds., 2010).

[88] *See* WIEACKER, *supra* note 87, at 181–212 (including Hans-Peter Haferkamp) (providing an overview of the confusing plurality of alleged positivisms).

[89] Traces of these notions can be found (for example) in LARENZ, *supra* note 56, at 9–185.

[90] BINDER, *supra* note 15, at 32.

[91] *Id.* at 30–35 (demonstrating that Binder's notions were almost Hegelian in this regard).

[92] BINDER, *supra* note 72, at 977.

[93] *Id.* at 983.

[94] *Id.* at 406.

[95] *Id. at* 406.

[96] *Id.* at 994.

jurisprudence as an "interpretative science,"[97] to adopt an offensive reading of his transpersonalism into the BGB.

This methodological program also paved several paths into the future. The idea that structures of meaning existed in "life" and "experience," which legal experts acknowledged and asserted against the BGB when implementing law, was something that pervaded the legal doctrines positioned against the BGB after 1933.[98] According to Larenz in 1938,[99] "the structures of *national community*" should possess the force "to curb any opposing abstract, general legal norms to the degree that its specific type and national purpose demands."[100] Hence, in 1941, Josef Esser required the judge[101] to "evaluate social reality,"[102] while, in 1942, Heinrich Lehmann spoke of an evaluative look at "social facts."[103] In 1941, Heinrich Lange made clear that importance was placed "not solely in the knowledge of being as such, but in the shaping of being according to a moral imperative."[104] For this method, as early as 1936, Lange had already coined the term "evaluative jurisprudence" (Wertungsjurisprudenz) again.[105]

---

[97] *Id.* at 886.

[98] *Cf.* BERND RÜTHERS, WIR DENKEN DIE RECHTSBEGRIFFE UM 33–35 (1987); JOACHIM RÜCKERT, DEUTSCHE RECHTSGESCHICHTE IN DER NS-ZEIT 177–240 (Joachim Rückert & Dietmar Willoweit eds., 1995).

[99] LARENZ, *supra* note 16, at 33.

[100] *Id.* at 29.

[101] The antithesis was a mode of thought purely concerned with legal facts. JOSEF ESSER, WERT UND BEDEUTUNG DER RECHTSFIKTIONEN 132 (2d ed. 1969) (referencing his teacher, Fritz von Hippel).

[102] JOSEF ESSER, DEUTSCHE RECHTSWISSENSCHAFT 69 (1942). This meant a "thorough consideration and interpretation of the social and economical relations, positions and judgments." cf. JOSEF ESSER, SCHMOLLERS JAHRBUCH 95 (1942) (reviewing Lange & Hedemann).

[103] HEINRICH LEHMANN, 90 JHERINGS JAHRBÜCHER 144 (1942); see also ANDRE DEPPING, DAS BGB ALS DURCHGANGSPUNKT. PRIVATRECHTSMETHODE UND PRIVATRECHTSLEITBILDER BEI HEINRICH LEHMANN 1876–1963, 172–84 (2002). On the development of a concept of de facto contracts, see PETER LAMBRECHT, DIE LEHRE VOM FAKTISCHEN VERTRAGSVERHÄLTNIS 46–68 (1994).

[104] HEINRICH LANGE, DIE ENTWICKLUNG DER WISSENSCHAFT VOM BÜRGERLICHEN RECHT SEIT 1933, 39 (1941).

[105] HEINRICH LANGE, ZEITSCHRIFT DER AKADEMIE FÜR DEUTSCHES RECHT 924 (1936), first mentioned in JOACHIM RÜCKERT, 125 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE GERMANISTISCHE ABTEILUNG 227 (2008).

D. 1933: The Founding of the Akademie für Deutsches Recht

Here we alight at the next stop—the *Akademie für Deutsches Recht.*[106] Until abandonment of the work in 1944,[107] large numbers of German civil law professors, who were not expelled[108] discussed the issue of a new National Socialist private law with a thoroughness and intensity that remained unmatched in the twentieth century.[109] Heinrich Stoll, Karl Larenz, Wolfgang Siebert, Franz Wieacker, Alfred Hueck, Hans Brand, Heinrich Lehmann, Hans-Carl Nipperdey, Justus Wilhelm Hedemann, Heinrich Lange, Gustav Boehmer, Eugen Ulmer, Erik Wolf, Josef Esser,[110] Walther Schönfeld, Gerhard Dulckeit, Hans Kreller, Wilhelm Felgentraeger, Arthur Nikisch, Hans Wüstendorfer, Hans Würdinger, Karl Blomeyer, Walter Wilburg, Hermann Krause, Gerhard Luther, Walter Schmidt-Rimpler, and others were among those professors engaged in questions of civil law.[111] It would be naive to believe that these jurists—who were, for the most part, very young in 1933—would, after 1945, simply revert to the Weimar Republic standards of knowledge.[112] Accordingly, present-day civil law jurisprudence must take a much closer look at this period when attempting to understand the genesis of many contemporary modes of thinking.[113]

Thought on method after 1945, which was also influenced by these debates, is outlined in greater detail later in this Article. In the initial discussion phase on method up until around

---

[106] BAYERISCHES GESETZ- UND VERORDNUNGSBLATT 277 (1933); cf. HANS-RAINER PICHINOT, DIE AKADEMIE FÜR DEUTSCHES RECHT 9–10 (1981).

[107] PICHINOT, *supra* note 106, at 144–45.

[108] On the subject of expulsion and exile of German jurists between 1933 and 1945, see generally LEONIE BREUNUNG & MANFRED WALTHER, DIE EMIGRATION DEUTSCHSPRACHIGER RECHTSWISSENSCHAFTLER AB 1933 (vol. 1, 2013); JURISTS UPROOTED. GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN (Jack Beatson & Reinhard Zimmermann *eds.,* 2004).

[109] Expressed more cautiously by WERNER SCHUBERT, in VOLKSGESETZBUCH: TEILENTWÜRFE, ARBEITSBERICHTE UND SONSTIGE MATERIALIEN 31 (Werner Schubert ed., 1988) ("Rarely has German jurisprudence concerned itself as thoroughly with questions of private law reforms and their systematics as in the period between 1933 and 1942.").

[110] Esser wasn't a member of the Academy. Nevertheless, he eagerly took part in the debates. See JOSEF ESSER, 148 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 121–46 (1943); JOSEF ESSER, DEUTSCHE RECHTSWISSENSCHAFT 65–81 (1942); JOSEF ESSER, SCHMOLLERS JAHRBUCH 93–102 (1942).

[111] SCHUBERT, *supra* note 109, at 33–36.

[112] *See* Rückert's analysis in JOACHIM RÜCKERT, NEUE JURISTISCHE WOCHENSCHRIFT 1251–59 (1995); MAREN BEDAU, ENTNAZIFIZIERUNG DES ZIVILRECHTS 23–24 (2004). *See generally* ILKA KAUHAUSEN, NACH DER "STUNDE NULL" (2007).

[113] This position is excellently demonstrated by JAN THIESSEN, *Wirtschaftsrecht und Wirtschaftsrechtler im Schatten der NS-Vergangenheit,* in DIE ROSENBURG. DAS BUNDESMINISTERIUM DER JUSTIZ UND DIE NS-VERGANGENHEIT – EINE BESTANDSAUFNAHME 204–95 (Manfred Görtemaker & Christoph Safferling eds., 2013).

1938, which was only to some degree connected with the Academy, those structures of the BGB, which afforded a safeguard of private law against the state, were destroyed. Fundamental concepts such as subjective law, legal capacity, contract, and property law were subjected to the benefit of the National Socialist society as a whole.[114] Academic reform crushed the Pandect system of the BGB and replaced its General Section —with its emphasis on equality—with politicized "social units of life" (Lebensordnungen), which allowed for situational allocation of legal positions.[115] Through the new theory of the general clause[116] and Siebert's doctrine of the abuse of law,[117] "breaching points"[118] of National Socialist legal theory were introduced within the BGB. Even the explicit will of the parties to a contract was not a respected boundary anymore. One read fiduciary duties into contractual agreements,[119] construed *de facto* contracts,[120] determined the frustration of purpose purely objectively,[121] and imputed the subjective elements required to establish quasi-usury, instead of requiring them to be proven.[122] As Heinrich Lange concluded: "The execution of the idea of duty and community destroy the legal form."[123]

The judge was to fill the lawless spaces created from this process.[124] Once again, this presupposed that the judge was in a position to make objective and subjective legal

---

[114] BERND RÜTHERS, DIE UNBEGRENZTE AUSLEGUNG 322–430 (7th ed. 2012).

[115] RALF FRASSEK, 111 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE GERMANISTISCHE ABTEILUNG 564–91 (1994).

[116] HANS-PETER HAFERKAMP, HISTORISCH-KRITISCHER KOMMENTAR ZUM BGB § 242 nn.71–77 (vol. 2/1, 2007); see also Section V of this Article.

