INTRODUCTION TO GERMAN LAW

THIRD EDITION

EDITED BY

JOACHIM ZEKOLL

&

GERHARD WAGNER

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Introduction to German Law

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Preface

The goal of this book is to provide an introduction of the most important areas of German law for foreign readers – be they practitioners, scholars, or students. Each chapter was written by one or several experts and presents an overview of the basic concepts and rules shaping German law in the respective field. After an initial characterization of the German legal system and culture, it covers fourteen specific topics of private and public law as well as procedural law. Each contribution provides a bibliography referring the reader to the most important literature for more detailed research.

This book is the third edition of *Introduction to German Law*. First published in 1996 by Werner Ebke and Matthew Finkin, its successor (published by Joachim Zekoll and Mathias Reimann) appeared under the same title in 2005. In the thirteen years that have passed since the second edition was completed, German law has again undergone substantial change. This is due mainly to three related factors. First, European Union law has continued to shape and change German private and public law in significant ways. Second, the German legislature has remained very active over the past thirteen years. Responsive not only to directives from Brussels and to judgments rendered by the European Court of Justice, but also to the forces of globalization and to demands for law reform on the purely domestic level, German lawmakers have left virtually no area addressed in this volume untouched. Third, the Constitutional Court as well as the Federal Supreme Court have handed down numerous decisions that added important changes to the legal landscape in Germany.

We are indebted to our secretaries and collaborators, Gisela Amend-Khaskhoussi (Frankfurt), and Dr. Bettina Rentsch (Berlin) for valuable assistance in the process of editing this volume.

Joachim Zekoll, Frankfurt am Main
Gerhard Wagner, Berlin
July 2018

CHAPTER 1

Characteristic Aspects of German Legal Culture

Reinhard Zimmermann[*]

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* The manuscript was submitted in the autumn of 2017 and reflects law and literature as of that date.

§1.01 THE CONSTITUTIONAL MONSTROSITY

If there is a specifically German legal culture, it is of relatively recent origin. Germany only became a modern nation-state in 1871, after Bismarck, by means of the Franco-Prussian war, had welded together the North German Federation (that had itself only been established five years earlier) and the South German States. Austria, of course, did not become part of the new German Empire, since it had effectively been dismissed from 'German' constitutional history in 1866. In that year, Prussia had crushingly defeated the Austrian army at Königgrätz and had thus brought to an end the constitutional regime established in 1815 at the Congress of Vienna. That regime had been based on the *Deutscher Bund*, a federation of forty-one formally independent 'German' states, among them one Empire (Austria), five kingdoms (Prussia, Bavaria, Saxony, Hannover, and Württemberg), one electorate (Hesse), seven Grand-Duchies (including Luxemburg), a whole range of duchies and principalities, and also the four Free Cities (Hamburg, Bremen, Lübeck, and Frankfurt); the latter were much loved among Romantic intellectuals.

This may appear to be a complex mélange today, but it replaced an infinitely more bewildering system of government that had, after a long period of decline, finally collapsed in 1806 under the Napoleonic onslaught.[1] It had been known as the Holy Roman Empire of German Nation and traced its lineage to Charlemagne's coronation as 'Roman' Emperor by the Bishop of Rome, Pope Leo III, on Christmas Day of the year 800. The Carolingian Empire had soon disintegrated, but the idea of a supreme ruler of the occidental world, who was regarded as a successor to the Roman Emperors, lived on. In 962 Otto I, German king (not king of Germany), was crowned Roman Emperor, and effectively established what was to become a fundamental feature of German constitutional history: the combination of German kingship and 'Roman' Empire. The universalist claim inherent in the concept of being 'Emperor' contributed to the fact that the (elected) German rulers were never in a position to establish a national kingdom along the French or English model.

The Holy Roman Empire, especially during the one and a half centuries following the Peace of Westphalia, has been said to have been neither holy, nor Roman, nor even

1. For the constitutional history of Germany, *see* Otto Kimminich, *Deutsche Verfassungsgeschichte* (2nd ed. 1987); Dietmar Willoweit, *Deutsche Verfassungsgeschichte* (7th ed. 2013).

an Empire. The famous Natural lawyer Samuel Pufendorf referred to it as a constitutional monstrosity.[2] It consisted of between 300 and 320 sovereign states as well as some 1,400 territories that were directly subordinate to the Empire. Even after the secession of Switzerland and of the (Northern) Netherlands, the Empire comprised territories such as the 'Spanish' Netherlands, Lorraine and Burgundy, Bohemia, Moravia, and parts of Northern Italy; and the Habsburgs, who had been elected to the Emperorship ever since 1438, also ruled the Kingdom of Hungary. Many 'foreign' potentates had a say in Imperial affairs, among them the British king, in his capacity as king of Hanover, and the king of Sweden, who had gained large parts of Pomerania, the duchy of Bremen and some other areas as a result of the Thirty Years' War. As time wore on, the old *Reich* was growing weaker and weaker before the territorial lords; and though it had provided an institutional framework for peaceful coexistence and dispute resolution,[3] it was increasingly perceived to be a tattered collection of outdated and highly inefficient institutions, bogged down by elaborate procedures and laborious protocol. It represented hardly more than an unduly ornate façade.

§1.02 FROM CIVIL LAW TO CIVIL CODE

This was reflected in the way in which the law developed. If the German king was Roman Emperor, it was not at all unnatural that the Imperial law should be Roman law. This ideological connection obviously helped the process of what is usually referred to as the 'reception' of Roman law.[4] But if Roman law was indeed 'received' in all imperial territories, that did not, of course, transform it into a German legal system. Since the days of the so-called Renaissance of the 12th century,[5] when the Glossators had started intellectually to penetrate the entire body of Roman law that had escaped the turmoil of the *Völkerwanderung*, its influence had spread northwards and westwards, and Roman legal learning soon formed a major component of what has come to be known as the Roman-Canon *ius commune*. Law, in the Middle Ages, was not conceived of as a system of rules enacted for, and exclusively applicable within, a specific territory, and thus the *ius commune* provided the cornerstone for the emergence of an essentially unified, European legal tradition.[6]

2. *De statu imperii Germanici*, 1667 (German translation by Horst Denzer, *Die Verfassung des deutschen Reiches*, 1976).
3. Barbara Stollberg-Rilinger, *Das Heilige Römische Reich deutscher Nation: Vom Ende des Mittelalters bis 1806* (5th ed. 2015); Hans-Peter Haferkamp, 'Holy Roman Empire', in: Jürgen Basedow, Klaus J. Hopt & Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (2012), pp. 835 et seq.
4. The authoritative discussion on the reception of Roman law and generally on the history of private law in Germany is Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* (2nd ed. 1967) (English translation by Tony Weir, *A History of Private Law in Europe*, 1995). For the significance of Roman law in Germany and in European history in general, *see* Paul Koschaker, *Europa und das römische Recht* (4th ed. 1966); Reinhard Zimmermann, 'Roman Law in the Modern World', in: David Johnston (ed.), *The Cambridge Companion to Roman Law* (2015), pp. 452 et seq.
5. The significance of which has been stressed by Harold J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition* (1983).
6. This point has been elaborated by Helmut Coing in various publications; cf., in particular, his *Europäisches Privatrecht*, vol. I (1985); and *see* Manlio Bellomo, *The Common Legal Past of*

It was only with the rise of rationalism and nationalism that the intellectual world of the European *ius commune* started to disintegrate.[7] The enlightened rulers of the two most influential states within the 'Roman' Empire set the wheels in motion to enchant their subjects with a codification, both rational and comprehensive, that would enable them to know their rights and duties within society. The Prussian *Allgemeines Landrecht* of 1794 and the Austrian *Allgemeines Bürgerliches Gesetzbuch* were radically different in many respects (particularly as far as the style of legal drafting is concerned), but they were both inspired by a desire to leave behind the subtleties of Roman legal disputes and to emphasize the responsibility of the territorial ruler for the administration of justice. In 1804 the codification movement received a further powerful impulse with the enactment of the *Code Napoléon (Code civil)*.[8] In the course of the 19th century, several other German states attempted to codify their private law, but only the kingdom of Saxony managed to enact a civil code. That was in 1865, a mere six years before the foundation of the German Reich.[9]

At that stage, the legal landscape of Germany still looked very patchy. Austria (to be pushed out of the *Deutscher Bund* in 1866) had its *Allgemeines Bürgerliches Gesetzbuch*. The Prussian territories (including, for instance, Westphalia, Bayreuth, and Ansbach) were governed by the *Prussian Allgemeines Landrecht*. In the Rhine-Province, in Alsace, and Lorraine the *Code civil* applied.[10] The Grand Duchy of Baden had adopted the *Badisches Landrecht* which was based on a translation of the *Code civil*. Some places in Bavaria lived according to Austrian law, while in parts of Schleswig-Holstein Danish law prevailed. Most of the remaining German territories (comprising, in 1890, close to 30% of the population of the *Deutsches Reich*) still

Europe, 1000–1800 (1995); Reinhard Zimmermann, 'Roman Law and the Harmonisation of European Private Law', in: Arthur Hartkamp et al. (eds), *Towards a European Civil Code* (4th ed. (2011), pp. 27 et seq.); Alfons Bürge, 'Das römische Recht als Grundlage für das Zivilrecht im künftigen Europa', in: Filippo Ranieri (ed.), *Die Europäisierung der Rechtswissenschaft* (2002), pp. 19 et seq.; Nils Jansen, 'Ius Commune', in: *Max Planck Encyclopedia* (n. 3), pp. 1006 et seq.

7. For a general discussion, *see* Helmut Coing, *Europäisches Privatrecht*, vol. II (1989); Klaus Luig, 'Usus Modernus', in: *Max Planck Encyclopedia* (n. 3), pp. 1755 et seq. The disintegration became visible in the emergence of a new type of legal literature; *see* Klaus Luig, 'The Institutes of National Law in the Seventeenth and Eighteenth Century', *Juridical Review* 17 (1972) 193 et seq.
8. On the codes of the age of the 'law of reason' (*Vernunftrecht*), *see* Wieacker/Weir (n. 4), 257 et seq.; Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (translated by Tony Weir, 3rd ed. 1998), pp. 80 et seq., 135 et seq. On the phenomenon of codification in general, *see* Reinhard Zimmermann, 'Codification: The Civilian Experience Reconsidered on the Eve of a Common European Sales Law', in: Wen-Yeu Wang (ed.), *Codification in International Perspective: Selected Papers from the 2nd IACL Thematic Conference* (2014), pp. 11 et seq. The codifications, however, did not succeed in pushing back the influence of Roman law. For the continuity between the *ius commune* and French law, *see* James Gordley, 'Myths of the French Civil Code', *American Journal of Comparative Law* 2 (1994) 459 et seq.; on the 'pandectification' of Dutch, Prussian and Austrian law, *see* Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (2001), pp. 3 et seq.
9. For all details concerning the history of codification in 19th-century Germany, *see* Barbara Dölemeyer, in: Helmut Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. III/2 (1982), pp. 1421 et seq.
10. *See* the contributions in Reiner Schulze (ed.), *Französisches Zivilrecht in Europa während des 19. Jahrhunderts* (1994), and in *idem* (ed.), *Rheinisches Recht und Europäische Rechtsgeschichte* (1996); Elmar Wadle, *Französisches Recht in Deutschland* (2002).

administered justice according to the *ius commune* (*gemeines Recht*).[11] Yet the *ius commune* was only applicable *in subsidio*, and countless more specific territorial or local laws could therefore govern a particular dispute: from 13th-century texts like Eike von Repgow's famous *Sachsenspiegel* or the *Jütsche Low* to Baron von Kreittmayr's *Codex Maximilianeus Bavaricus Civilis* of 1756 (which became the *Bayerisches Landrecht*), from the *Neumünsterische Kirchspielgebräuche* to the *Nassau-Katzenelnbogensche Landesordnung*.[12] Thus, for example, there were all in all more than 100 different regulations concerning succession upon death. This was not, of course, a very convenient state of affairs; nor did it seem worthy of a modern united nation-state that its citizens, to quote a famous quip of Voltaire, had to change their law as often as they changed their post-horses. Thus, it is hardly surprising that the preparation of a German Civil Code immediately became a matter of great practical as well as symbolic significance in the years after 1871.