[117] HANS-PETER HAFERKAMP, DIE HEUTIGE RECHTSMIßBRAUCHSLEHRE – ERGEBNIS NATIONALSOZIALISTISCHEN RECHTSDENKENS? 178–213 (1994).

[118] HEINRICH LANGE, JURISTISCHE WOCHENSCHRIFT 2859 (1933).

[119] *See* ANDREA DEYERLING, DIE VERTRAGSLEHRE IM DRITTEN REICH UND IN DER DDR WÄHREND DER GELTUNG DES BÜRGERLICHEN GESETZBUCHES (1996).

[120] LAMBRECHT, *supra* note 103, at 5–17.

[121] MATTHIAS ZIRKER, VERTRAG UND GESCHÄFTSGRUNDLAGE IN DER ZEIT DES NATIONALSOZIALISMUS 112–266 (1996); RUDOLF MEYER-PRITZL, HISTORISCH-KRITISCHER KOMMENTAR ZUM BGB §§ 313–14 nn.25–31 (vol. 2/2, 2007).

[122] JAN THIESSEN, FESTSCHRIFT FÜR JAN SCHRÖDER 187–219 (2013).

[123] HEINRICH LANGE, LIBERALISMUS, NATIONALSOZIALISMUS UND BÜRGERLICHES RECHT 37 (1933).

[124] This, however, was not simply about judicial freedom. Between the demands of nationalist communal thinking and the ever-prevailing Führer principle, the judge's main concern was to reach a politically acceptable decision. These ambivalences of National Socialist legal thought are excellently illustrated in HUBERT ROTTLEUTHNER, 18 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 28–33 (1983). On the limitations of the notion of Natural Law (Dietze et al.), see also FABIAN WITTRECK, NATIONALSOZIALISTISCHE RECHTSLEHRE UND NATURRECHT (2008).

evaluations. To this end, Binder appealed to the judge in 1925 to "overcome his subjectivism": The judge must allow objective reason to prevail within him self.[125] What had sounded complicated in the factious Weimar political reality was no longer daunting for Lange in 1933. There were definite advantages to the new age in comparison to the "ideological indifference of liberalism":

> The ideological indifference of earlier states allowed all to pursue their own happiness; it could understand almost anything, forgive almost anything. Every individual, every group, party, class had their own autonomous system of values, but that of the state altered along with that of its ruler . . . . National Socialism introduced a substantial standardization, and thus simplification.[126]

Be this as it may, doubts as to whether judicial acumen was capable of "minimizing the distance between expertise and plain legal sensibility"[127] increased around 1938. In light of the judicial crisis staged by the circle around Thierack in 1943, Lange underscored the fact that respect for the upholders of the law had "lessened substantially."[128] As early as 1941, the central committee of the People's Code openly discussed the "crisis of confidence" in the judiciary.[129] The need for a stronger guide concerning values became increasingly evident.[130] Because there was no wish to abandon the central insight that the "just decision in an individual case takes precedence over logically deduced major premises,"[131] new

---

[125] BINDER, *supra* note 72, at 993.

[126] LANGE, *supra* note 105, at 924.

[127] HEINRICH LANGE, ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 251 (1943).

[128] *Id.* For context, see generally SARAH SCHÄDLER, 'JUSTIZKRISE' UND 'JUSTIZREFORM' IM NATIONALSOZIALISMUS 9–13 (2009); WERNER SCHUBERT, FESTSCHRIFT FÜR JAN SCHRÖDER 771–86 (2013); DIETMAR WILLOWEIT, ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 276–77, 286–87 (1994).

[129] SCHUBERT, *supra* note 109, at 331 (showing session protocol from May 26–27, 1941).

[130] In 1943, Lange opined that "professional training" was required to transform "vague and uncertain legal sensiblities" into "expert professional knowledge." LANGE, *supra* note 127, at 250.

[131] *Id.* at 241–42.

concepts continued to circulate.[132] Carl Schmitt had made it plain in 1935 that the "relationship between the law and the judge . . . was essentially determined by the type of law in question."[133] As for the "unique style of legislation" in National Socialism, Schmitt emphasized that "guiding principles"[134] which preceded new legislation would give the judge a "new confinement and a new freedom."[135] These principles determined "the usage and interpretation of the subsequent legal norms, as well as the intellectual poise and ethos of those legal experts who concern themselves with them."[136]

In the preliminary work for the People's Code, Lehmann and Hedemann also emphasized in 1941 the concept of "guiding principles,"[137] which, as a "bridge between national life and the legal sphere,"[138] should provide "value rankings" to act as a reference point for the judge's evaluation. The judge should not make decisions exclusively using the "guiding ideas of these basic rules" when faced with gaps in the law;[139] they were to be regarded more as general "guidelines,"[140] "legal directives" and "standards of value for the balancing and/or reconciliation of interests."[141] Evaluative jurists were given evaluation guidelines. Also in 1941, Walter Wilburg, who had provided the aforementioned groundwork in the law of unjust enrichment at the Academy, joined the debate.[142] He proposed his flexible system of

---

[132] Only a few core values of a National Socialist private law were undisputed. As enumerated by Lange in LANGE, *supra* note 105: "The people, race, community, loyalty and honor and the basic tenet of law—communal interests have priority over individual interests."

[133] CARL SCHMITT, DEUTSCHE JURISTEN-ZEITUNG 920 (1935); *see also* HANS HATTENHAUER, FESTSCHRIFT FÜR RUDOLF GMÜR 264–65 (1983).

[134] SCHMITT, *supra* note 133, at 922.

[135] *Id.* at 923.

[136] *Id.* at 922.

[137] JUSTUS WILHELM HEDEMANN, in VOLKSGESETZBUCH, *supra* note 109, at 472–76; *id.* at 541–50, 515-18 (with Heinrich Lehmann & Wolfgang Siebert); concerning Lehmann see the draft of the guiding principles in DEPPING, *supra* note 103, at 347.

[138] JUSTUS WILHELM HEDEMANN, in VOLKSGESETZBUCH, *supra* note 109, at 541.

[139] General Rule 22 page 2, see VOLKSGESETZBUCH, *supra* note 109, at 517.

[140] HEINRICH LEHMANN, quoted in JUSTUS WILHELM HEDEMANN, in VOLKSGESETZBUCH, *supra* note 109, at 545.

[141] HEINRICH LANGE, ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 208–09, 250 (1943), quoted in HEINRICH LEHMANN, in VOLKSGESETZBUCH, *supra* note 109, at 662.

[142] Cf. his draft of Title 7 of the People's Code concerning unjust enrichment, published in VOLKSGESETZBUCH, *supra* note 109, at 150–52.

a law of compensation (bewegliches System) as a dogmatic solution and legal technique.[143] In 1943, Lange argued that Wilburg, along with Esser,[144] exerted considerable influence on the Academy's committee on legal damages.[145] Wilburg substantiated his proposal with the fact that "with the formation of a national legal system, the National Socialist State would also shape anew the principles of protection against injustice." He hoped to prove himself useful in that his concept related to the "idea of community in compliance with the National Socialist notion of duty."[146] More specifically, this signified greater consideration for the economic capacity of the perpetrator of the damage, thus providing an alternative to equitable liability, which played a central role in the contemporary debates[147] and had been the subject of discussion long before 1933.[148]

In terms of the history of methodology, such proposals are not easy to classify. From the concepts of principles in the nineteenth century[149] to Bierling's theory of principles,[150] no singular approach leads directly to the Academy debates on "guiding principles." In the former, discussions on principles were consistently argued inductively from positive law and not from judicial policy or philosophy. Similarly, the introductory sections of the older codifications would never have attempted to prepend guiding legal principles for the judge. Regulation by way of legislating principles was precisely what the BGB did not seek to do. In

---

[143] Wilburg was not entirely clear about this. WALTER WILBURG, ELEMENTE DES SCHADENSRECHTS IX (1941); WALTER WILBURG, ENTWICKLUNG EINES BEWEGLICHEN SYSTEMS IM BÜRGERLICHEN RECHT 5 (1950) ("Placed into the legal norms themselves and their elements . . . . "); *id.* at 22 (question of legal technique); *see also* EWALD HÜCKING, DER SYSTEMVERSUCH WILBURGS 94 (1982). I would like to thank Susanne K. Paas for this information.

[144] Apart from his commentaries on the work of the Academy, Esser exerted his influence mainly through his book JOSEF ESSER, GRUNDLAGEN UND ENTWICKLUNG DER GEFÄHRDUNGSHAFTUNG (1941), in which he openly advocated a "reconstruction of our private law, *id.* at 1, 4 (preface)." Cf. ESSER, *supra* note 110.