§1.03 THE QUEST FOR GERMAN LEGAL UNITY

The quest for German national legal (as well as political!) unity was not new, however. One of its first harbingers had been A.F.J. Thibaut, a professor of Roman law at Heidelberg.[13] In the wave of patriotism that swept the German states after they had finally shaken off the Napoleonic yoke, he had published a pamphlet in which he urged the introduction of a general German civil code, modelled on the French *Code civil*, which could pave the way towards political unity. This proposition – which eventually did not gain acceptance – was opposed, particularly prominently, by the man who was to emerge as Germany's most celebrated jurist of the century. Friedrich Carl von Savigny in his famous essay entitled *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* [Of the Vocation of our Time for Legislation and Legal Science][14] did not, of course, argue that Germany should remain, legally, the patch-work quilt that it was. 'As to what we aim at, we are in agreement', he wrote, '[for] we want a national community whose scientific endeavours focus upon one and the same object'. But, he added, the right way towards this goal was not a piece of legislation but rather an 'organically progressive legal science which may be common to the whole nation'.

11. For an overview of the laws applicable in Germany at the end of the 19th century, *see* 'Anlage zur Denkschrift zum BGB', in: Benno Mugdan (ed.), *Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich*, vol. I (1899), pp. 844–845; and *see* the *Allgemeine Deutsche Rechts- und Gerichtskarte* (1896) (re-edited in 1996 by Diethelm Klippel).
12. For a comprehensive study of the application of the various laws prevailing in Germany in the practice of the courts (covering the early modern period), *see* now Peter Oestmann, *Rechtsvielfalt vor Gericht: Rechtsanwendung und Partikularrecht im Alten Reich* (2002); on the relationship between statutory law and common law in general, *see* Reinhard Zimmermann, 'Statuta sunt stricte interpretanda? Statutes and the Common Law: A Continental Perspective', *Cambridge Law Journal* 56 (1997) 315 et seq.
13. On whom *see* Christian Hattenhauer, Klaus-Peter Schroeder & Christian Baldus (eds), *A.F.J. Thibaut (1772–1840)* (2017).
14. Both Savigny's and Thibaut's programmatic essays (the latter of which was entitled 'Über die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland') are easily accessible in Hans Hattenhauer (ed.), *Thibaut und Savigny: Ihre programmatischen Schriften* (2nd ed. 2002).

Savigny himself[15] laid the foundations for this kind of 'legal science' (*Rechtswissenschaft*) when he turned his attention (and that of his followers) to the Roman law of the antiquity and started to rid its contemporary version of all the accretions and distortions brought about by some 800 years of scholarship and legal practice.

The result of Savigny's legal historicism was a new approach to legal scholarship. It was dubbed 'pandectist' because it used the most important body of the Roman legal sources, the Digest (Greek synonym: *Pandectae*), to build an internally consistent and logical system of concepts, rules and principles.[16] The pandectist school secured the leading place for Germany in the world of 19th-century legal scholarship; it was much admired by lawyers all over Europe and exercised significant influence on legal developments in countries like France, Italy, and Austria.[17] Above all, however, it was the fulcrum for the emergence of a national community of scholars,[18] of German legal unification on a scholarly level. The flip side of this coin, incidentally, was the condescending and neglectful attitude that the German professoriate tended to adopt towards the territorial laws – even if they were as important as the Prussian civil code.

But the legislatures and governments of the various states joined in the *Deutscher Bund* were not entirely inactive either. They were attempting to accommodate the needs of an expanding economy that was operating increasingly on a supraregional level. The advent of machinery and urbanization facilitated the production processes

15. On Savigny, on his concept of law, and on his influence on 19th-century German legal scholarship, *see* Joachim Rückert, *Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny* (1984); Horst Heinrich Jakobs, *Die Begründung der geschichtlichen Rechtswissenschaft* (1992); Joachim Rückert, 'Savignys Konzeption von Jurisprudenz und Recht, ihre Folgen und ihre Bedeutung bis heute', *Tijdschrift voor rechtsgeschiedenis* 61 (1993) 65 et seq.; Benjamin Lahusen, *Alles Recht geht vom Volksgeist aus*: *Friedrich Carl von Savigny und die moderne Rechtswissenschaft* (2012); cf. also the contributions in *American Journal of Comparative Law* 37 (1989) 1 et seq.
16. For details, *see* Wolfgang Wilhelm, *Zur juristischen Methodenlehre im 19. Jahrhundert* (1958); Franz Wieacker, *Pandektenwissenschaft und Industrielle Revolution* (1966); Mathias Reimann, 'Nineteenth Century German Legal Science', *Boston College Law Review* 31 (1990) 837 et seq.; Jan Schröder, *Recht als Wissenschaft* (2nd ed. 2012), pp. 193 et seq.; Thomas Rüfner, 'Historical School', in: *Max Planck Encyclopedia* (n. 3), pp. 830 et seq.; Hans-Peter Haferkamp & Tilman Repgen (eds), *Wie pandektistisch war die Pandektistik?* (2017). On the pandectist systematization of private law, *see* Jan Peter Schmidt, 'Pandektensystem', in *Max Planck Encyclopedia* (n. 3), pp. 1238 et seq.
17. Cf., as far as France is concerned, the comprehensive study by Alfons Bürge, *Das französische Privatrecht im 19. Jahrhundert* (1991), pp. 150 et seq.; for Austria: Werner Ogris, *Der Entwicklungsgang der österreichischen Privatrechtswissenschaft im 19. Jahrhundert* (1968); for Italy: the contributions in Reiner Schulze (ed.), *Deutsche Rechtswissenschaft und Staatslehre im Spiegel der italienischen Rechtskultur während der zweiten Hälfte des 19. Jahrhunderts* (1990). For further references to literature concerning other European countries and the United States, *see* Reinhard Zimmermann, 'Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science', *Law Quarterly Review* 112 (1996) 580, n. 18.
18. The rise of the Roman law professoriate in the early 19th century made Germany the quintessential country of professorial law; it thus became, in the words of Jack Dawson, the only region in Europe to build its law on academic treatises. For details *see* James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era* (1990); Stefan Vogenauer, 'An Empire of Light? Learning and Lawmaking in the History of German Law', *Cambridge Law Journal* 64 (2005) 481 et seq. For the position at the end of the 19th century, *see* the memorandum by Emil Friedberg, *Die künftige Gestaltung des deutschen Rechtsstudiums nach den Beschlüssen der Eisenacher Konferenz* (1896), pp. 7–8, translated in Zimmermann, *Civilian Tradition* (n. 8), 7–8.

and the rising *bourgeoisie* favoured open markets promoting the free interplay of economic forces. Legal unification therefore was required, first and foremost, in the trade-related fields of law. A first significant step in this direction was the establishment of a German Customs Union in 1833. In 1848 the law of negotiable instruments was unified by means of the *Allgemeine Deutsche Wechselordnung*[19] and between 1861 and 1866 nearly all the states of the *Deutscher Bund* adopted the draft of a General German Commercial Code (*Allgemeines Deutsches Handelsgesetzbuch*) that had been completed in 1861.[20] A draft law of obligations (*Dresdener Entwurf*) was published in 1865. Although it was never adopted, it significantly influenced the German Civil Code.

After the creation of the *Deutsches Reich* a streamlined procedural and organizational framework for the uniform and efficient administration of justice was established: the four *Reichsjustizgesetze*[21] concerned the unification of the court system (*Gerichtsverfassungsgesetz*), of the law of bankruptcy (*Konkursordnung*), civil procedure (*Zivilprozeßordnung*) and criminal procedure (*Strafprozeßordnung*). They all came into force in October 1879. While they have been amended on various occasions, three of these acts have remained on the statute book until today; the *Konkursordnung* has been replaced by a new insolvency code (*Insolvenzordnung*) in 1999. 1 October 1879 also saw the opening of a Supreme Appeal Court for the entire *Reich* in all civil and criminal matters: the *Reichsgericht*.[22] Its seat was Leipzig, a city with a distinguished legal tradition which had the advantage of being outside of, but still sufficiently close to, the political capital of the *Reich* (Berlin). Its first president was Eduard von Simson, a Prussian lawyer of Jewish descent who had been baptized in his early youth. He had presided over the German National Assembly of 1848 that had met in the Frankfurt *Paulskirche* and had also been president of the Imperial Parliament.[23]

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19. *See* Ulrich Huber, 'Das Reichsgesetz über die Einführung einer allgemeinen Wechselordnung für Deutschland vom 26. November 1848', *Juristenzeitung* 1978, 785 et seq.
20. Christoph Bergfeld, 'Preußen und das Allgemeine Deutsche Handelsgesetzbuch', *Ius Commune* 14 (1987) 101 et seq.; Andreas M Fleckner, 'Allgemeines Deutsches Handelsgesetzbuch (ADHGB)' in: *Max Planck Encyclopedia* (n. 2), pp. 51 et seq.; and *see* Karsten Schmidt, *Das HGB und die Gegenwartsaufgaben des Handelsrechts* (1983). For the modernization of commercial law in the 19th century in general, *see* Karl Otto Scherner (ed.), *Modernisierung des Handelsrechts im 19. Jahrhundert* (1993); Arnold J.Kanning, *Unifying Commercial Laws of Nation-States* (2003), pp. 46 et seq.
21. On which *see* Peter Landau, 'Die Reichsjustizgesetze von 1879 und die deutsche Rechtseinheit', in: *Vom Reichsjustizamt zum Bundesministerium der Justiz: Zum 100jährigen Gründungstag des Reichsjustizamtes* (1977), pp. 161 et seq.
22. On which *see*, on the occasion of its 100th anniversary, Arno Buschmann, '100 Jahre Gründungstag des Reichsgerichts', *Neue Juristische Wochenschrift* 1979, 1966 et seq.; Elmar Wadle, 'Das Reichsgericht im Widerschein denkwürdiger Tage', *Juristische Schulung* 1979, 841 et seq. On the *Reichsgericht's* predecessor, the Supreme Commercial Court, first of the *Norddeutscher Bund* and later of the *Reich* (it existed from 1870–1879), *see* Herbert Kronke, 'Rechtsvergleichung und Rechtsvereinheitlichung in der Rechsprechung des Reichsoberhandelsgerichts', *Zeitschrift für Europäisches Privatrecht* 5 (1997) 735 et seq.*; Andreas M. Fleckner, 'Reichsoberhandelsgericht (with Reichsgericht)', in: Max Planck Encyclopedia* (n. 3), pp. 1438 et seq.
23. On Eduard von Simson, *see* James E. Dow, *A Prussian Liberal: The Life of Eduard von Simson* (1981); Bernd-Rüdiger Kern & Klaus-Peter Schroeder (eds), *Eduard von Simson (1810–1899)* (2001). On the rise of Jewish lawyers and lawyers of Jewish descent in 19th-century Germany, *see* Peter Landau, 'Juristen jüdischer Herkunft im Kaiserreich und in der Weimarer Republik', in: Helmut Heinrichs, Harald Franzki, Klaus Schmalz & Michael Stolleis (eds), *Deutsche Juristen jüdischer Herkunft* (1993), pp. 133 et seq.; Reinhard Zimmermann, 'Was Heimat hieß, nun heißt

The scene was thus set for what was to be the crowning symbol of German legal unity: a civil code common to the whole nation. Its gestation period was twenty-six years.[24] A First Commission consisting of eleven judges, officials, and professors (among them the most famous pandectist scholar of his time, Bernhard Windscheid)[25] produced a draft that was published in 1888. It aroused a vigorous public debate and encountered sharp criticism as being too abstract, pedantic, and 'doctrinaire'. The leading 'Germanist' of the day, Otto von Gierke, mourned the absence of even 'a drop of socialist oil'.[26] A second commission (this time containing some non-lawyers, among them three members of the landed gentry) was appointed in 1890. The second draft did not, however, substantially differ from the first one. The Imperial Parliament debated the code in 1896 and made a few amendments here and there: the words 'and hares' were deleted in the section relating to damage caused by game, the right of pursuit of the owner of a swarm of bees was modified. The Social Democrats eventually voted against the code because it did not specifically deal with labour relations. Nevertheless, the Civil Code (*Bürgerliches Gesetzbuch,* BGB) was adopted with a comfortable majority and signed into law by Emperor Wilhelm II. It came into force on what many people believed to be the beginning of a new era: 1 January 1900. On that day, the *Deutsche Juristenzeitung* carried the heading: *'Ein Volk. Ein Reich. Ein Recht'* (One People. One Empire. One Law), and Ernst von Wildenbruch celebrated the great event with an impassioned poem.[27] It marked the apogee of the age of legal nationalism.

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es Hölle': The emigration of lawyers from Hitler's Germany: political background, legal framework and cultural context, in: Jack Beatson & Reinhard Zimmermann, *Jurists Uprooted: German-Speaking Emigré lawyers in Twentieth Century Britain* (2004), pp. 9 et seq.