[145] LANGE, *supra* note 127, at 218. Immediately following the publication of his seminal work, Wilburg became a member of the committee on damages, see UTA MOHNHAUPT-WOLF, DELIKTSRECHT UND RECHTSPOLITIK 190 (2004). At the very least, he was more successful in his time than F. Bydlinski assumes, whose sole description of the years after Rabel reads like this: "In war time and during the reign of the National Socialists, this scholar [Wilburg], being unwilling to adapt and thus unpopular, was, among other things, forced to become a simple soldier in the *Volkssturm*." FRANZ BYDLINSKI, 113 JURISTISCHE BLÄTTER 776 (1991).

[146] WILBURG, SCHADENSRECHT, *supra* note 143, at VIII. This quote should not be taken as indicative of Wilburg's political position as a whole; it is merely to demonstrate how his concept aligned with contemporaneous ideas.

[147] MOHNHAUPT-WOLF, *supra* note 145, at 195–96.

[148] *Id.* at 191–204.

[149] Overview in SCHRÖDER, *supra* note 8, at 250–57.

[150] *Cf.* FUNKE, *supra* note 32, at 126–32.

1897, Planck stressed that law should not limit itself to "stating the guiding legal ideas," but instead needed to "find those legal principles most suited to realize the guiding legal idea."[151] Principles were not mentioned in the debates on the role of the judges in Weimar either,[152] just as the binding nature of the constitution was barely discussed among private law scholars.[153] In any case, the Academy debates begin a new story. Without the radical departure from the structures of the BGB propagated here, it is difficult to explain why, immediately after 1945 (and thus, long before Esser's 1956 work "Grundsatz und Norm" popularized the Anglo-American debate on principles in Germany), the likes of Larenz,[154] Boehmer and Coing[155] offered the judge philosophical-political principles beyond the BGB as

---

[151] GOTTLIEB PLANCK, BÜRGERLICHES GESETZBUCH 20–21 (vol. 1, 1897); *see also* RÜCKERT, *supra* note 6, preface to § 1 n.16; STEPHAN MEDER, GOTTLIEB PLANCK UND DIE KUNST DER GESETZGEBUNG 37–48 (2010).

[152] See, for example, Phillip Heck, who wanted to build a system based on decisions of conflicts and who avoided the term "principle" which, to him, embodied a conflation of norms and values. PHILLIP HECK, BEGRIFFSBILDUNG UND INTERESSENJURISPRUDENZ 58 (1932). This was also criticized by CLAUS-WILHELM CANARIS, SYSTEMDENKEN UND SYSTEMBEGRIFF IN DER JURISPRUDENZ 38 (2d ed. 1983); cf. MARIETTA AUER, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 517–33 (2008). On the general issue, see HEINRICH SCHOPPMEYER, JURISTISCHE METHODE ALS LEBENSAUFGABE: LEBEN, WIRKEN UND WIRKUNGSGESCHICHTE PHILIPP HECKS (2001); SCHRÖDER, *supra* note 8, at 420–22, doesn't mention principles in the Weimar debates either.

[153] Some authors did indeed approach this issue. Cf. HANS CARL NIPPERDEY, DIE GRUNDRECHTE UND GRUNDPFLICHTEN DER REICHSVERFASSUNG, Preface (vol. 1, 1929) (taking his clue from his teacher Lehmann). On this, see THORSTEN HOLLSTEIN, DIE VERFASSUNG ALS ALLGEMEINER TEIL 153–57 (2006); HEINRICH STOLL, 76 JHERINGS JAHRBÜCHER 193–206 (1926); HEINRICH STOLL, DEUTSCHE JURISTEN-ZEITUNG 278–83 (1933). The question of judicial review was primarily discussed among jurists of public law—in the late 1920s, this authority was accepted by a majority; the *Reichsgericht* autonomously implemented and expanded upon it during the 1920s. Cf. SCHRÖDER, *supra* note 8, at 322–26.

[154] KARL LARENZ, LEHRBUCH ZUM ALLGEMEINEN TEIL DES DEUTSCHEN BÜRGERLICHEN RECHTS V (1967): The aim was to facilitate an understanding of positive law, to lay bare its innermost structure, by drawing attention to its basic principles. Naturally, it [a textbook for educational purposes] can only achieve this if it doesn't use positive law as its point of departure. It needs to be grounded in legal philosophy but it must always refer back to the law currently in force.

On ethical personalism, as it was discussed by Larenz in an 80-page philosophical preface, see KAUHAUSEN, *supra* note 112, at 113–26.

[155] Coing's work shows some remarkable similarities to the People's Code, even in the language he used, see HAFERKAMP, HISTORISCH-KRITISCHER KOMMENTAR ZUM BGB, *supra* note 20, § 138 n.279. Of course, Coing didn't have much of a political affiliation with National Socialists and he wasn't a member of the Academy either; details can be found in LENA FOLJANTY, RECHT ODER GESETZ 176 (2013). Nevertheless, see also FOLKER SCHMERBACH, DAS "GEMEINSCHAFTSLAGER HANNS KERRL" FÜR RECHTSREFERENDARE IN JÜTERBORG 1933–1939, 127 (2008). In addition, HEINZ MOHNHAUPT, RECHTSGESCHICHTSWISSENSCHAFT IN DEUTSCHLAND 1945 BIS 1952, 97–128 (Horst Schröder & Dieter Simon eds., 2001); KAUHAUSEN, *supra* note 112, at 28–50.

aids of interpretation.[156] The success of Wilburg's method of principle evaluation[157] is, in the same way, difficult to imagine in Weimar. Similarly, the ascent of the evaluative paradigm in civil law[158] had already begun ten years before the *Lüth* judgment, in the *Akademie für Deutsches Recht*.

E. 1958: The Lüth Judgment of the Bundesverfassungsgericht

The *Lüth* judgment issued on January 15, 1958, stood at the threshold of a new chapter — the chapter of the constitutionalization of private law.[159] In this chapter, methods played a special role. The 1950s debates on whether Article 3 II GG entailed the obligation of equal treatment of men and women in the field of employment law marked the point of departure.[160] Alfred Hueck argued against Nipperdey's thesis of a third-party direct effect of constitutional rights,[161] proposing instead Section 138 and Section 826 BGB as intermediaries between both classes of norms.[162] Civil law experts substantially agreed to

---

[156] Cf. the comparative analysis in KAUHAUSEN, *supra* note 112, at 275–76 ("Free reign of the principle").

[157] Wilburg himself did not use the term principle, which he seems to have considered as non-conducive to evaluation. His disciple Bydlinski did conflate Wilburg's "elements" with principles in FRANZ BYDLINSKI, DAS BEWEGLICHE SYSTEM IM GELTENDEN UND KÜNFTIGEN RECHT 32 (1986).

[158] On this see JOACHIM RÜCKERT, GEWOHNHEIT GEBOT GESETZ 181–220 (Nils Jansen & Peter Oestmann eds., 2011). Rückert references an early concept of evaluation proposed by Stampe in 1905 (*Id.* at 187–88) that, in the end, did not have much of an impact.

[159] DAS LÜTH-URTEIL AUS (RECHTS-)HISTORISCHER SICHT (Thomas Henne & Arne Riedlinger eds., 2005); STOLLEIS, *supra* note 21, at 216–46. See also the essays collected in DIE KONSTITUTIONALISIERUNG DER RECHTSORDNUNG (Gunnar Folke Schuppert & Christian Bumke eds., 2000). For a critical perspective on the method employed by the Federal Constitutional Court, see e.g. MATTHIAS JESTAEDT, GRUNDRECHTSENTFALTUNG IM GESETZ (1999). See also THOMAS VESTING, 41 DER STAAT. ZEITSCHRIFT FÜR STAATSLEHRE UND VERFASSUNGSGESCHICHTE, DEUTSCHES UND EUROPÄISCHES ÖFFENTLICHES RECHT 73–90 (2002).

[160] CHRISTINE FRANZIUS, BONNER GRUNDGESETZ UND FAMILIENRECHT 66–68 (2005); *id.* at 140–42.

[161] On this see HOLLSTEIN, *supra* note 153, at 305–19; HOLLSTEIN, DAS LÜTH-URTEIL, *supra* note 159, at 249–69.

[162] ALFRED HUECK, DIE BEDEUTUNG DES ART. 3 DES BONNER GRUNDGESETZES FÜR DIE LOHN- UND ARBEITSBEDINGUNGEN DER FRAUEN 27 (1951).

such proposal.[163] Experts of constitutional law drew on this,[164] including above all Günter Dürig,[165] who developed the theory of indirect third-party effect during the 1950s.[166] His concept of method casts back to the Weimar Republic.

During the revaluation crisis,[167] the Committee of the Association of Judges at the Reichsgericht, in a petition submitted to the Reichsregierung,[168] claimed that good faith stood "beyond the scope of a single law, beyond a single positive legal stipulation. No legal system worthy of the epithet can exist without that principle. Therefore, the legislator may not, by word of command, circumvent a result authoritatively demanded by the principle of good faith."[169] The Association of Judges turned Section 242 BGB into a "control norm"[170] of the judge with respect to the legislator. Contemporaries considered this idea outrageous. In practice, it was void of any consequences because the united Civil Senates[171] and the President of the Reichsgericht made it clear that the court would refuse to "criticize a constitutionally established norm on the aspect of right law, and thereby position itself above legislative sovereignty."[172] At this point, the rebellion of the judges remained just an announcement of a minority's existence among the judges of the Reichsgericht.[173]

---

[163] In the discussion following Hueck's speech at the 1951 conference of private law scholars, the majority of participants rejected Nipperdey's position, arguing instead "that constitutional rights have no immediate effect on legal transactions in private law which doesn't mean they shouldn't be considered in an evaluation based on Sections 138, 242, 826 BGB," as reported in JURISTENZEITUNG 734 (1951).

[164] See GÜNTER DÜRIG, JURISTISCHE RUNDSCHAU 262 n.50 (1952) for a first direct reference to Hueck.

[165] For a compilation of the various contemporaneous positions in this debate see DIETER VOGT, DIE DRITTWIRKUNG DER GRUNDRECHTE UND GRUNDRECHTSBESTIMMUNGEN DES BONNER GRUNDGESETZES 6–10 (1960).

[166] For an early discussion, see GÜNTER DÜRIG, JURISTENZEITUNG 199 (1953); GÜNTER DÜRIG, 109 ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 341 (1953). Primarily, see GÜNTER DÜRIG, FESTSCHRIFT FÜR NAWIASKY 157–90 (1956).

[167] Cf. my analysis in HAFERKAMP, *supra* note 116, at § 242 n.57.

[168] Association of Judges at the Reichsgericht, JURISTISCHE WOCHENSCHRIFT 90 (1924).

[169] *Id.*

[170] SCHRÖDER, *supra* note 8, at 316.

[171] Reichsgericht [RG] [Supreme Court of the German Reich] Feb. 22, 1924, ENTSCHEIDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN [RGZ] 320–26.

[172] WALTER SIMONS, DEUTSCHE JURISTEN-ZEITUNG 243 (1924).

[173] This was also, in effect, Nörr's position. KNUT WOLFGANG NÖRR, DER RICHTER ZWISCHEN GESETZ UND WIRKLICHKEIT: DIE REAKTION DES REICHSGERICHTS AUF DIE KRISEN VON WELTKRIEG UND INFLATION, UND DIE ENTFALTUNG EINES NEUEN RICHTERLICHEN SELBSTVERSTÄNDNISSES 30 (1996); JOACHIM RÜCKERT, 30 KRITISCHE JUSTIZ 429–41 (1997).

Yet, an idea had taken root, which prompted a "free law" advocate Ernst Fuchs to triumphantly declare in 1925 that good faith constituted the "Archimedian point on the basis of which it is possible to unhinge the old legal world."[174] So long as nobody attached an outlined material concept to good faith, the provision remained a mere judicial pressure relief valve, similar to those drawn on by the judiciary prior to the First World War in order to break through binding laws.[175] The more far-reaching move to connect general clauses with the constitution was discussed in the Reichsgericht in Weimar in a few cases.[176] Despite this, an unambiguous theory of indirect or direct "third-party effect"[177] or even a general subordination of private law to the constitution was still missing prior to 1945.[178]

Contemporaries perceived the politically dangerous methodological potential of the new general clause concept. In view of Russia, Hedemann cautioned the following in 1932: "It is as if the body politic is rent in twain. Classes, professions, religions, ideologies, and the one half declares: We are the guardians of public morality; all you others know nothing of this?"[179] In Russia, he saw the use of "general clauses of astonishing scope" for the implementation of views of the "one, governing half," because only "the one (the ruling) class is to decide on the material content of these general clauses."[180] When his critique appeared in 1933, many National Socialist authors perceived Hedemann's warning more as an opportunity. For Heinrich Lange, general clauses were "cuckoo's eggs in a libertarian legal

---

[174] ERNST FUCHS, 1 DIE JUSTIZ 349 (1925/26).

[175] A compilation of cases can be found in KLEMMER, *supra* note 53, at 41, 429. On *bona fides* as a concept in ordinary law—and its use against lawsuits based on binding legal norms—see HAFERKAMP, *supra* note 116, at § 242 nn.29–36. The proliferation of those cases can thus be seen as a symptom of a crisis caused by inflation rather than an indication of a "new" conception of § 242. See RÜCKERT, *supra* note 173, at 429–41.

[176] RG, Jan 15, 1926, JURISTISCHE WOCHENSCHRIFT 980–81 (1926) with a critical comment by ERICH MOLITOR (articles 153 and 155 Weimarer Reichsverfassung are drawn upon for an interpretation of Sections 242, 138, 226, 826 of the BGB); in RGZ 128, 95–100, Section 138 BGB is said to demand that "human interactions be governed by a respect for those constitutional rights." See KNUT WOLFGANG NÖRR, ZWISCHEN DEN MÜHLSTEINEN 10 n.42 (1988).

[177] Term introduced by JÖRN IPSEN, DIE GRUNDRECHTE 143 (Franz Leopold Neumann et al. eds., vol. 2, 1954).

[178] Cf. STOLLEIS, *supra* note 57, at 220–26; CHRISTOPH GUSY, DIE WEIMARER REICHSVERFASSUNG 285 (1997); MATTHIAS RUFFERT, VORRANG DER VERFASSUNG UND EIGENSTÄNDIGKEIT DES PRIVATRECHTS 9–10 (2001); KLAUS STERN, DAS STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND 1515–16 (Vol. III/1, 1988). Leisner's construction of a theory of an immediate third-party effect in Weimar involves an inaccurate stretching of historical fact. WALTER LEISSNER, GRUNDRECHTE UND PRIVATRECHT 52–112, 223–40 (1960).

[179] JUSTUS WILHELM HEDEMANN, DIE FLUCHT IN DIE GENERALKLAUSELN 72 (1933). This was written in 1932 (*Id.* at *Preface).*

[180] *Id.* at 73.

system,"[181]—a trick within the positivist illusion of the rule of law. Lange subordinated legislation to the law, hence, the "principle of good faith constitutes the basic law of community life, which the single norms simply seek to exploit to their own advantage."[182] Larenz sought to allay Hedemann's fears of an "instrumentalization" of the general clauses by employing the familiar arguments. Formerly, "in times of ideological turmoil, [the judge] would antagonize a part of the people against him with every decisive position, while today, he may draw on the support of a, with respect to fundamental principles, unified legal and constitutional conception of the entire people."[183]

In contrast, Carl Schmitt made clear, in unflatteringly blunt terms, that the concern was not the freedom of the judiciary, but specific revaluation: "As soon as terms such as 'good faith' . . . are no longer used with reference to the individualist civic society, but instead the interest of the people as a whole, the entire legal system is altered without it being necessary to amend a single 'positive' section."[184] Good faith became the methodological vehicle for Carl Schmitt's *konkretes Ordnungsdenken*, the "concrete" normative orders between value and reality.[185] Schmitt had clarified the consequences for the judge back in 1933. He stressed that the "confinement of the judge would not be affected" by the general clauses.[186]

> That which rules, leads and decides is not opinions and ideas in general, but the views of people with particular dispositions. The National Socialist movement is the leading force within the contemporary German state. Questions concerning the nature of good morals and good faith must thus be determined by way of its fundamental principles.[187]

Hedemann had been proven right.[188]

---

[181] HEINRICH LANGE, LIBERALISMUS, NATIONALSOZIALISMUS UND BÜRGERLICHES RECHT 5 (1933).

[182] *Id.* at 7.

[183] KARL LARENZ, *Review of Justus Wilhelm Hedemann*, 100 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT 378–82 (1934); *see also* CHRISTINE WEGERICH, DIE FLUCHT IN DIE GRENZENLOSIGKEIT: JUSTUS WILHELM HEDEMANN (1878–1963) 148–49 (2004).

[184] CARL SCHMITT, ÜBER DIE DREI ARTEN DES RECHTSWISSENSCHAFTLICHEN DENKENS 49 (2d ed. 1993).

[185] *Id.* at 48.

[186] CARL SCHMITT, 62 JURISTISCHE WOCHENSCHRIFT 2793–94 (1933).

[187] *Id.* at 2794.

[188] This did not keep him from adopting the National Socialist conception, see WEGERICH, *supra* note 183, at 146–51.