24. For details, *see* Werner Schubert, in: Horst Heinrich Jakobs & Werner Schubert (eds), *Die Beratung des Bürgerlichen Gesetzbuchs in systematischer Zusammenstellung der unveröffentlichten Quellen: Materialien zur Entstehungsgeschichte des BGB* (1978), pp. 27 et seq.; Barbara Dölemeyer, 'Das Bürgerliche Gesetzbuch für das Deutsche Reich', in: Coing (n. 9), 1572 et seq.; Michael John, *Politics and Law in Late Nineteenth Century Germany: The Origins of the Civil Code* (1989); Hans-Peter Haferkamp, 'Bürgerliches Gesetzbuch (BGB)', in: *Max Planck Encyclopedia* (n. 3), pp. 120 et seq.; and *see* the charming account by Frederic W. Maitland, 'The Making of the German Civil Code', in: Herbert A.L. Fisher (ed.), *The Collected Papers of Frederic William Maitland*, vol. III (1911), pp. 474 et seq. Cf. also the table in Mathias Schmoeckel, Joachim Rückert & Reinhard Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB*, vol. I (2003), pp. XXVII–XXVIII.
25. Windscheid wrote the leading pandectist textbook of his time. This three-volume treatise has remained a monument: Bernhard Windscheid, *Lehrbuch des Pandektenrechts* (9th ed. 1906, edited by Theodor Kipp). For an important re-evaluation of Windscheid as a jurist, *see* Ulrich Falk, *Ein Gelehrter wie Windscheid* (1989); cf. also Joachim Rückert, 'Methode und Zivilrecht bei Bernhard Windscheid (1817–1892)', in: Joachim Rückert & Ralf Seinecke (eds), *Methodik des Zivilrechts von Savigny bis Teubner* (2nd ed. 2012), pp. 97 et seq.; Friedrich Klein, *Bernhard Windscheid 26.6.1817–26.10.1892: Leben und Werk* (2014).
26. Otto von Gierke, *Die soziale Aufgabe des Privatrechts* (1889), p. 11; for comment, *see* Tilman Repgen, *Die soziale Aufgabe des Privatrechts: Eine Grundfrage in Wissenschaft und Kodifikation am Ende des 19. Jahrhunderts* (2001). On the emergence of two separate branches of Savigny's Historical School, i.e., the 'Romanists' and the 'Germanists', *see* Zimmermann, *Civilian Traditon* (n. 8), 18 et seq. For the history of criticism of the BGB, *see* Dieter Schwab, 'Das BGB und seine Kritiker', *Zeitschrift für Neuere Rechtsgeschichte* 22 (2000) 325 et seq.
27. *Deutsche Juristen-Zeitung* 1900, XXI.

§1.04 ONE NATION: ONE LAW

It is a remarkable feature of our modern academic life that whilst it would be manifestly absurd to refer to German chemistry or French mathematics, it has for the past hundred years been taken for granted that there are, in principle, as many legal systems (and consequently: legal scholarships) in Europe as there are national states. This is, at least partly, another aspect of the intellectual heritage of the 'historical school' of jurisprudence: that the law of a country has come to be regarded as a characteristic expression of its national spirit. The national code, which was taken to constitute an autonomous interpretational space, was attributed sole, supreme, and unquestioned authority, and all the energies of those legal academics interested in the application and development of private law were channelled into the task of expounding the code and of discussing the court decisions based on its provisions. This is what has happened in Germany after 1900. Mountains of literature have been compiled on every detail of the civil code,[28] but in the process the basic historical unity of European legal scholarship has largely been forgotten. The history of the *ius commune* was held to have ended with the enactment of the national codifications, and exploration of the Roman sources was thus regarded as an end in itself.[29] Legal history emerged as a proper discipline in its own right and has since achieved an unparalleled level of sophistication. But it has become a highly specialized type of scholarship, increasingly unwilling and unable to maintain an intellectual contact with the legal profession. The historical approach to law that was still so characteristic of 19th-century legal science has largely been abandoned in Germany (as elsewhere);[30] at the same time, the national particularization of legal scholarship has shaped the minds and attitudes of several new generations of lawyers. This state of affairs is still reflected in our modern law curricula and examination regulations, in the appointment requirements for law teachers, and the prerequisites for entry into the legal profession.[31] German law professors, by and large, train German lawyers, who in turn use German legal literature when drafting their opinions or handing down their judgments.

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28. Even by 1899, i.e., before the Civil Code had entered into force, the librarian of the *Reichsgericht*, Georg Maas, published a bibliography that listed approximately 4,000 titles over 324 pages.
29. On the neo-humanistic turn of legal history, *see* Koschaker (n. 4), 290 et seq.; Zimmermann, *Civilian Tradition* (n. 8), 22 et seq. The disjunction between legal history and modern doctrine strongly resonates in modern methodological debates; *see*, for example, Reinhard Zimmermann, 'Roman and Comparative Law: The European Perspective', *Journal of Legal History* 16 (1995) 21 et seq.; Mathias Reimann, 'Rechtsvergleichung und Rechtsgeschichte im Dialog', *Zeitschrift für Europäisches Privatrecht* 7 (1999) 496 et seq.; Johannes Liebrecht, 'Rechtsgeschichte', in: *Max Planck Encyclopedia* (n. 2), pp. 1245 et seq. and *see* the contributions to Pio Caroni & Gerhard Dilcher (eds), *Norm und Tradition: Welche Geschichtlichkeit für die Rechtsgeschichte?* (1998).
30. Zimmermann, *Civilian Tradition* (n. 8), 40 et seq.; Eugen Bucher, 'Rechtsüberlieferung und heutiges Recht', *Zeitschrift für Europäisches Privatrecht* 8 (2000) 394 et seq.; for the Netherlands, *see* Willem Zwalve, 'Teaching Roman Law in the Netherlands', *Zeitschrift für Europäisches Privatrecht* 5 (1997) 393 et seq.
31. For criticism, Hein Kötz, 'Europäische Juristenausbildung', *Zeitschrift für Europäisches Privatrecht* 1 (1993) 268 et seq.; Axel Flessner, 'Deutsche Juristenausbildung', *Juristenzeitung* 1996, 689 et seq.; *idem*, 'Juristische Methode und europäisches Privatrecht', *Juristenzeitung* 2002, 14 et seq.

What has been said here about private law applies, *mutatis mutandis*, to the other legal subjects to be treated in this book. They are part of a national jurisprudence that finds its basis in a statutory enactment of, at least, its leading principles. Civil procedure and criminal procedure, as has been pointed out already, are governed by two codifications, both dating back to 1879. The Criminal Code (*Strafgesetzbuch*) came into effect in 1871 (a revised version was enacted in 1975), the Commercial Code (*Handelsgesetzbuch*), like the BGB, on 1 January 1900. The Introductory Act to the BGB (EGBGB) attempted to codify the private international law (conflict of laws).[32] The law of business associations and companies is regulated partly by the Commercial Code and partly by special statutes. The tradition of German constitutions laid down in a constitutional charter goes back to the National Assembly of 1848 (*Paulskirche*). The German Empire and the Weimar Republic had written constitutions, their modern successor is the *Grundgesetz* (Basic Law) of 1949. The rules of administrative law are found in a whole variety of scattered enactments; the matter has largely been left to the individual States rather than the federal legislature. Thus, it is only in the field of labour law that we find a somewhat special situation. All attempts at drafting a comprehensive labour code appear to have been abandoned. There are a multitude of special statutes (apart, of course, from the rules relating to the contract of services in the BGB), but much of what constitutes modern labour law has been developed by the courts. Thus, the Federal Labour Court is usually referred to as the real architect of modern labour law.

§1.05 THE STYLE AND SYSTEM OF THE GERMAN CIVIL CODE

Since, however, all of these topics will be dealt with in separate chapters, we will continue to focus our attention on the general private law. In a way, of course, this bias towards private law (as well as the strict separation between private law and public law on a conceptual level) is in itself a characteristic feature of the civilian tradition.[33] And while it may be criticized, it still provides a fair idea of what may be dubbed German legal culture. This is particularly true of the German Civil Code.[34] Somewhat dry and uninspiring in its tone and rather aloof from the social and political issues of the day,

32. A comprehensive reform has entered into effect in 1986; it has subsequently repeatedly been amended and supplemented – today *see* Art 3-48 EGBGB. Of increasing significance are the efforts to harmonize private international law within the European Union; *see* the Rome I, II, and III Regulations as well as the European Regulation concerning the law of succession, easily accessible in Oliver Radley-Gardner, Hugh Beale & Reinhard Zimmermann (eds), *Fundamental Texts on European Private Law* (2nd ed 2016), pp. 59 et seq.
33. Thus, for instance, it is only very recently that the history of public law in Germany has been written; *see* the four-volume treatise by Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. I (1600–1800) (2nd ed. 2012); vol. II (1800–1914) (1992); vol. III (1914–1945) (1999); vol. IV (1945-1990) (2012); cf. also, for a brief account, Michael Stolleis, *Öffentliches Recht in Deutschland: Eine Einführung in seine Geschichte 16.–21. Jahrhundert* (2014).
34. For an assessment, *see* Max Kaser, 'Der römische Anteil am deutschen bürgerlichen Recht', *Juristische Schulung* 1967, 337 et seq.; Franz Wieacker, *Industriegesellschaft und Privatrechtsordnung* (1974); Zweigert, Kötz & Weir (n. 8), 143 et seq.; Rolf Stürner, 'Der hundertste Geburtstag des BGB: Nationale Kodifikationen im Greisenalter?', *Juristenzeitung* 1996, 741 et seq.; Michael Martinek & Patrick L. Sellier (eds), *100 Jahre BGB – 100 Jahre Staudinger* (1999); Okko Behrends

it is of very considerable technical solidity. Its high level of doctrinal refinement, its intellectual maturity, and its remarkable sense of legislative self-restraint have made it an enduring monument to 19th-century legal scholarship. The BGB is not addressed to the layman. Its prose is neither beautiful nor easily comprehensible. Not everywhere, of course, are its sentences as convoluted as in § 164 II ('In the case where the will to act in another person's name is not apparent, the absence of the agent's will to act in his own name is not taken into account'), not everywhere does one find a string of cross-references as complex as in § 2013 I. But the BGB is marked by a degree of conceptual abstraction that has caused, and continues to cause, both admiration and disapproval. Technical terms tend to be used in one and the same sense, the way in which a sentence is constructed indicates where the burden of proof lies, and many provisions of the code can only be understood properly when they are read in conjunction with other provisions in far-away corners of the code. The internal logic of this kind of arrangement is usually impeccable, but it does not promote the code's comprehensibility.

The BGB consists of five books: general part (§§ 1–240), obligations (§§ 241–853), property (§§ 854–1296), family law (§§ 1297–1921) and succession (§§ 1922–2385). This way of subdividing the general private law can ultimately be traced back to the famous threefold classification introduced by Gaius in his Institutes: *personae*, *res*, *actiones*, with *res* being conceived of as the law of the patrimony in a broad sense and thus comprising the law of property in a narrower sense, succession, and obligations. In the course of the subsequent centuries, this system underwent considerable change and refinement.[35] One of its central features remains the differentiation between the law of obligations and of property which represents the translation into substantive law of the dichotomy between the Roman *actiones in rem* and *in personam*. Of Roman origin, too, is the concept of a law of obligations, embracing particularly contract and delict, but also what the Romans termed quasi-contract and quasi-delict.[36] Family law and the law of succession (both contextual rather than conceptual categories) owe their recognition as separate systematic entities to the Natural lawyers.

The most original and characteristic contribution of 19th-century scholarship to the disposition of private law as reflected by the BGB is Book I, the general part.[37] It has left its mark not only on the code but on German legal scholarship as a whole (and on most legal systems influenced by German law). To abstract and bring forth a body of general rules has great systematic advantages as well as severe inherent dangers. It has a rationalizing effect and contributes to the clarity of legal analysis. On the other hand,

& Wolfgang Sellert (eds), *Der Kodifikationsgedanke und das Modell des Bürgerlichen Gesetzbuches (BGB)* (2000); Uwe Diederichsen & Wolfgang Sellert (eds), *Das BGB im Wandel der Epochen* (2002).

35. For details, *see* Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (paperback edition 1996), pp. 24 et seq.
36. *See* Zimmermann (previous note), pp. 10 et seq.
37. On which *see* Mathias Schmoeckel, 'Der Allgemeine Teil in der Ordnung des BGB', in: Mathias Schmoeckel, Joachim Rückert & Reinhard Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB*, vol. I (2003), pp. 123 et seq.; Jan Peter Schmidt, 'General Part', in *Max Planck Encyclopedia* (n. 3), pp. 774 et seq.

it tends to render the law inaccessible. Thus, many of the general rules about the law of obligations are not, in fact, to be found in Book II, but in the general part (Book I): how contracts are to be concluded, the effect of *error* or *metus* on the validity of contracts, capacity to contract, interpretation, etc. And if, for instance, a dispute concerning the sale of a movable object between an 'entrepreneur' (*Unternehmer*, as defined today in § 14 BGB) and a consumer (*Verbraucher,* § 13 BGB) has arisen, the special rules concerning consumer sales may be relevant (§§ 474 ff.), as may be the more general (but still fairly special) rules provided for the contract of sale (§§ 433 ff.), the general part of the law of obligations (§§ 241 ff.), the general part of the BGB (more particularly §§ 104 ff.), and, as far as the transfer of ownership is concerned, the law of property (Book III, particularly §§ 929 ff., dealing with the transfer of ownership in movable things). The hierarchy of rules applicable to a specific case, incidentally, is determined by the rule of *lex specialis derogat legi generali*.

The general part is a child of legal formalism; legal philosophies based on social ethics are bound to reject this abstract, technical, and unconcrete way of structuring law and legal analysis. As far as in particular the BGB is concerned, additional criticism can be levelled against the content of its general part; for it does not contain rules about the basic principles of legal behaviour, about the exercise of rights in society, the sources of law, or the powers of a judge; instead, a variety of topics are included, which foreign lawyers would hardly expect there, such as the law of associations, foundations, extinctive prescription (limitation of actions), or the giving of security.

§1.06 WINDS OF CHANGE

The BGB has now been in force for close to one hundred and twenty years and it is not surprising, in view of the vast changes in the general conditions of life over that period, that it has been amended in many respects. Thus, in particular, the field of family law has been fundamentally reshaped. Around seventy significant amendments have left hardly a single aspect of it unchanged.[38] Family law is probably more intimately linked to norms and practices of a specific period and society than any other of the core-areas of private law, and the Christian(-Protestant) and patriarchal views still prevailing in the second half of the 19th century have given way to more permissive sentiments. Recognition of the equality of sexes has led to a legal model of marriage based on partnership rather than domination, as well as to a significant change in the marital property regime; the discrimination against illegitimate children has been abandoned; the age of majority was reduced from 21 to 18 years in order to accommodate the desire of young grown-ups fully to participate in public and commercial life; the role-model of the married woman performing the function of a house-keeper was removed from the statute book (if not from the reality of married life); fault was replaced by irretrievable

38. For an overview, *see* Dieter Schwab, *Wertewandel und Familienrecht* (1993) (reprinted in *idem*, *Geschichtliches Recht und moderne Zeiten* (1995), pp. 257 et seq.); Rainer Frank, '100 Jahre BGB – Familienrecht zwischen Rechtspolitik, Verfassung und Dogmatik', *Archiv für die civilistische Praxis* 200 (2000) 401 et seq.; Elisabeth Koch, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (7 th ed., vol. VIII, 2017), *Einleitung*, nos 64 et seq.

breakdown of the marriage as the central consideration for granting a divorce; the maintenance claims of the needy spouse after divorce were also largely detached from considerations of fault in the breakdown of the marriage; fifteen extraordinarily complex provisions concerning pension rights adjustment after divorce were introduced (and have ever since managed to test the powers of comprehension of the average lawyer to the utmost);[39] adoption was recognized as a means of taking care of children without a (suitable) home rather than of perpetuating the name and property of the adoptive parents' family; the concept of parental power was replaced by parental care, and the 'welfare of the child' was emphasized as the core concern within parent-child-relationships; the legal position of transsexual persons had to be improved; persons incapable of dealing with their own affairs are no longer simply placed under guardianship but are being 'looked after' (*betreut*); the law concerning the determination of the family name underwent two major reforms before it could be regarded as reflecting the fundamental equality of man and woman (and as having irremediably lost its function of disclosing the underlying family relationships);[40] and homosexual partnerships came to be recognized in the form of a legal institution effectively resembling marriage without, however, being called marriage (*Gesetz über die Eingetragene Lebenspartnerschaft* of 2001 – literally: Act on Registered Life Partnerships). A statement by the German Chancellor, Mrs Merkel, in the course of a panel discussion prompted a cascade of events which resulted in the opening up of the legal institution of marriage for homosexual couples in the summer of 2017. The respective act (*Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts*) was passed by the German Parliament in June and entered into force on 1 October 2017.

These are but a number of the more important examples. Some of the changes have become necessary as a result of the enactment of the Basic Law of 1949, while in other cases the Basic Law had to be invoked to protect established institutions against excessive reformist zeal. Nowhere have the premises of constitutional law had a greater impact on private law than in the area of family law. The catalyst for reform has usually been the Constitutional Supreme Court,[41] which has declared numerous provisions of the BGB to be invalid: as insufficiently taking account of the fact that the care and upbringing of children is a natural right of, and a duty primarily incumbent upon, the parents (Article 6 II GG); as disregarding the 'equal rights' provision of Article 3 II GG; as infringing the personality rights of children; and for many other reasons. Of great significance in setting the parameters for law reform has also been the provision of Article 6 I GG according to which 'marriage and family shall enjoy the

39. In the course of a fundamental structural reform in 2009, the respective provisions have been removed from the BGB. The *Gesetz über den Versorgungsausgleich* (Act concerning pension rights adjustment) now contains 54 provisions.
40. Cf. Uwe Diederichsen, 'Die Neuordnung des Familiennamensrechts', *Neue Juristische Wochenschrift* 1994, 1089 et seq.; and *see* the amusing comments by Dieter Schwab, 'Statt einer Glosse: Der Name ist Schall und Rauch', *Zeitschrift für das gesamte Familienrecht* 1992, 1015 et seq.
41. *See* Dieter Henrich, 'Familienrechtsreform durch die Verfassungsgerichte', *Zeitschrift für Rechtsvergleichung* 1990, 241 et seq.; Joachim Gernhuber & Dagmar Coester-Waltjen, *Lehrbuch des Familienrechts* (6th ed. 2010), pp. 31 et seq.

special protection of the state'. Where parliament has tried to shirk its duty of reforming the law, the courts have not hesitated to step into the breach. Thus, most famously, they tackled the task of bringing family law into conformity with the equal rights provision of Article 3 II GG after the Federal Parliament, neglectful of Article 117 I GG, had failed to do so by the end of March 1953.[42] This judicial regime was subsequently replaced by the Equal Rights Act of 1957.

Until recently it would have been true to claim that the other books of the BGB have, by and large, weathered the storms of legal development. They have, for just over one hundred years, provided the doctrinal foundations of the modern German law of obligations, property, and succession. The BGB's remarkable resilience throughout the 20th century, with all its upheavals and changes in political regime, has often been noted either critically or as confirmation of the inherent strengths of that code. For a very long time, there have been relatively few changes in the actual wording of Books I–III and V. The formal requirements for drawing up a will have been relaxed, the position of the surviving spouse in the law of instestate succession has been improved, and the provisions on lease and employment contracts have been considerably modified and supplemented (but the development of the law on residential leases has largely, and that of labour law has just about completely, taken place outside the framework of the BGB).[43] Animals have been elevated to a special status; they are no longer 'things' but the rules relating to 'things' apply *mutatis mutandis*.[44] In 1979, the legislature managed to disfigure the law of special contracts by a regulation of contracts relating to package holidays (§§ 651a–651l BGB) that has created more problems than it has solved. Other major amendments relate to the law of land tenure (§§ 585 ff. BGB) and contracts concerning bank transfer, bank payments and current accounts (§§ 676a ff. BGB; today *see* §§ 675c–676c (28 provisions!)). Outside the BGB, a 'secondary system of private law'[45] has grown up based on special statutes, by means of which the social model underlying the BGB has been adapted to modern conditions. Apart from competition law, labour law, and 'social lease law', the law of consumer protection deserves to be mentioned in this context. Among its core components are the statutes on standard contract terms,[46] doorstep sales and similar transactions, and consumer credit, but also other statutes such as the ones dealing with liability for defective products, time-share agreements, and distance sales.[47] It is often overlooked that this

42. *See* Jan Kropholler, *Gleichberechtigung durch Richterrecht* (1975).
43. The *Mietrechtsreformgesetz* (Act Reforming Lease Law) of 2001 has led to a partial reintegration of the law relating to residential leases into the BGB; *see* now §§ 535–580a BGB, with §§ 549–577a being devoted to special rules on residential leases.
44. 90a BGB (on which *see* Jürgen Ellenberger, in: Palandt, *Bürgerliches Gesetzbuch* (76th ed. 2017), § 90 no. 1: 'a sentimental pronouncement without any effective legal content').
45. Stürner, *Juristenzeitung* 1996, 742.
46. The pertinent political and academic discussions preceding the enactment of the *Gesetz zur Regelung der Allgemeinen Geschäftsbedingungen* (Standard Terms of Business Act) of 1976 had been dominated by the notion of consumer protection. None the less, the Act was not confined to contracts concluded between consumers; it was also, at least in principle, made to apply to businessmen. For background *see*, e.g., Hein Kötz, 'Der Schutzzweck der AGB-Kontrolle – Eine rechsökonomische Skizze', *Juristische Schulung* 2003, 209 et seq.
47. For details of the development, *see* Reinhard Zimmermann, *The New German Law of Obligations* (2005), pp. 171 et seq.

tradition of excluding from the general private law codification subjects, which were considered to be of a special nature because they fly in the face of basic principles underpinning the system of private law, goes back to the Historical School, and that therefore neither the statute on instalment sales of 1894 nor the one imposing strict liability for personal injuries sustained in the operation of a railway (the Imperial Law of Liability, *Reichshaftpflichtgesetz*) were included in the code. The latter statute provided a deviation from the principle of letting losses lie where they have fallen, unless they are attributable to somebody else's fault;[48] the former one could hardly be reconciled with the basic precepts of classical contract doctrine.[49] It has, in fact, remained controversial until today whether, or to what extent, such matters have attained the kind of structural and conceptual stability required for a codification or are at all suitable for incorporation into the general civil law. The tendencies towards a 'materialization' of the German law of contract,[50] however, are evident, not only in the special statutes outside the BGB, but also in the application of the provision invalidating transactions *contra bonos mores* to instalment credit contracts, or to suretyship contracts entered into by impecunious wives or children of the main debtor, and in the development and use of institutions of judge-made law such as *culpa in contrahendo*.

§1.07 TURNING THE CIVIL CODE INTO A BUILDING SITE

Today, however, the picture has changed dramatically. This is due, largely, to the most momentous reform that has affected the BGB since its inception. It has been brought about by the statute modernizing the German law of obligations (*Gesetz zur Modernisierung des Schuldrechts*), which entered into effect on 1 January 2002.[51] The history of the idea to effect a comprehensive reform of the German law of obligations reaches back to the late 1970s when the Minister of Justice requested a number of academic opinions which were published in 1981 and 1983.[52] The project was then limited to three notorious problem areas: extinctive prescription, breach of contract, and liability for defects in contracts of sale and contracts for work. A special Commission, appointed

48. This had acquired, in the course of the 19th century, the status of an unquestionable, axiomatic truth: Zimmermann (n. 35), 1034–1035. On the historical background of the Imperial Law of Liability and on the pattern of ad hoc legislation as the appropriate means of accommodating the need for a stricter-than-normal type of liability in exceptional instances, *see* Zimmermann (n. 35), 1130 et seq.
49. On which *see* James Gordley, *Philosophical Origins of Modern Contract Doctrine* (1991), pp. 161 et seq.
50. On which *see* Claus-Wilhelm Canaris, 'Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner "Materialisierung"', *Archiv für die civilistische Praxis* 200 (2000) 273 et seq.
51. For an easily accessible collection of the various drafts and the motivations of the draftsmen, *see* Claus-Wilhelm Canaris (ed.), *Schuldrechtsreform 2002* (2002); for comment *see*, e.g., Peter Huber & Florian Faust, *Schuldrechtsmodernisierung* (2002); Ingo Koller, Herbert Roth & Reinhard Zimmermann, *Schuldrechtsmodernisierungsgesetz 2002*, (2002). For an account in English, *see* Zimmermann (n. 47), pp. 30 et seq.
52. Bundesminister der Justiz (ed.), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, vol. I (1981); vol. II (1981); vol. III (1983).

in 1984 by the Federal Minister of Justice, presented its final report in 1992.[53] After that, however, the élan to enact the reform proposals appeared to peter out (as had previously happened with much less ambitious projects), and the report of the reform commission was not very broadly discussed.