After 1945, this concept of the general clauses, as the hinge to super-ordinated legal principles governing the BGB, never fell from view. Good faith remained a standard, which not only referred to the individual judicial evaluation of cases, but also facilitated "legal ethical ruptures in statute law."[189] Even prior to the founding of the Federal Republic of Germany, problems of revaluation expedited the discussion around the olympic question: "At which point does morality demand that a German court of justice curb the actions of even the highest political forces?"[190] After several courts denied the creditors' obligation to accept payments at nominal value[191] by appealing to good faith, the British military government, as the highest political power, issued a regulation in 1947; this regulation not only prohibited the courts from revaluation, but also explicitly barred them from breaking through this regulation with reference to "§§ 157, 242 or 607 of the Civil Code or any other German law."[192] And yet, the President of the Regional Court of Aschaffenburg firmly maintained that good faith may not be excluded. Section 242 of the BGB is "more than positive law"; it is an "indispensable requirement of moral law and, as such, preeminent with respect to all other positive legal norms."[193] Koch presumed to dispute the validity of a military government law, because it violated good faith or "did not concur with general moral law despite having been duly issued."[194] Some parts of jurisprudence also retained the significance of good faith as an expression of a "reign of legal ethics."[195] As Heinrich Vollmer stressed:

> Hence, the legal principle of good faith is intrinsic to the law, and thus indispensable. Judges as well as legislators are subject to the rule of law. The principle of good faith

---

[189] FRANZ WIEACKER, ZUR RECHTSTHEORETISCHEN PRÄZISIERUNG DES § 242 BGB, 36 (1956).

[190] JUSTUS WILHELM HEDEMANN, JURISTISCHE RUNDSCHAU 131 (1950).

[191] Landgericht Kleve [Regional Court] Jan. 31, 1947, MONATSSCHRIFT FÜR DEUTSCHES RECHT [MDR] 18–19 (1947); Oberlandesgericht Kiel [Regional Appeal Court] Dec. 17, 1946, MONATSSCHRIFT FÜR DEUTSCHES RECHT [MDR] 15–18 (1947); Landgericht Bonn [Regional Court] Dec. 4, 1946, MONATSSCHRIFT FÜR DEUTSCHES RECHT [MDR] 53–54 (1947). I wish to thank Kristina Busam for her advice on this matter.

[192] Verordnung [V] [Regulation] Nr. 92. Änderung des Gesetzes Nr. 51 der Militärregierung (Währung) vom 1. Juli 1947 AMTSBLATT DER MILITÄRREGIERUNG IN DEUTSCHLAND Nr. 20, at 567.

[193] FRITZ KOCH, NEUE JURISTISCHE WOCHENSCHRIFT 171 (1947).

[194] *Id.* at 171.

[195] FRANZ SCHOLZ, NEUE JURISTISCHE WOCHENSCHRIFT 81 (1950). Coing also stressed the continuing importance of Section 242 BGB because judges "are sworn to general principles of justice" even in the face of binding legal norms, HELMUT COING, 3 SÜDDEUTSCHE JURISTEN-ZEITUNG 132 (1948).

> in legal relations is an alternative expression of a directive to all to be just, a directive logically inherent to the office of the judge and to the law itself. One cannot, therefore, exclude the principle of good faith without denying the law itself.[196]

The simultaneous debates on the judicial control of constitutional provisions by way of the unwritten "higher ranking constitutional norms" demonstrate how this idea was characteristic of the period.[197] By linking good faith to super-positive law, the old question of whether the judicial legal awareness was a medium or preconception of the law remained. For now, optimism stood its ground:

> Even if the erstwhile ideological unity that once provided the standard and moderation for all thought and action has long since become a thing of the past for contemporary society, then at least the unity of many moral concepts continues to exist, which coalesce into an objective image of order, which is also capable of giving direction and shape to general clauses.[198]

In spite of this, unease continued to spread about the increasingly unbridled judicial evaluation. Wieacker perceived an "all too simple notion of natural law"[199] in those judgments based on the general clauses, while Esser found an "academically uncontrollable admixture of legal and ethical principles and value standards."[200] In 1949, Herbert Krüger was likely the first to have underlined the constitution as legally binding for civil law judicature. He criticized the "self-referential" tendency of the judicature.[201] For Krüger, "orientating oneself on existing moral concepts"[202] meant "if nothing else, to consult the

---

[196] HEINRICH VOLLMER, DIE EINWIRKUNG DER VERORDNUNG NR. 92 DER BRITISCHEN MILITÄRREGIERUNG BETR. "ÄNDERUNG DES GESETZES NR. 51 DER MILITÄRREGIERUNG (WÄHRUNG)" UND DES "ERSTES GESETZ ZUR ÄNDERUNG DES GESETZES NR. 51 DER MILITÄRREGIERUNG" DER AMERIKANISCHEN MILITÄRREGIERUNG AUF BESTEHENDE GELDSCHULDEN, INSBESONDERE AUF DURCH GOLDKLAUSEL GESICHERTE FORDERUNGEN 88 (1948).

[197] *Cf.* FOLJANTY, *supra* note 155, at 88–94.

[198] HANS HERRMANN, JURISTENZEITUNG 184 (1955).

[199] WIEACKER, *supra* note 189, at 10–11.

[200] JOSEF ESSER, JURISTENZEITUNG 521 (1953).

[201] HERBERT KRÜGER, NEUE JURISTISCHE WOCHENSCHRIFT 163–66 (1949).

[202] *Id.* at 164.

constitution," should one seek to determine a violation of good faith[203]: "For civil law, the constitution is the noblest of sources from which it should fill its value-deficient terms and general clauses."[204] When Dürig presented his doctrine of indirect third-party effect, and thus influenced the *Lüth* judgment, he also aimed to restrict the special paths of private law[205] by postulating a value program of the Grundgesetz behind the constitutional text.[206] This safeguarded the "unity of the law in its entirety in judicial morality."[207] The constitution was now expected to contain uncontrolled judicial evaluation.

Dürig used the tried and tested method of the general clause as an escape valve, although he replaced the National Socialist ideology and post war natural law with the constitution. He referred to the general clauses as "breaching points of constitutional rights in civil law"[208] and, perhaps unwittingly, played on Heinrich Lange[209] who made reference in 1933 to "breaching points by means of which the new legal thought inundates the old." In so far as the "objective order of values" of the constitution having replaced the philosophically freely construed concepts of justice after 1945, the contemporary gains for the rule of law could not be overlooked. Good faith was now domesticated precisely by being applied. Hence, the same method effectuated entirely different concepts of law in 1933 and 1958. In any case, a "methodological recurrence of revaluation from 1933"[210] was again poised on the threshold of an entirely new history. Via the general clauses, the court now began to assert from the fundamental rights in the constitution a "behavioural canon for society as a whole" as a means of protection from the state.[211]

---

[203] *Id.* at 166.

[204] *Id.* at 163.

[205] HASSO HOFMANN rightly emphasizes this in RECHTSPHILOSOPHIE NACH 1945, 21–25 (2012).

[206] *WOLFGANG GRAF VITZTHUM*, in DAS LÜTH-URTEIL AUS (RECHTS-)HISTORISCHER SICHT, *supra* note 159, at 349-67; *HASSO HOFMANN*, in MENSCH – STAAT – UMWELT 47–78 (Ivo Appel & Georg Hermes eds., 2008); for a clarification concerning the alleged influence of Smend, see STEFAN RUPPERT, in DAS LÜTH-URTEIL AUS (RECHTS-)HISTORISCHER SICHT, *supra* note 159, at 327–48.

[207] GÜNTER DÜRIG, *Grundrechte und Zivilrechtsprechung*, in FESTSCHRIFT NAWIASKY 177 (1956).

[208] GÜNTER DÜRIG, *Freizügigkeit*, in DIE GRUNDRECHTE 525 (Franz Leopold Neumann et al. eds., vol. 2, 1954).

[209] HEINRICH LANGE, JURISTISCHE WOCHENSCHRIFT 2859 (1933).

[210] STOLLEIS, *supra* note 57, at 218.

[211] *Id.* at 227.

Thus the tectonics of law shifted considerably. What was initially perceived in civil law as a shifting of competencies from the Federal High Court of Justice to the Federal Constitutional Court as the "supreme civil court"[212] marked the beginning of a de-politicization of thought on civil law. Until 1945, views on civil law had turned on the relationship of the individual to the state. After 1945, only a few untainted professors, such as Walter Hallstein, Ludwig Raiser, Franz Böhm, and Werner Flume, wished to continue discussing a contemporary concept of private law.[213] In contrast, the majority[214] of the seemingly apolitical[215] professors of civil law avoided all fundamental discussions. Nevertheless, the anti-liberal mood[216] lived on, which was reflected in a tacit departure from "subjective law" as a political guiding concept[217] and its concealed endurance in the continuity of dogmatic figures.[218] For

---

[212] UWE DIEDERICHSEN, 198 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 171–260 (1998).