It therefore caused considerable surprise when in September 2000 a 630-page 'discussion draft' of a statute modernizing the law of obligations was published by the Federal Department of Justice. This draft was triggered by the enactment of *Directive 1999/44/EC of the European Parliament and Council on certain aspects of the sale of consumer goods and associated guarantees* and the need for that directive's implementation by 1 January 2002. In some respects, the 'discussion draft' considerably deviated from the proposals submitted by the reform commission; in other respects, it went beyond the reform agenda covered by the latter; and, for the rest, it had not been brought up to date and had thus missed more than ten years of legal development. Immediately, therefore, severe criticism was levelled against the 'discussion draft'.[54] Two working groups were then established by the Minister of Justice. They revised the draft, in some areas very substantially.[55] A government draft was published in early May 2001. Though it was pushed through Parliament by way of an accelerated procedure, it was again repeatedly changed. Thus, for example, the Council of State Governments submitted proposals for 150 amendments, of which the Government accepted about 100. The statute was finally approved by the Federal Parliament in October and by the Council of State Governments in early November 2001 and it was promulgated on 26 November 2001. A little more than five weeks later it entered into force. The period left to German courts and legal practice to adjust to the new civil code can hardly be regarded as generous. After the BGB in its original version had been promulgated, a period of more than three years was regarded as adequate before the new code took effect.[56]

The following core areas of the law of obligations and of the general part of the BGB have been affected: extinctive prescription, breach of contract, contracts of sale, contracts for work,[57] credit transactions, and restitution after termination for breach of contract. The Standard Contract Terms Act and a number of special statutes aiming at the protection of the consumer have been integrated into the BGB. Some legal doctrines which had been developed over the past hundred years and had come to be generally recognized have also now found their home in the text of the BGB. All of these reforms were well-intentioned. They attempted to iron out a number of grave and widely

53. Bundesminister der Justiz (ed.), *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts* (1992).
54. *See* the contributions published in Wolfgang Ernst & Reinhard Zimmermann (eds), *Zivilrechtswissenschaft und Schuldrechtsreform* (2001).
55. *See* the contributions published in *Juristenzeitung* 2001, 433 et seq.
56. Generally on the process of preparing legislation in Germany, *see* Reinhard Zimmermann, 'Text und Kontext – Einführung in das Symposium über die Entstehung von Gesetzen in rechtsvergleichender Perspektive', *RabelsZ* 78 (2014) 315 et seq.
57. For all details, *see* Zimmermann (n. 47), pp. 39 et seq., 79 et seq., 122 et seq; Reinhard Zimmermann, 'Restitution after Termination for Breach of Contract: German Law after the Reform of 2002', in: Andrew Burrows & Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (2006), pp. 323 et seq.

perceived deficiencies of the code, they were supposed to render the law clearer and 'more in keeping with the times'[58] and they were designed to bring the German law of obligations in line with international developments and thus to render a contribution to the Europeanization of private law.[59]

These aims, however, have only partly been achieved. This is true, particularly, of the law of prescription (which is practically by far the most important issue on the reform agenda) and of the law of breach of contract (which is the most interesting area, doctrinally). The diversity, and eccentricity, of the individual prescription periods in the old code had brought about serious distortions in core areas of the law of obligations and had created a host of intricate but substantially unnecessary difficulties.[60] The new regime (based, essentially, on a short general prescription period which does not run as long as the creditor does not know, and cannot reasonably know, of the identity of his debtor and of the facts giving rise to his claim) constitutes a considerable improvement but it has not been implemented consistently. The extraordinarily tight time schedule has also made it impossible to devote sufficient attention to a number of important points of detail.[61] The fragmented and excessively complicated way of dealing with the problem of breach of contract, revolving unhappily around a pandectist concept of 'impossibility' and other specific types of breach, was also widely regarded as an unfortunate feature of the BGB.[62] However, the new rules are not distinguished by the simplicity of their structure either. Nonetheless, the courts have, by and large, managed to cope with the legal problems arising in their practical application.[63] As far as the inclusion of a number of (but not all!) special private law statutes into the BGB is concerned,[64] even the most cursory glance at the new BGB indicates that use of the term 'integration' would be a remarkable euphemism. What used to be the Standard Contract Terms Act now occupies the place of §§ 305–310 BGB. Thus, the rules of the previous act, covering a variety of issues such as formation of contract, interpretation and fairness control, have all been shoved into one place. No attention has been paid to the fact that the BGB is based on a systematic structure. The contrast with the careful and meticulous way in which the BGB in its original version was prepared is evident.

All of this has to be seen against the background of further amendments of the BGB effected either shortly before or in the course of 2002. Thus, for example, a reform of the law relating to damages has been implemented.[65]

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58. Hans A. Engelhard (the then Minister of Justice), 'Zu den Aufgaben einer Kommission für die Überarbeitung des Schuldrechts', *Neue Juristische Wochenschrift* 1984, 1201 et seq.
59. *See* Herta Däubler-Gmelin (the then Minister of Justice), 'Die Entscheidung für die so genannte Große Lösung bei der Schuldrechtsreform', *Neue Juristische Wochenschrift* 2001, 2281 et seq.
60. *See* Reinhard Zimmermann, 'Extinctive Prescription in German Law', in: Erik Jayme (ed.), *German National Reports in Civil Law Matters for the XIVth Congress of Comparative Law in Athens* (1994), pp. 164 et seq.
61. For a comparative analysis *see* Zimmermann (n. 47), pp. 122 et seq.
62. *See*, e.g., Zweigert, Kötz & Weir (n. 8), 488 et seq.; but *see* Ulrich Huber, *Leistungsstörungen*, vols. I and II (1999).
63. *See* Markus Arzt, Beate Gsell & Stephan Lorenz, *Zehn Jahre Schuldrechtsmodernisierung* (2014).
64. On the policy considerations for and against such move, *see* Wulf-Henning Roth, 'Europäischer Verbraucherschutz und BGB', *Juristenzeitung* 2001, 475 et seq.
65. For details, *see* Gerhard Wagner, *Das neue Schadensersatzrecht* (2002).

Further reforms have followed, many of them based on the necessity of implementing directives enacted by the European Union. If the experience is anything to go by, the future for the integrity and resilience of the BGB does not look bright.[66] Thus, Ulrich Huber has emphasized the 'indifference, superficiality and arrogance' of the legislature in dealing with traditional core areas of the law.[67] There have also repeatedly been objections to the surprise character of far-reaching amendments implemented hastily and without adequate public discussion.[68] It is obvious today that the BGB, once acclaimed for its durability and technical perfection, has been turned into a permanent building site.[69] But then, perhaps, it may be better for a modern code of private law to resemble a building site than a museum.

§1.08 THE PROVINCE OF LEGISLATION DETERMINED

It would be utterly wrong, even in a codified legal system, to measure the advances of private law in the 20th century[70] merely by looking at amendments to the code and at the enactment of specific statutes. Unlike the fathers of the Prussian code the draftsmen of the BGB were no longer obsessed with the idea that they had to provide an exhaustive regulation – from first principles down to the finest details – for every imaginable set of facts.[71] They did not aim at comprehensiveness. Nor did they contemplate the abolition of legal scholarship. They were keenly aware of the distinction between the 'political' and the 'technical' element of private law which had once been introduced by Savigny in order to mark off the province of legislation from

66. *See* Hans Hermann Seiler, 'Bewahrung von Kodifikationen in der Gegenwart am Beispiel des BGB', in: Okko Behrends & Wolfgang Sellert (eds), Der Kodifikationsgedanke und das Modell des Bürgerlichen Gesetzbuches (BGB) (2000), pp. 105 et seq.
67. Ulrich Huber, 'Das Gesetz zur Beschleunigung fälliger Zahlungen und die europäische Richtlinie zur Bekämpfung von Zahlungsverzug im Geschäftsverkehr', *Juristenzeitung* 2000, 966–967.
68. *See*, for example, Wolfgang Ernst, 'Deutsche Gesetzgebung in Europa – am Beispiel des Verzugsrechts', *Zeitschrift für Europäisches Privatrecht* 8 (2000) 767 et seq.
69. Wulf-Henning Roth, *Juristenzeitung* 2001, 488.
70. *See* generally Karl Kroeschell, *Rechtsgeschichte Deutschlands im 20. Jahrhundert* (1992). A history of private law during the time of the Weimar Republic has been written by Knut Wolfgang Nörr, *Zwischen den Mühlsteinen: Eine Privatrechtsgeschichte der Weimarer Republik* (1988); on German legal history in the post-war period, *see* Rainer Schröder, 'Rechtsgeschichte der Nachkriegszeit', *Juristische Schulung* 1993, 617 et seq.; Joachim Rückert, 'Abbau und Aufbau der Rechtswissenschaft nach 1945', *Neue Juristische Wochenschrift* 1995, 1251 et seq.; Dieter Simon (ed.), *Rechtswissenschaft in der Bonner Republik* (1994); Dieter Medicus, 'Entscheidungen des BGH als Marksteine für die Entwicklung des allgemeinen Zivilrechts', *Neue Juristische Wochenschrift* 2000, 2921 et seq. For a comprehensive assessment, *see* the contributions to Mathias Schmoeckel, Joachim Rückert & Reinhard Zimmermann (eds), Historisch-kritischer Kommentar zum BGB, vol. I (2003), vols. II 1 and II 2 (2007) and vols. III 1 and III 2 (2013).
71. On the principled nature of the BGB, *see* Joachim Rückert, 'Das BGB und seine Prinzipien: Aufgabe, Lösung, Erfolg', in: Mathias Schmoeckel, Joachim Rückert & Reinhard Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB*, vol. I (2003), pp. 34 et seq.

that of 'legal science'.[72] Time and again, we therefore find statements in the *travaux préparatoires* that a particular problem should be left to legal scholarship rather than be resolved by the code itself.

Moreover, the fathers of the BGB refrained from defining and regulating purely doctrinal questions – central as they might be. Thus, we find neither definition nor explanation of basic concepts such as legal capacity, contract, declaration of intention, damage, causation, or unlawfulness; freedom of contract is not even mentioned. Matters of legal construction (is performance merely a factual act or is it a contract?) are avoided, as far as possible. Many basic propositions have not been included in the code as being self-evident. Thus, for instance, the BGB merely sets out the three different types of error that it regards as operative but does not mention that a mere error in motive cannot give rise to a right of rescission (as Savigny had pointed out, error in motive does not affect the will of the contracting party but relates to the preliminary process of the formation of such a will).[73] The BGB, in this as in many other cases, merely marks certain fixed points but does not attempt to prescribe the details of a comprehensive doctrine. Moreover, as has repeatedly been observed, the BGB is characterized by a considerable degree of abstraction, both as far as style and content are concerned.[74] It refrains from a case by case regulation of the individual problems encountered in real life but rather provides abstract conceptual tools which can usefully be employed for a variety of new and unforeseen situations. In fact, the BGB has turned out to be conspicuously weak and outdated where it, exceptionally, departs from this approach: where it deals with individual concerns such as the law of the flight of the bees (§§ 961 ff.) or where it used to take us into the 19th-century world of cab drivers and messengers, of domestic servants, day labourers and journeymen (§ 196, old version, in force until 1 January 2002). The language, too, in which the BGB is drafted, usually maintains a level of abstraction that leaves much room for interpretation and scholarly refinement. In addition, of course, the draftsmen of the code have made use of the device of inserting a number of provisions merely containing general standards of behaviour, most famously § 138 I BGB (*boni mores*)[75] and § 242 BGB (good faith).[76]

All of this contributes to a considerable built-in flexibility which immediately sets the scene not for confrontation but for an alliance between legislation and legal

72. For details, *see* Horst Heinrich Jakobs, *Wissenschaft und Gesetzgebung im bürgerlichen Recht nach der Rechtsquellenlehre des 19. Jahrhunderts* (1983); Hans Hermann Seiler, 'Rechtsgeschichte und Rechtsdogmatik', in: Karsten Schmidt (ed.), *Rechtsdogmatik und Rechtspolitik* (1990), pp. 117 et seq.
73. On Savigny's doctrine concerning error, *see* Martin Josef Schermeier, *Die Bestimmung des wesentlichen Irrtums von den Glossatoren bis zum BGB* (2000), pp. 483 et seq.
74. Cf., e.g., Folke Schmidt, 'The German Abstract Approach to Law', *Scandinavian Studies in Law* 9 (1965) 133 et seq.
75. On the application of which *see* Hans-Peter Haferkamp, in: Mathias Schmoeckel, Joachim Rückert & Reinhard Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB*, vol. I (2003), § 138, nos 1 et seq.
76. On which *see* Simon Whittaker & Reinhard Zimmermann, 'Good faith in European contract law: surveying the legal landscape', in: Reinhard Zimmermann & Simon Whittaker (eds), *Good Faith in European Contract Law* (2000), pp. 18 et seq.

scholarship.[77] Even more importantly, however, the code itself suggests the point of reference for the most congenial kind of legal scholarship: the Roman-Canon *ius commune* in its 19th-century pandectist version. For those who drafted the BGB did not, on a doctrinal level, intend their code to constitute a fresh start, a break with the past. On the contrary: they largely aimed at setting out, containing and consolidating 'the legal achievements of centuries',[78] as they had been processed and refined by pandectist legal learning. Horst Heinrich Jakobs has, therefore, pointedly referred to the BGB as a codification 'which does not contain the source of law in itself but has its source in the legal scholarship from which it was created'.[79] The BGB was designed to provide a framework for an 'organically progressive legal science'[80] which was itself an organic product of the tradition of pandectist learning. This, incidentally, supports the claim of those who argue that the BGB is much less specifically 'German' than is often assumed; that it merely constitutes both a local variation and a transitional stage within an ongoing tradition; that legal history and modern law are not two different worlds; and that the elucidation of the history of legal doctrines and institutions remains an important prerequisite for laying the foundations of a contemporary European scholarship in private law.[81]

§1.09 CASE LAW IN A CODIFIED SYSTEM

The Imperial Court (*Reichsgericht*), too, did not regard the BGB as the great watershed in German legal history. It cautiously developed the law and started to adapt it to new circumstances. Usually there were either overt or covert lines of continuity linking the new law to the old: either because the judges simply perpetuated their earlier case law, or because they extended a line of development which had its origin in the 19th

77. Cf. the contributions by Jan Schröder and Okko Behrends in: Okko Behrends & Wolfram Henkel (eds), *Gesetzgebung und Dogmatik* (1989); Vogenauer, Cambridge Law Journal 64 (2005) 481 et seq.; Reinhard Zimmermann, 'Wider die verderbliche Einseitigkeit': Einführung in das Symposium 'Dialog zwischen Rechtswissenschaft und Rechtsprechung', RabelsZ 77 (2013) 300 et seq.
78. *See* Bernhard Windscheid, 'Die geschichtliche Schule in der Rechtswissenschaft', in: *idem*, *Gesammelte Reden und Abhandlungen* (edited by Paul Oertmann, 1904), pp. 75–76: 'We want to have the code and also the legal achievements of centuries: we will take care of that as genuinely historical jurists. As historical jurists we know that the code will be no more than a moment in the development, more tangible, certainly, than the ripple in a stream but, none the less, merely a ripple in the stream.'
79. Jakobs, *Wissenschaft und Gesetzgebung* (n. 79), 160. This does not mean that the draftsmen of the BGB did not in many instances abandon outdated doctrines and institutions; sometimes they also resolutely opted for a new regulatory pattern (even, or perhaps particularly, in the law of succession, an area usually regarded as stable and resistant to change; for the German parentelic system, taken over from Austria, *see* Reinhard Zimmermann, 'Intestate Succession in Germany', in: Kenneth G.C. Reid, Marius J. de Waal, and Reinhard Zimmermann (eds), *Intestate Succession* (2015), pp. 180 et seq.; a very similar story can be told about the compulsory portion).
80. *Supra*, text following n. 15.
81. For a more detailed discussion, and for further references, *see* Reinhard Zimmermann, 'Heard melodies are sweet, but those unheard are sweeter … ', *Archiv für die civilistische Praxis* 193 (1993) 121 et seq.; *idem*, 'Savigny's Legacy: Legal History, Comparative Law and the Emergence of a European Legal Science', *Law Quarterly Review* 112 (1995) 576 et seq.; *idem*, 'Europa und das römische Recht', *Archiv für die civilistische Praxis* 202 (2002) 243 et seq.

century.[82] Among the tools used by the courts were the undisguised appeal to general legal intuition or common sense, the reading of tacit conditions into a contract (a device which has been popular at all times and in many countries), and the construction of fictitious contracts.[83] The practice of the *Reichsgericht*, even in the early years of the 20th century, was not characterized by positivistic narrowness in the application of the code. At the same time, it was one of the great achievements of the Court to avoid a break in continuity.

Today, of course, the BGB has become enveloped in thick layers of case law which anybody who wishes to apply the law has to be thoroughly familiar with.[84] Drafting mistakes, internal inconsistencies and gaps have been discovered in the code. The proper interpretation of the words and phrases used by the draftsmen of the code had to be settled. The details of many abstract provisions had to be worked out, atypical situations to be accommodated. Some provisions had to be extended, others to be restricted in their scope of application. Entirely new and unforeseen legal problems had to be solved: What are the legal consequences of artificial insemination?[85] Can the birth of a child conceivably be regarded as a damaging event?[86] May the transfer fee for a professional soccer player be reclaimed if the German soccer association withdraws his licence to play?[87] Can a shop owner sue a person caught in the act of shoplifting for the reward promised and paid to those who caught the thief?[88] Changed societal *mores* and evaluations had to be accommodated. The modern cult of the motor vehicle or the increasing 'commercialization' of leisure time, particularly holidays, has been reflected in the development of the law of damages.[89] Unjustified enrichment, delictual liability, the law of damages: areas such as these, where the code provides hardly more than general principles, have become pockets of a typical case-law jurisprudence.[90]

But the courts have done much more. They have introduced entirely new legal institutions of which we find only a few scattered points of departure in the code. The

82. For details, *see* the contributions to Ulrich Falk & Heinz Mohnhaupt (eds), *Das Bürgerliche Gesetzbuch und seine Richter* (2000); Zimmermann, *Civilian Tradition* (n. 8), 53 et seq.
83. *See* the references in Reinhard Zimmermann, 'Das Bürgerliche Gesetzbuch und die Entwicklung des Bürgerlichen Rechts', in: Mathias Schmoeckel, Joachim Rückert & Reinhard Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB*, vol. I (2003), vor § 1, no. 17. At no. 16 a number of examples are given substantiating the proposition that, contrary to a widely held opinion, judges in 19th-century courts had also managed 'to procure for themselves the flexibility which is so indispensable for the judge' (Bernhard Windscheid & Theodor Kipp, *Lehrbuch des Pandektenrechts*, vol. I (9th ed. 1906), § 28 note 4); cf. also Regina Ogorek, *Richterkönig oder Subsumtionsautomat? Zur Justiztheorie im 19. Jahrhundert* (1986).
84. John P. Dawson, *The Oracles of the Law* (1968), pp. 432 et seq. refers to 'Germany's Case-Law Revolution'.
85. BGHZ 87, 169 and subsequent cases.
86. BGHZ 76, 249; more recently, *see* BGHZ 124, 128; BGH, *Neue Juristische Wochenschrift* 2002, 2636 et seq.
87. BGH, *Neue Juristische Wochenschrift* 1976, 565; *see* Zimmermann & Whittaker (n. 76), 578 et seq.
88. BGHZ 75, 230.
89. Cf., e.g., BGHZ 56, 214; 63, 98; Dieter Medicus & Jens Petersen, *Bürgerliches Recht* (25th ed. 2015), nos 822 et seq.
90. The commentary by Gerhard Wagner on § 823 in *Münchner Kommentar zum Bürgerlichen Gesetzbuch*, 7th ed., vol. 6 (2017), extends over more than 1,000 marginal numbers (and is not even the longest commentary).

German equivalent of frustration of contract (*Wegfall der Geschäftsgrundlage*) was recognized, initially, in response to the problems posed by the consequences of the First World War on the performance of long-term contracts. It has become an established feature of the German legal landscape, even though the draftsmen of the code had rejected its predecessors of the pre-code *ius commune* period, the *clausula rebus sic stantibus* and Bernhard Windscheid's 'presupposition' doctrine.[91] *Culpa in contrahendo* and the contract with protective effects vis-à-vis third parties have installed themselves in the grey area between contract and delict, and positive malperformance has been introduced as a specific type of breach of contract, supplementing the system of remedies provided by the code.[92] Often these new institutions have been designed to circumvent provisions of the code which have turned out to be inappropriate or inconvenient. One of the reasons why the German courts have felt compelled to extend the province of the law of contract beyond its natural borderline into the adjoining law of delict lies in the odd, but practically important, distinction relating to liability for the fault of third parties: § 278 BGB provides for a strict liability in contract, whereas the defendant in a delictual action can exonerate himself by showing that no *culpa in eligendo*, *custodiendo* or *inspiciendo* was attributable to him.[93] The 'right to an established and operating business' (*Recht am eingerichteten und ausgeübten Gewerbebetrieb*) has been smuggled into the list of rights and interests protected according to § 823 I BGB in order to sidestep the decision that pure economic loss is not, in principle, recoverable in delict.[94] A complex body of law concerning transfer of ownership *in securitatem debiti* has been developed because the principle entrenched in § 1205 BGB, that a pledge must be delivered to the creditor, has turned out to be impractical.[95] A delictual action has been made available where an object that has been bought is destroyed as the result of a defect in an individual and identifiable part of it. The true reason for this development is the desire to help disappointed purchasers whose warranty claims under the contract of sale have prescribed as a result of the extraordinarily harsh prescription rule of § 477 BGB (old version).[96]

91. RGZ 103, 328; Klaus Luig, 'Die Kontinuität allgemeiner Rechtsgrundsätze: Das Beispiel der clausula rebus sic stantibus', in: Reinhard Zimmermann, Rolf Knütel & Jens Peter Meincke (eds), *Rechtsgeschichte und Privatrechtsdogmatik* (2000), pp. 171 et seq.; Zimmermann (n. 35), 579 et seq.; *idem*, *Civilian Tradition* (n. 8), 80 et seq. Since 1 January 2002 the doctrine has found a statutory home in § 313 BGB.
92. Zimmermann, *Civilian Tradition* (n. 8), 88 et seq., 92 et seq., 95 et seq. *Culpa in contrahendo* has today found a statutory basis in § 311 II, III BGB, while the doctrine of positive malperformance has been absorbed by the general notion of 'breach of duty' (*Pflichtverletzung*): § 280 BGB. The doctrinal device of a contract with protection effects has not found a home in the code; it is based either on what is usually referred to as *ergänzende Vertragsauslegung* (supplementary interpretation) or regarded as an instance of judicial development of the law legitimated by § 242 BGB (good faith).
93. Zimmermann (n. 35), 1120 et seq. (1125–1126); *idem*, *Civilian Tradition* (n. 8), 72 et seq.
94. Zimmermann (n. 35), 1036 et seq.; *idem*, *Civilian Tradition* (n. 8), 63 et seq.
95. Klaus Luig, 'Richter secundum, praeter oder contra BGB? Das Beispiel der Sicherungsübereignung', in: Falk & Mohnhaupt (n. 82), 383 et seq.; Zimmermann (n. 37), 116.
96. *See* Zimmermann (n. 60), 170. For a comparative study, *see* Hartwin Bungert, 'Compensating Harm to the Product Itself', *Tulane Law Review* 66 (1992) 1179, 1217 et seq. Even after the abolition of the six-month period of § 477 BGB in the course of the reform of the law of extinctive prescription the courts have not changed direction; *see* Hein Kötz & Gerhard

The famous 'general provisions' of the BGB have, of course, provided the most convenient space for judicial law making. In the process, however, they have been taken far beyond the scope of application originally allotted to them. The standard of 'good faith' (*Treu und Glauben*), for instance, appears only in a seemingly rather marginal provision (§ 242), where it relates specifically to the manner in which an obligation has to be performed. Soon, however, the courts seized upon the rule and converted it into a provision governing, and transforming, the German law of contract. By 1961 the details of its application had reached such a degree of complexity that a standard commentary on the BGB devoted a whole volume of about 1,400 pages, largely in small print, to the compilation, classification, and analysis of the rules and institutions derived from it.[97] The '*boni mores*' clause of § 138 I has been used to combat unfair standard contract terms[98] and it continues to be a valuable tool in the hands of courts that are willing to protect the economically weaker party within a contract from exploitation. It has thus heralded a shift of emphasis from freedom of contract to social responsibility. By falling back on § 138 I in order to sidestep the restrictive requirements of the usury provision of § 138 II, the courts have, at the same time, begun to re-emphasize the idea of equality of exchange.[99] In a startling decision of 1993 the Federal Constitutional Court has enjoined the civil courts to police the content of contracts which are unusually burdensome for one of the two parties and which result from structurally unequal bargaining power.[100] That decision has prompted the Federal Supreme Court to invalidate a surety's obligation in terms of § 138 I in situations where the conclusion of the contract of suretyship cannot be said to be the result of an act of free self-determination. This can be the case, particularly, where close relatives have stood surety for the main debtor's obligations and where the amount of the main debt far exceeds the economic possibilities of the surety.[101]

Wagner, *Deliktsrecht*, 13th ed. (2016), nos 151 et seq. This may be due to the fact that damages claims based on latent defects continue to be under a different (i.e., stricter) prescription regime than delictual claims.