[213] WERNER FLUME, in FESTSCHRIFT ZUM HUNDERTJÄHRIGEN BESTEHEN DES DEUTSCHEN JURISTENTAGES 1860–1960, 135–238 (vol. 1, 1960). For a discussion of additional authors, see KAUHAUSEN, *supra* note 112, at 206–08, 217–28; JOACHIM RÜCKERT, NEUE JURISTISCHE WOCHENSCHRIFT 1251–59 (1995).

[214] The not entirely untainted Franz Wieacker is an exception, cf. the essays, FRANZ WIEACKER, INDUSTRIEGESELLSCHAFT UND PRIVATRECHTSORDNUNG (1974). See also his astonishing reconsideration of the position he held on property law during the National Socialist period, FRANZ WIEACKER, 5–6 QUADERNI FIORENTINI 841–59 (1976/77). For contrast, see his strongly relativist stance in FRANZ WIEACKER, PRIVATRECHTSGESCHICHTE DER NEUZEIT 486–87, 514–16 (2d ed. 1967).

[215] For example, Hueck, Hefermehl, and Schmidt-Rimpler came across as decidedly apolitical to their students, cf. THIESSEN, *supra* note 113, at 287 n.430.

[216] KNUT WOLFGANG NÖRR, *DIE REPUBLIK DER WIRTSCHAFT. PART I: VON DER BESATZUNGSZEIT BIS ZUR GROßEN KOALITION* 5–18 (1999) (organized economical constitution). On jurisprudence, see FOLJANTY, *supra* note 155, at 235–46.

[217] Cf. Karl Larenz's "Rahmenbegriff," see KARL LARENZ, in BEITRÄGE ZUR EUROPÄISCHEN RECHTSGESCHICHTE UND ZUM GELTENDEN ZIVILRECHT. FESTGABE FÜR JOHANNES SONTIS 129–48 (Fritz Baur et al., eds., 1977) (regarding the "framing concept"). For contrast, see KARL LARENZ, GRUNDFRAGEN DER NEUEN RECHTSWISSENSCHAFT 225–60 (Karl Larenz ed., 1935).

[218] The continuity of the so-called *Innentheorie* (Theory of Immancence) established by WOLFGANG SIEBERT (VERWIRKUNG UND UNZULÄSSIGKEIT DER RECHTSAUSÜBUNG (1934)) is an example. On the National Socialist notions of this doctrine see HAFERKAMP, *supra* note 117, at 200–09. See PALANDT/CHRISTIAN GRÜNEBERG, § 242 n.38 (71st ed. 2012):

> The principle of good faith constitutes an immanent limitation of the content of every law ("Innentheorie") . . . . If one exercises one's right or takes advantage of a legal position in breach of the principle of good faith, that action constitutes an inacceptable abuse of law . . . . If the relevant circumstances change, the exercise of a right in breach of good faith can become permissible again; by the same logic, a relevant situational change can render a hitherto permissible action abusive and thus illegal. § 242 thus makes legal content relative.

While this, at first, seems to be a somewhat technical approach—which, of course, grants the judge an almost unlimited power to interfere in subjective rights—Johannes Friesecke explains it in its original political function in the 3d edition, 1940: "This limitation of rights results from the idea that every subjective right also contains a duty." The nature and content of this limitation "is not primarily defined by the morality of the contractual comrades

methodology, the changes were fundamental. In terms of the history of method, the *Lüth* judgment stood at the beginning of a constitutionalization of methodology. For the first time, a court established the requirements of methodology as binding,[219] thereby filling a gap that the BGB had intentionally left to the judicature.[220]

F. 1970: Josef Esser, Vorverständnis und Methodenwahl in der Rechtsfindung

The year 1970 and the monograph *Vorverständnis und Methodenwahl in der Rechtsfindung* (Preunderstanding and the Selection of Method in the Finding of Law) by Josef Esser require a brief retrospection. Evaluative jurisprudence regrouped after 1945.[221] At this point, concern was pitched against the natural law optimisms of Helmut Coing, Erik Wolf, Hermann Weinkauff, and others,[222] which by no means entailed a return to positivism. On the contrary, Heck was obliged to endure ongoing insult by being lumbered with the positivist

---

(Vertragsgenossen) . . . but by the values and morality of the national community (Volksgemeinschaft)." PALANDT/JOHANNES FRIESECKE, § 242 at 193 (3d ed. 1940). In the 9th edition (1951), Bernhard Danckelmann adopted this idea of immanent duties in every subjective right and merely purified the language, speaking of "contractual parties" instead of "contractual comrades" and of "general moral principles" instead of *Volksgemeinschaft*. PALANDT/BERNHARD DANCKELMANN, § 242 n.197 (9th ed. 1951). As an explanation for the merely cosmetic amendment, he declared that whilst the terminology of the Reichsgericht in 1939—"communal spirit" and "Volksgemeinschaft"—may have been influenced by National Socialism, "the idea behind it has merit" (*id.*). In 1969, from the 28th edition onwards, Helmut Heinrichs obliterated every trace of politics from this discussion—this remains true for the present—whilst the doctrine itself remained the same, PALANDT/HELMUT HEINRICHS, § 242 (28th ed. 1969). In contrast, the idea of a "unity of rights and duties"—as an attack on the notion of constitutional rights as liberties against the state—is still openly discussed among constitutional jurists, cf. OTTO DEPENHEUER, in HANDBUCH DER GRUNDRECHTE n.52 (Detlef Merten & Hans-Jürgen Papier eds., vol. 1, 2004).

[219] Overview in BODO PIEROTH & TOBIAS AUBEL, JURISTENZEITUNG 504–10 (2003); MAUNZ-DÜRIG/CHRISTIAN HILLGRUBER, GG art. 97 nn.55–62 (52d ed. 2008).

[220] In §§ 1–3 of his preliminary draft of the General Part, Gebhardt had still planned to include rules for interpretation, see generally WERNER SCHUBERT, *Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuches*, I ALLGEMEINER TEIL 1 (1981). The first commission eventually doubted the "usefulness of an inclusion of such tenets of jurisprudence" in a codification, DIE BERATUNG DES BÜRGERLICHEN GESETZBUCHS IN SYSTEMATISCHER ZUSAMMENSTELLUNG DER UNVERÖFFENTLICHTEN QUELLEN, II ALLGEMEINER TEIL 1193 (Horst Heinrich Jakobs & Werner Schubert eds., 1985).

[221] It was, in fact, a regrouping and decidedly not—as SCHOPPMEYER, *supra* note 152, at 232–37, believed—a birth; in this regard, Schoppmeyer was probably fooled by Larenz's legend. LARENZ, *supra* note 56, at 119–85.

[222] On this, see Foljanty's analysis. FOLJANTY, *supra* note 155, at 188–204; see also ULFRID NEUMANN, in RECHTSWISSENSCHAFT IN DER BONNER REPUBLIK 145–87 (Dieter Simon ed., 1994); HOFMANN, *supra* note 205, at 10–21; on Weinkauff see generally DANIEL HERBE, HERMANN WEINKAUFF (1894–1981) (2008).

epithet, whose lack of orientation on "material standards of justice,"[223] on "subjacent levels of law," its "ethical content,"[224] or the "idea of justice"[225] were lamented. The evaluative judge remained in place. Many emphasized the legislative evaluative guidelines, be it those of the BGB—according to Harry Westermann[226] and, in his later works, Coing,[227]—or those of the constitution, according to Nipperdey.[228] Extralegal principles of evaluation still remained prominent after the *Lüth* judgment, such as with Larenz, Lange, Lehmann, and Boehmer.[229] On this matter, there was mostly concurrence that "the logical rule of law" provided the judge with support "free from all arbitrariness."[230] Certainly, Radbruch was the only person who wished to use this designated nature of things as a cautious orientation on legal reality without drawing on a claim to universal validity.[231] In contrast, his civil law colleagues during the 1950s, such as Coing,[232] believed they had identified the ontological core of law. For Larenz, the idea that there existed "in (human) living conditions as such, an inherent and express meaning"[233] became, after 1945,[234] the means of transporting his

---

[223] JOSEF ESSER, EINFÜHRUNG IN DIE GRUNDBEGRIFFE DES RECHTES UND DES STAATES 14 (1949).

[224] CANARIS, *supra* note 152, at 37, 39.

[225] HARRY WESTERMANN, WESEN UND GRENZEN DER RICHTERLICHEN STREITENTSCHEIDUNG IM ZIVILRECHT 20–25 (1955).

[226] HARRY WESTERMANN, INTERESSENKOLLISIONEN UND IHRE RICHTERLICHE WERTUNG BEI DEN SICHERUNGSRECHTEN AN FAHRNIS UND FORDERUNGEN 14–24 (1954); *see also* WESTERMANN, *supra* note 225, at 15–24.

[227] HELMUT COING, GRUNDZÜGE DER RECHTSPHILOSOPHIE, from 1950 to the 5th edition in 1993 in the final chapter on "purpose and method"; on this RÜCKERT, *supra* note 8, at 526–29.