97. Wilhelm Weber, in: Staudinger, *Kommentar zum BGB* (11th ed. 1961), § 242. Very influential in the process of domesticating the unruly horse and in paving the way towards a more orderly and rational analysis has been Franz Wieacker, *Zur rechtstheoretischen Präzisierung des § 242 BGB* (1956). Cf. also John Dawson, 'The General Clauses, Viewed from a Distance', *Rabels Zeitschrift* 41 (1977) 441 et seq.; Whittaker & Zimmermann (n. 76), 22 et seq.
98. Cf., e.g., Ludwig Raiser, *Das Recht der Allgemeinen Geschäftsbedingungen* (1935), pp. 302 et seq. After the Second World War, the courts started to base the policing of unfair standard contract terms on § 242 BGB; *see*, for the development prior to the enactment of the Standard Contract Terms Act in 1976 (*see* above, n. 47) Sibylle Hofer, in: Mathias Schmoeckel, Joachim Rückert & Reinhard Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB*, vol. II 2 (2007), §§ 305–310, nos 7 et seq.
99. Christian Armbrüster, in: *Münchener Kommentar zum BGB*, vol. I (7th ed. 2015), § 138, nos 112 et seq.; Zimmermann (n. 35), 269 et seq.
100. BVerfGE 89, 214.
101. For discussion, *see* Mathias Habersack & Reinhard Zimmermann, 'Legal Change in a Codified System: Recent Developments in German Suretyship Law', *Edinburgh Law Review* 3 (1999) 272 et seq.

§1.10 JUDICIAL LAW-MAKING: PROBLEMS, PREMISES, PERSPECTIVES

[A] The Constitutionalization of Private Law

General provisions such as §§ 138, 242 BGB constitute the most important as well as the most convenient ports of entry for the values of the community. Under the Nazi-dictatorship this was a curse as much as it is a blessing under the Basic Law. The concept of an indirect horizontal effect (*mittelbare Drittwirkung*) of the fundamental rights contained in the first part of the Basic Law[102] has led to an infusion of constitutional values into private law. At the same time, however, it has increasingly placed the Federal Constitutional Court into the position of a Supreme adjudicator in private law matters: a development which has been severely criticized by a number of private law professors.[103] One of the most dramatic examples of the impact of constitutional values on the shape of modern private law has occurred in the area of the law of delict. Influenced by the totalitarianism of the Nazi-regime the draftsmen of the Basic Law entrenched the respect for human dignity and the right to personal freedom, very prominently, in its first two articles. Soon the argument began to gain ground that these constitutional provisions were of fundamental importance not only in the field of public law; and since their spirit was to pervade every branch of the legal system, they should also be given effect on the level of the private law. More particularly, delictual protection of the personality was deemed to be desirable, and even necessary. It was introduced in 1954 by the Federal Supreme Court via the phrase 'or other right of another' (*oder ein sonstiges Recht eines anderen*) contained in § 823 I BGB[104] and has, since then, been reaffirmed on numerous occasions. Yet, a further, and even more spectacular, step was taken. In spite of the fact that 253 BGB (old version) in conjunction with §§ 823 I, 847 BGB (old version) explicitly confined the aggrieved claimant to a claim for the pecuniary loss that he had suffered, the Federal Supreme Court has been so bold as to award financial compensation for non-pecuniary harm in all cases where the intrusion into the plaintiff's personality right has been grave and objectively serious.[105] The elimination of damages for immaterial loss from the

102. It was developed by Günter Dürig, 'Grundrechte und Zivilrechtsprechung', in: *Festschrift für Hans Nawiasky* (1956), pp. 158 et seq. and has been adopted by the Federal Constitutional Court in the *Lüth*-decision: BVerfGE 7, 198; on which *see* David P. Currie, *The Constitution of the Federal Republic of Germany* (1994), pp. 181 et seq. For a summary of the debate about the horizontal effect in English, *see* Basil S. Markesinis, 'Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany', *Law Quarterly Review* 115 (1999) 47 et seq.; for a discussion in comparative and European perspective, *see* Chantal Mak, *Fundamental Rights on European Contract Law* (2008), pp. 25 et seq., 45 et seq.

103. *See*, e.g., Uwe Diederichsen, 'Das Bundesverfassungsgericht als oberstes Zivilgericht – ein Lehrstück der juristischen Methodenlehre', *Archiv für die civilistische Praxis* 198 (1998) 171 et seq.

104. BGHZ 13, 334. Ironically, this seminal decision concerned a letter written on behalf of a former Nazi minister of economic affairs who felt insulted by a newspaper article dealing with his activities in pre-war and post-war Germany. On the phrase 'or other right of another' in § 823 I BGB, *see* Zimmermann, *Civilian Tradition* (n. 8), 57 et seq.

105. BGHZ 26, 349 (the case of the 'gentleman horse-rider'); BGHZ 35, 363 (the case of the ginseng roots).

protection of personality would, in the opinion of the Court, have meant that injury to the dignity and honour of a human being would remain without a satisfactory sanction by the civil law and such a state of affairs could no longer be considered to be in conformity with the fundamental value system established by the Basic Law.[106]

[B] The Re-Emergence of Ideas

In a broader, historical perspective, these developments can hardly be regarded as surprising. The very rigorous attitude adopted by the draftsmen of the BGB towards infringements of a person's honour and good reputation was based on relatively short-lived notions of contemporary upper class society.[107] It has not stood the test of time, and the courts have managed to bring German law back into the mainstream of European legal tradition, as represented, in this case, by the history of the *actio iniuriarum*.[108] The courts have also, for example, at least partly, endorsed the idea of equality of exchange, even though the draftsmen of the code had rejected the time-honoured device of *laesio enormis*.[109] The *clausula rebus sic stantibus* has re-entered German law through the window, although it had been thrown out by the door.[110] A modern version of the Roman *fiducia* has slipped into German law, in spite of the fact that the fathers of the BGB had attempted to ensure that a right of pledge could not be granted without transfer of the object to the creditor.[111] Even as accomplished a codification as the BGB is not detached from the ebb and flow of legal development; and the re-appearance of supposedly outmoded ideas is not a rare phenomenon.[112]

[C] Theory and Practice of Interpretation

The methodological background to the German 'case-law revolution' is provided by Philipp Heck's *Interessenjurisprudenz* (an interpretation guided by the interests underlying the law),[113] which was based on Rudolf von Jhering's sociological and anti-formalistic approach to the law[114] and which was transformed into a *Wertungsjurisprudenz* (an interpretation focusing on the values underlying the law) after

106. For details, *see* Zweigert, Kötz & Weir (n. 8), 688 et seq.; Basil S. Markesinis & Hannes Unberath, *The German Law of Torts: A Comparative Treatise* (2002), pp. 415 et seq.
107. *See* Zimmermann (n. 35), 1090 et seq.
108. Zimmermann (n. 35), 1085 et seq.
109. Zimmermann (n. 35), 259 et seq.
110. *Supra*, text to n. 91.
111. *Supra*, text to n. 95.
112. Cf. Theo Mayer-Maly, 'Die Wiederkehr von Rechtsfiguren', *Juristenzeitung* 1971, 1 et seq.; Peter Stein, 'Judge and Jurist in the Civil Law: A Historical Interpretation', in: *idem*, *The Character and Influence of the Roman Civil Law* (1988), pp. 142 et seq.; Reinhard Zimmermann, 'Civil Code and Civil Law', *Columbia Journal of European Law* 1 (1994/95) 91 et seq.
113. On Heck, *see* Heinrich Schoppmeyer, *Juristische Methode als Lebensaufgabe: Leben, Werk und Wirkungsgeschichte Philipp Hecks* (2001), pp. 89 et seq.
114. On Rudolf von Jhering, the great methodological innovator in 19th-century German jurisprudence, *see* Nils Jansen & Mathias Reimann, 'Begriff und Zweck in der Jurisprudenz', *Zeitschrift für Europäisches Privatrecht* 26 (2018) 89 et seq.

1945.[115] Textbooks on legal methodology[116] tell us how the courts may proceed: that they have to take account of the literal meaning of the words and of the grammatical structure of a sentence, of the legislative history and of the systematic context of a legal rule. Above all, however, they are guided by the design or purpose that lies behind a rule: the 'teleological' method of interpretation. We read about 'wide' and 'narrow' interpretation, interpretation in conformity with the constitution, comparative interpretation and 'harmonizing' interpretation under the auspices of European law.[117] With the proliferation of European directives affecting private law, the significance of interpreting statutory provisions of national law implementing those directives in conformity with them increases.[118] Under the surface, many of the maxims, or *regulae iuris*, concerning interpretation of the *ius commune* still live on.[119] Little, however, can be said as to when or why a court is using the one or the other approach,[120] or how certain preconceived ideas and value judgments can, or cannot, be prevented from influencing the judgment.[121] But German courts go far beyond what may legitimately be dubbed 'interpretation'. They regard it as their duty to fill both patent and latent 'gaps' in the law, often by resorting either to the device of analogical reasoning or that of 'teleological reduction'. They even resort to judicial law-making *praeter legem* and thus transcend both the intentions of the draftsmen of the statute in question and its objective 'rationale'.[122] This obviously leads on to the wider question whether German courts are allowed to disregard the law. Article 97 I GG makes clear that the subjection of the judge to the law is inextricably linked with, and has to be regarded as a necessary

115. Jens Petersen, *Von der Interessenjurisprudenz zur Wertungsjurisprudenz* (2001).
116. The leading one is Karl Larenz & Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft* (3rd ed. 1995); cf. also Ernst A. Kramer, *Juristische Methodenlehre* (5th ed. 2016); Bernd Rüthers, Christian Fischer & Axel Birk, *Rechtstheorie* (9th ed. 2016); Franz Reimer, Juristische Methodenlehre *(2016)*. A monumental account on legal methods in comparative perspective is Wolfgang Fikentscher, Methoden des Rechts in vergleichender Darstellung, 5 vols. (1975–1977); an equally monumental work on statutory interpretation in historical and comparative perspective is Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent: Eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen*, 2 vols. (2001). In English, *see* the discussion by Dawson (n. 84), 479 et seq. At its bi-annual meeting in Würzburg in 2013, the association of private law professors of German language (*Zivilrechtslehrervereinigung*) comprehensively explored the legal methodology of private law; the papers are published in Gerhard Wagner & Reinhard Zimmermann (eds), 'Methoden des Privatrechts', *Archiv für die civilistische Praxis* 214 (2014) 1 et seq.
117. For the latter, *see* Walter Odersky, 'Harmonisierende Auslegung und europäische Rechtskultur', *Zeitschrift für Europäisches Privatrecht* 2 (1994) 1 et seq.
118. *See* Claus-Wilhelm Canaris, 'Die richtlinienkonforme Auslegung und Rechtsfortbildung im System der juristischen Methodenlehre', in: *Festschrift für Franz Bydlinski* (2002), pp. 47 et seq.; Wulf-Henning Roth, Christian Jopen, 'Die richtlinienkonforme Auslegung', in: Karl Riesenhuber (ed.), *Europäische Methodenlehre* (3rd ed., 2015), pp. 263 et seq.
119. Hans Hattenhauer, 'Zur Rechtsgeschichte und Dogmatik der Gesetzesauslegung', in: Reinhard Zimmermann, Rolf Knütel & Jens Peter Meincke (eds), *Rechtsgeschichte und Privatrechtsdogmatik* (2000), pp. 129 et seq.; Vogenauer (n.116), 430 et seq.
120. For a comprehensive discussion as to how the German courts normally proceed, *see* Vogenauer (n. 116), 248 et seq.
121. Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung: Rationalitätsgarantien der richterlichen Entscheidungsfindung* (1970).
122. For details, *see* Larenz & Canaris (n. 116), 187 et seq. A specificity of German legal methodology is the distinction between interpretation and judicial development of the law, on which the treatise by Larenz & Canaris and most other works are based.

prerequisite for, the hallowed judicial independence. Article 20 III GG, on the other hand, provides that the judiciary is to be bound by law and justice (*Gesetz und Recht*) and thus evokes the memory of those twelve years in German legal history when law and justice emphatically did not coincide. Whatever the constitutional lawyers may have to say about the matter,[123] both the existence and the legitimacy of judge-made law are very widely acknowledged today and even judicial law-making *contra legem* is tolerated in exceptional situations.[124]

Judge-made law, of course, is case law and so we widely find today a typical case-law approach prevailing:[125] the recognition of 'leading cases' as starting points for new developments and principles, distinguishing and arguing from case to case. 'Herrenreiter', 'Schwimmerschalter', 'Jungbullen', 'Flugreise', 'Hühnerpest', 'Funkenflug', 'Kartoffelpülpe', 'Seereise' and many others have become household names for German lawyers[126] – since cases are never cited by the names of the litigants but, somewhat dully, by the place and page of publication, leading cases have come to be remembered by a characteristic feature of the underlying factual situation. A doctrine of *stare decisis* does not, in general, exist in German law[127] but, of course, decisions of the Federal Supreme Court have an authority for the lower courts which in actual practice is more than merely 'persuasive'. The Federal Supreme Court, too, is not bound by its own previous decisions but, for obvious reasons, tends to overrule them as rarely as possible.[128] Occasionally, the Court hints at a future change of opinion in order to reduce possible surprise and embarrassment for potential litigants.