[228] HOLLSTEIN, *supra* note 153, at 305–19. For context, see discussion *supra* Part E.

[229] See the comparative analysis in KAUHAUSEN, *supra* note 112, at 83. For further studies focusing on Larenz, see *id.* at 111–26; on Boehmer, see *id.* at 168–77; on Lange, see WILHELM WOLF, *VOM ALTEN ZUM NEUEN PRIVATRECHT: DAS KONZEPT DER NORMGESTÜTZTEN KOLLEKTIVIERUNG IN DEN ZIVILRECHTLICHEN ARBEITEN HEINRICH LANGES (1900-1977)* 288–91 (1998); on Lehmann, see DEPPING, *supra* note 103, at 237–38.

[230] HANS WELZEL, NATURRECHT UND RECHTSPOSITIVISMUS, here quoted from the reprint in NATURRECHT ODER RECHTSPOSITIVISMUS 337 (Werner Maihofer ed., 1962). Foljanty discusses this as well. See FOLJANTY, *supra* note 155, at 196–203; RALF DREIER, ZUM BEGRIFF DER „NATUR DER SACHE" 35–82 (1965). For the long history of this argument, see SCHRÖDER, *supra* note 8, at 64–65, 265–68 (on the very similar resistance against a further development of the law by systemic deduction in the 19th century), 336–37.

[231] GUSTAV RADBRUCH, GUSTAV RADBRUCH GESAMTAUSGABE 229–54 (vol. 3, 1990). On this, see Neumann's comparative analysis, ULFRID NEUMANN, NATURRECHT UND POLITIK 83–86 (Karl Graf Ballestrem ed., 1993); FOLJANTY, *supra* note 155, at 198.

[232] COING, *supra* note 227, at 92–93; on this FOLJANTY, *supra* note 155, at 183–85, 199.

[233] LARENZ, *supra* note 85, at 309.

[234] KARL LARENZ, ZUR BEURTEILUNG DES NATURRECHTS 31–32 (1947); *see also* FOLJANTY, *supra* note 155, at 200.

conception of type (Typuskonzeption) first developed in 1938.[235] Hence, there was considerable continuity with respect to method: The insight into the properly understood legal reality lead towards "concurring evaluations and thus standards of evaluation" for judges.[236]

During National Socialism, Esser also enthused about totalitarian value unity. Earlier forms of positivism had been unable to achieve a "critical legal evaluation of those living conditions to be ordered" as it lacked a "fruitful ideological basis."[237] Instead, in 1941, a "strong material legal imperative and an evaluative standard that follows from this"[238] existed as "acknowledged by nationalist legal theory."[239] After 1945, Esser became increasingly critical. His "evaluation of social reality"[240] as juridical method had revealed its drawbacks during National Socialism. Günter Haupt methodically grounded his *de facto* contract in 1941[241] entirely in the rhetoric of a new methodological honesty that one must "have the courage to see things as they are in reality. This involves . . . contractual conditions being recognized without formal conclusion of contract . . . ."[242] In 1958 Esser criticized Haupt's argument "life itself assigns" as "the capitulation of normative legal thought to political-social fact."[243]

Esser exposed and dismissed the unified legal awareness of the judge as an ideological fiction as early as 1949, albeit that the trust in "a unified legal awareness of the judiciary" possesses great theoretical completeness. In practical terms, however, this means a "strong test of

---

[235] On this, see the analysis by JOSEF KOKERT, DER BEGRIFF DES TYPUS BEI KARL LARENZ 95–119, 206–10 (1995); critically BERND HÜPERS, KARL LARENZ – METHODENLEHRE UND PHILOSOPHIE DES RECHTS IN GESCHICHTE UND GEGENWART 468–73 (2010). On the kinship between Larenz's conception of type and Binder's positions—and thus a completely different notion of type than Max Weber's—see LARENZ, METHODENLEHRE, *supra* note 85, at 108.

[236] LARENZ, METHODENLEHRE, *supra* note 85, at 127.

[237] ESSER, *supra* note 101, at 132.

[238] *Id.* at 135.

[239] *Id.* at 28.

[240] JOSEF ESSER, DEUTSCHE RECHTSWISSENSCHAFT 69 (1942). This meant a "thorough consideration and interpretation of the social and economical relations." *See* ESSER, *supra* note 102 (reviewing Lange & Hedemann), at 95.

[241] GÜNTER HAUPT, ÜBER FAKTISCHE VERTRAGSVERHÄLTNISSE (1941); *see also* LAMBRECHT, *supra* note 103, at 5–17.

[242] HAUPT, *supra* note 241, at 11.

[243] JOSEF ESSER, *Gedanken zur Dogmatik der „faktischen Schuldverhältnisse"*, *in* GEDANKEN ZUR DOGMATIK (1958), quoted from the reprint in WEGE DER RECHTSGEWINNUNG 56 (Peter Häberle & Hans G. Leser eds., 1990). Esser expressed a different view in Josef Esser, review of Haupt, *Schmollers Jahrbuch* 230–34 (1942).

stamina for the judiciary and tempts one to try to educate the judges 'ideologically.'"[244] Esser dispensed with value certainty. In 1953, he took a risk and publicly endorsed moving away from the mixing of ethical standards and moving towards a case law system.[245] In 1956, following a research period in America,[246] he published *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*.[247] Esser incorporated American influences into his own theory, which pre-empted Ronald Dworkin's work. According to Esser, the judge identified principles by critically examining the facts of a case, the norms, and the social reality, on a case-by-case basis. In the contemporary discussion,[248] the judge as a law-making factor shifted into the foreground. It was now no longer philosophy's claim to truth that was decisive, but institutional efficacy and aptness for consensus in judicial discussion. Methodologically, this now turned on the question of to what extent case law developed rational structures and would be capable of stabilizing the legal system as a system of discourse.[249]

In 1970, Esser pursued this further in *Vorverständnis und Methodenwahl*[250] and put the individual predisposition of the judge into the limelight.[251] The notion that interpretation is "the result of its conclusion"[252] had been well known since Radbruch in 1906 and Hermann Isay in 1929.[253] Nevertheless, the severity with which civil law scholarship branded Esser as

---

[244] ESSER, *supra* note 223, at 133.

[245] JOSEF ESSER, in JURISTENZEITUNG 521–26 (1953); *see also* KAUHAUSEN, *supra* note 112, at 266–68.

[246] *See* STEFAN VOGEL, JOSEF ESSER – BRÜCKENBAUER ZWISCHEN THEORIE UND PRAXIS 12 (2009); *see also* JOHANNES KÖNDGEN, DEUTSCHSPRACHIGE ZIVILRECHTSLEHRER DES 20. JAHRHUNDERTS IN BERICHTEN IHRER SCHÜLER 103–27 (Stefan Grundmann & Karl Riesenhuber eds., vol. 1, 2007).

[247] JOSEF ESSER, GRUNDSATZ UND NORM IN DER RICHTERLICHEN FORTBILDUNG DES PRIVATRECHTS (1956); *see also* VOGEL, *supra* note 246, at 65–92; FOLJANTY, *supra* note 155, at 216–17; BIRGIT SCHÄFER, in METHODIK DES ZIVILRECHTS 261–84, *supra* note 8; WOLFGANG FIKENTSCHER, METHODEN DES RECHTS 411–14 (vol. 3, 1976).

[248] FOLJANTY, *supra* note 155, at 212–16.

[249] Skeptically LARENZ, *supra* note 85, at 126.

[250] JOSEF ESSER, VORVERSTÄNDNIS UND METHODENWAHL IN DER RECHTSFINDUNG. RATIONALITÄTSGARANTIEN DER RICHTERLICHEN ENTSCHEIDUNGSPRAXIS (1970).

[251] On this VOGEL, *supra* note 246, at 93–96; MONIKA FROMMEL, DIE REZEPTION DER HERMENEUTIK BEI KARL LARENZ UND JOSEF ESSER 83–96, 207–30 (1981).

[252] GUSTAV RADBRUCH, EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT (1929), here quoted from the 11th edition, GUSTAV RADBRUCH, EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT 166 (11th ed. 1964); GUSTAV RADBRUCH, 22 Archiv für Sozialgeschichte 355–70 (1906).

[253] HERMANN ISAY, RECHTSNORM UND ENTSCHEIDUNG 177–81 (1929).

a champion of "case-law positivism lacking any criteria of legitimization"[254] well into the 1990s underscores the fact that he had struck a nerve. Since the 1930s, evaluative jurisprudence had systematically dismantled dogmatic structures to facilitate the possibility for the judge to apply nationalist communal thinking, the spirit of the legal system, the nature of things, and the needs of life in an evaluative manner against the BGB. If the judge now entered this free space as a subject, then the entire façade of materialization merely masked free case law. If, according to Larenz in 1991, the "turn to 'evaluative jurisprudence' . . . first [obtains] its full significance by being attached—in the case of most authors—to the acknowledgement of 'extralegal' or 'pre-positive' values or evaluative standards,"[255] the legal science was denied any ability to guide judicial decision-making.[256]

Consequently, the debate shifted—same as prior to 1914—to the political judge[257] and the single-level training of jurists.[258] Here, Esser expedited a dynamic that he himself was barely in a position to control.[259] In 1956, he made reference to stabilizing fixed judicial standards, such as "the prudent businessman."[260] For Esser, "the responsibility of the judge to assure himself that his standards would indeed find an adequate framework of recognition" was sufficient in order to recognize these.[261] In 1974, Hans Ryffel pointed out that it was contradictory to demand this while not considering empirical survey.[262] In 1968, Wolfgang Birke had already concluded from the democratic imperative that it was the task of the judge to implement the empirical legal sensibilities of the population.[263] Private law discussed this difficulty, especially with regard to general clauses which often referred to social standards such as the concept of "common usage". Around this time, opinion polls made their

---

[254] FRANZ BYDLINSKI, JURISTISCHE METHODENLEHRE 23–24 (1991). Additional critical voices can be found in VOGEL, *supra* note 246, at 115–34.

[255] LARENZ, *supra* note 56, at 122.

[256] *Id.* at 121.

[257] MICHAEL ROHLS, in METHODIK DES ZIVILRECHTS 309–25 (on Wiethölter), *supra* note 8; RÜCKERT, *supra* note 8, at 530.

[258] See RÜCKERT, *supra* note 8, at 531, as well as ALFRED RINKEN, EINFÜHRUNG IN DAS JURISTISCHE STUDIUM § 15 (2d ed. 1991).

[259] Concisely on this: DIETER SIMON, ESSAYS ZUR PERIODISIERUNG DER DEUTSCHEN NACHKRIEGSGESCHICHTE 160–67 (Martin Broszat ed., 1990).

[260] ESSER, *supra* note 247, at 97.

[261] JOSEF ESSER, in WERTE UND WERTEWANDEL IN DER GESETZESANWENDUNG 25–26 (Josef Esser & Erwin Stein, eds., 1966).

[262] HANS RYFFEL, RECHTSSOZIOLOGIE 212 n.155 (1974).

[263] WOLFGANG BIRKE, RICHTERLICHE RECHTSANWENDUNG UND GESELLSCHAFTLICHE AUFFASSUNGEN 41–59 (1968).

appearance as a partner to jurisprudence.[264] In the ensuing debate, one side pointed out that one could not speak of "general legal convictions"[265] if one had not "once empirically tested this generality,"[266] whereas the other side stoically emphasized the "plebiscitary misconception"[267] "of seeking to identify a binding decision-making basis for judges on the basis of opinion polls."[268] When Rüdiger Lautmann optimistically localized "sociology before the gates of jurisprudence" in 1971,[269] law threatened to be taken out of the hands of jurists. At the same time, the supporting pillars of evaluative jurisprudence, namely the theories of material justice, broke away.[270] Language philosophy, theories of procedural justice, the analytical theory of law, and the sociology of the judge demanded complete revaluation of the relationship of the judge to law. Many experts of civil law withdrew behind old certainties, and barely took part in these debates.[271] Themes such as the juridical theory of argumentation, juridical logic, juridical hermeneutics, and judicial decision were developed, for the most part, in the fields of constitutional and criminal law, as well as the sociology of law.[272]

Because Esser's many opponents in civil law fused his reflections with these rejected new principles, it was forgotten that Esser, as an outstanding dogmatist, had not capitulated to the political judge, but, in 1972, had made a strong plea for the theoretical precepts of good juridical dogmatics capable of offering support and influencing expert preunderstanding.[273]

---

[264] In particular, see the essays by GUNTHER TEUBNER, ELISABETH NOELLE-NEUMANN & KLAUS LÜDERSSEN, in GENERALKLAUSELN ALS GEGENSTAND DER SOZIALWISSENSCHAFTEN (Klaus Lüderssen ed., 1978).

[265] ROLF SACK, IN WETTBEWERB IN RECHT UND PRAXIS 7 (1985).

[266] ALTERNATIVKOMMENTAR/REINHARD DAMM, § 138 n.58 (1987).

[267] GUNTHER TEUBNER, STANDARDS UND DIREKTIVEN IN GENERALKLAUSELN 112 (1971).

[268] STAUDINGER/ROLF SACK, BGB § 138 n.47 (12th ed. 2003).

[269] RÜDIGER LAUTMANN, DIE SOZIOLOGIE VOR DEN TOREN DER JURISPRUDENZ (1971).

[270] GRALF-PETER CALLIESS, JAHRBUCH JUNGER ZIVILRECHTSWISSENSCHAFTLER 87 (Brigitta Jud & Thomas Bachner eds., 2000).

[271] See, however, CLAUS-WILHELM CANARIS, in 200 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 282–89 (2000), who attempts a degree of symbiosis between theories of material and procedural justice. In addition, see Wolfgang Fikentscher's concept of "Case Norms," in METHODEN DES RECHTS, 202–67 (vol. 4, 1977).

[272] The following names may suffice: Klug, Perelmann, F. Müller, Alexy, Kriele, U. Neumann, as well as Dworkin, Luhmann and Habermas who triggered important discussions. On the vibrant contemporary debates in public law, see e.g. MATTHIAS JESTAEDT, DAS MAG IN DER THEORIE RICHTIG SEIN ... (2006); ÖFFENTLICHES RECHT UND WISSENSCHAFTSTHEORIE (Andreas Funke & Jörn Lüdemann eds., 2009); WAS WEIß DOGMATIK? (Gregor Kirchhof et al. eds., 2011) and the essays in VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER (vol. 71, 2012).

[273] JOSEF ESSER, in WEGE DER RECHTSGEWINNUNG 328–31, 363–96, 420–27 (Peter Häberle & Hans Georg Leser, eds., 1990).

1972 was the same year in which *Spiros Simitis* soberly determined that anyone who continued to argue dogmatically would find himself being permanently suspected of operating at cross-purposes to social reality.[274] Esser replied to Wilburg in 1956:

> The ossified doctrinal system, with its logic of concepts, has increasingly proven itself as a restraint to modern jurisprudence dependent on the identification of problems of legal ethics and policy formation. However, the question remains whether it is not precisely these 'restraints' which form irreplaceable legal guarantees and important control points.[275]

G. Conclusion

"*Vestigia terrent,*" exclaimed Flume in 1994,[276] when discovering the concept of breach of contractual duty—which he had apostrophized as National Socialist—in a draft of the commission for a new law of obligation. While one aspect of his colleagues' reaction was that one could naturally argue that Stoll's ideas of 1936 were, in fact, even older,[277] of far greater interest was that commission member Dieter Rabe emphasized that one "had not even considered the Academy of German law." Although exhaustive, admittedly uncommented use had been made of Stoll's memorandum[278] in Ulrich Huber's report.[279] The debates about civil law and National Socialism carried out in recent years are marked by the controversy about who had and who had not been a National Socialist. In view of contemporary civil law, such debates amount to mere posthumous settlements of guilt, which serve only to direct attention to what remains of those authors—their ideas. Precisely in view of National Socialism, the concern is not with the itemization of prohibited thought,

---

[274] SPIROS SIMITIS, in 172 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 135 (1972).

[275] ESSER, *supra* note 247, at 6 (with reference to Wilburg).

[276] WERNER FLUME, in ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 1497 (1994).

[277] HEINRICH STOLL, DIE LEHRE VON DEN LEISTUNGSSTÖRUNGEN. DENKSCHRIFT DES AUSSCHUSSES FÜR PERSONEN-, VEREINS- UND SCHULDRECHT 32–35 (1936); see also SESSLER, *supra* note 67, at 23–106 (Stoll's system before 1933), 106–99 (Stoll's system after 1933). For a discussion of the 1994 debates, see THIESSEN, *supra* note 113, at 232 n. 135.

[278] DIETER RABE, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 1655 (1996). Previously on this debate THIESSEN, *supra* note 113, at 232–33.

[279] ULRICH HUBER, in GUTACHTEN UND VORSCHLÄGE ZUR ÜBERARBEITUNG DES SCHULDRECHTS 699–702, 705–08 (Bundesminister der Justiz ed., vol. 1, 1981); see also *id.* at 908 (containing the bibliography, which features the entry "Stoll, memorandum" without any reference to National Socialism).

but with demanding that those who continue to employ the concepts of that period prove that such usage is unproblematic. Thus—in contrast to what Flume maintained[280]—nothing is undiscussible.

Legal doctrine and methods do not merely constitute abstract problem solving techniques, but are also storehouses of our past legal culture. In order to avoid entanglement in the puppet strings of old ideas, one must understand and discuss those premises.

[280] FLUME, *supra* note 276, at 1500.