[D] The Style of German Court Decisions

But there are further mechanisms for safeguarding certainty of law. One of them, of course, is the hierarchical structure of the court system which, as long as the litigants are prepared to take their case that far, allows the Federal Supreme Court to have the last word in most matters of any significance (unless, of course, it can be argued that

123. Cf. Jörn Ipsen, *Richterrecht und Verfassung* (1975); Horst Dreier, Art. 20 (*Demokratie*), nos 140 et seq., Art 20 (*Rechtsstaat*) nos 101 et seq. and 175 et seq., in *idem* (ed.), *Grundgesetz: Kommentar*, vol. II (3rd ed. 2015).
124. The award of a financial compensation for non-pecuniary harm resulting from an infringement of the 'general right of personality' (*see* above, n. 104) is one of the most blatant examples of judicial law-making *contra legem.* The Federal Constitutional Court has, however, condoned what effectively amounted to a judicial derogation of § 253 BGB (old version); *see* BVerfGE 34, 269 (*Soraya*). But see subsequently BVerfGE 65, 182 reversing BAG, *Neue Juristische Wochenschrift* 1979, 774 (concerning how claims based on social redundancy plans have to be treated if the employer falls insolvent).
125. Of fundamental importance for the German discussion has been Josef Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (2nd ed. 1964).
126. For a characteristic expression of this phenomenon, *see* Haimo Schack & Hans-Peter Ackmann, *Höchstrichterliche Rechtsprechung zum Bürgerlichen Recht* (5th ed. 2004); and see the appendix listing 'especially important decisions' in Medicus & Petersen (n. 89), nos 499 et seq.
127. On the methodological and theoretical implications of interpretative change in a codified system, *see* Reinhard Zimmermann & Nils Jansen, 'Quieta movere: Interpretative Change in a Codified System', in: *The Law of Obligations: Essays in Celebration of John Fleming* (1998), pp. 285 et seq.
128. A number of examples are discussed by Zimmermann & Jansen (previous note), 287 et seq.

a decision of the Federal Supreme Court disregards one of the fundamental rights enshrined in the Basic Law, in which case the matter may be brought before the Federal Constitutional Court). Another one is the necessity for all courts to provide reasons for their decisions and thus to expose their arguments to (academic) criticism.[129] A German judgment is supposed to appear as an act of an impartial as well as impersonal public authority furnishing the official and objective interpretation rather than personalized opinions of the individual deciding justices. Thus it is drafted in a uniform and dispassionate style without personal flavour.[130] The judges never write in the first person, and concurring or dissenting opinions are not permitted, except in decisions of the Federal Constitutional Court. The decision emanates from the court (or, in actual fact, from one of its divisions, i.e., for the Federal Supreme Court, from one of its 'senates' for matters of private law (*Zivilsenate*)) rather than from individual judges (whose names are not even mentioned in the case reports). The typical German judgment, like its French counterpart, attempts to deduce the result of a case from the pertinent legal rules. But, like its English counterpart, it is discursive in character. All legal problems raised by the facts of the case are comprehensively discussed, the pertinent case law and academic literature are thoroughly considered. A German decision, at the Regional Appellate or Federal Supreme Court level, addresses itself as much to the legal community (including the community of legal scholars) as to the parties of the individual case.

[E] Bench and Chair

That leads on to a further characteristic feature of German legal culture: the close cooperation between courts and legal writers in developing the law.[131] Learned monographs and commentaries, legal textbooks, and articles in law reviews: all forms of scholarly writing are carefully noted and taken into consideration by the courts, and one need be neither dead nor particularly prominent in order to be quoted by the Federal Supreme Court. It is merely the applicability and the persuasiveness of the argument that counts. German legal scholarship, in turn, is typically 'doctrinal' in nature:[132] it expands, develops, refines, or criticizes a specific doctrine of German law

129. *See* also Dawson (n. 84), 433 et seq.
130. For a comparative analysis of judicial styles, *see* Hein Kötz, *über den Stil höchstrichterlicher Entscheidungen* (1973); *idem*, 'Scholarship and the Courts: A Comparative Survey', in: *Comparative and Private International Law: Essays in Honour of John Henry Merryman* (1990), pp. 183 et seq.; Jutta Lashöfer, *Zum Stilwandel in richterlichen Entscheidungen* (1992). And *see* the comments by Basil S. Markesinis, 'Conceptualism, Pragmatism and Courage: A Common Lawyer Looks at Some Judgments of the German Federal Court', *American Journal of Comparative Law* 34 (1986) 349 et seq.
131. *See* above, n. 77. For an interesting study relating to company law, *see* Wulf Goette, 'Dialog zwischen Rechtswissenschaft und Rechtsprechung in Deutschland am Beispiel des Gesellschaftsrechts', *RabelsZ* 77 (2013) 309 et seq.
132. *See*, e.g., Nils Jansen, 'Rechtsdogmatik im Zivilrecht', in: *Enzyklopädie der Rechtsphilosophie* (online, 2011); Christian Bumke, Rechtsdogmatik (2017). For a more general assessment of what is characteristic for legal scholarship in Germany, see the contributions to Christoph Engel and Wolfgang Schön (eds), *Das Proprium der Rechtswissenschaft* (2007).

(like 'Fremdbesitzerexzeß im Eigentümer-Besitzer-Verhältnis' or 'Saldotheorie')[133] and, in the process, discusses all the relevant decisions of the courts. It provides – usually – sophisticated foundations for both the existing and the future case law. The complexity and high level of technical refinement of (much of) German legal writing renders access by outsiders notoriously difficult. Elegance in style and presentation is not generally considered to be worth striving for, and witticisms are usually frowned upon. Unconventional forms of legal scholarship have tended for a long time, to be marginalized.[134] Economic analysis has now, however, established itself as an alternative (or perhaps rather: supplementary) perspective for private law regulation and dispute resolution.[135]

§1.11 THE PERVERSION OF THE LAW

[A] The Unjust Positive Law and the Precepts of Justice

The fixation of German lawyers on doctrinal exegesis with the 'positive law' as its central, and largely unquestioned, starting point[136] has been blamed for the subdued and uncritical, if not outright supportive, attitude which German lawyers have displayed during the darkest period in German history, the years of the so-called 'Third *Reich*'. The 1950s saw a revival of Natural law thinking that even influenced decisions of the Federal Supreme Court.[137] It was a pointed reaction against a legal formalism which had not concerned itself with substantive value-judgements and which had thus lost the ability to draw fundamental distinctions between good and evil or between law

133. Occasionally a new doctrine or new approach is 'discovered'. On legal discoveries, *see* Hans Dölle, 'Juristische Entdeckungen', in: *Verhandlungen des 42. Deutschen Juristentages* (1958), pp. 131 et seq.; on legal discoverers, *see* Thomas Hoeren (ed.), *Zivilrechtliche Entdecker* (2001).
134. One of the most interesting 'unconventional' approaches in modern German legal history was the *Freirechtsbewegung* (Free Law Movement); for a recent re-assessment, *see* Marietta Auer, 'Der Kampf um die Wissenschaftlichkeit der Rechtswissenschaft', *Zeitschrift für Europäisches Privatrecht* 23 (2015) 773 et seq.
135. For an assessment of various different 'perspectives' (both traditional and unconventional) on private law, see the contributions to Gerhard Wagner and Reinhard Zimmermann (eds), 'Perspektiven des Privatrechts', *Archiv für die civilistische Praxis* 216 (2016) 1 et seq. (based on the biannual meeting of the *Zivilrechtslehrervereinigung* in Cologne in 2015). For the economic analysis of law cf. also Horst Eidenmüller, *Effizienz als Rechtsprinzip* (4th ed. 2015); for the historical perspective Nils Jansen, 'Tief ist der Brunnen der Vergangenheit': Funktion, Methode und Ausgangspunkt historischer Fragestellungen in der Privatrechtsdogmatik', *Zeitschrift für Neuere Rechtsgeschichte* 27 (2005) 202 et seq.; for comparative law, *see* Thomas Coendet, *Rechtsvergleichende Argumentation* (2012). Legal sociology is a largely neglected field of study in Germany; and the impact of legal philosophy (or legal theory) on private law is also comparatively underdeveloped; but *see* now Marietta Auer, *Der privatrechtliche Diskurs der Moderne* (2014).
136. The classical account on the rise of 'positivism' (first 'scholarly positivism' and then 'textual positivism') in 19th-century German law is Wieacker & Weir (n. 4), pp. 341 et seq., 363 et seq.
137. *See* the critical discussion by Franz Wieacker, 'Rechtsprechung und Sittengesetz', *Juristenzeitung* 1961, 337 et seq.; Arthur Kaufmann, 'Die Naturrechtsrenaissance der ersten Nachkriegsjahre – und was daraus geworden ist', in: *Die Bedeutung der Wörter: Festschrift für Sten Gagnér* (1991), pp. 105 et seq.; Lena Foljanty, *Recht oder Gesetz: Juristische Identität und Autorität in der Naturrechtsdebatte der Nachkriegszeit* (2013).

and justice; and it was encouraged also by the public renunciation, in 1946, of unlimited positivism on the part of one of its most influential exponents during the time of the Weimar Republic. Gustav Radbruch had been professor of criminal law and legal philosophy in Kiel and Heidelberg before he was dismissed by the Nazi Government in May 1933, and in the early 1920s he had also been member of the *Reichstag* for the Social Democratic Party and Minister of Justice.[138] In his philosophical writings he had always insisted on the 'formal' character of justice and had emphasized certainty of law as the key aspect of legal validity. Having experienced the atrocities committed in the name of a particularly venomous combination of racism, nationalism, and totalitarianism, he coined what has come to be known as the Radbruch formula: where the discrepancy between the positive law and justice reaches a level so unbearable that legal certainty, as a value safeguarded by the positive law, can no longer be regarded as significant, the positive law has to make way to justice because it is 'false law', or non-law.[139]

But positivism was hardly the real culprit, certainly not the only one. Nor were the lawyers merely detached and uncritical observers. The national-socialist regime did not force itself onto an unwilling nation. It was cautiously welcomed or even greeted enthusiastically by a majority of the population, and among that majority there were the mainstream lawyers. The new rulers immediately embarked on a programme of purging the legal professions of what they regarded as racially or politically unsuitable elements – the German law faculties, for instance, lost more than a quarter of their members.[140] Many of them left Germany and had to try to reorient themselves in a strange new environment.[141] These purges elicited hardly any adverse comment. The process of 'aryanization' of the German law professoriate offered considerable chances of advancement for the younger generation of scholars. Some of them eagerly embraced the golden opportunity of contributing to the new era of national grandeur, no one more so than the highly opportunistic Carl Schmitt, one of the rising stars of constitutional law during the Weimar Republic. He celebrated the Nuremberg laws as

138. An edition of Radbruch's collected works has appeared in 20 volumes (1987 et seq.). On the life and work of Radbruch, *see* Arthur Kaufmann, *Gustav Radbruch: Rechtsdenker, Philosoph, Sozialdemokrat* (1987); cf. also Gustav Radbruch, *Der innere Weg: Aufriß meines Lebens* (1951).

139. Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', *Süddeutsche Juristenzeitung* 1946, 105 et seq.; *idem*, *Vorschule der Rechtsphilosophie* (2nd ed. 1959), p. 33.

140. For details concerning the 'purge' of the German law faculties and on the 'nazification' of legal life in Germany, *see* Reinhard Zimmermann, '"Was Heimat hieß, nun heißt es Hölle": The emigration of lawyers from Hitler's Germany: political background, legal framework and cultural context', in: Jack Beatson & Reinhard Zimmermann (eds), *Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth Century Britain* (2004), pp. 46 et seq.

141. For an assessment of the influence of the German émigré scholars on American law cf. Ernst C. Stiefel & Frank Mecklenburg, *Deutsche Juristen im amerikanischen Exil (1933–1950)* (1991); Marcus Lutter, Ernst C. Stiefel & Michael H. Hoeflich (eds), *Der Einfluß deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland* (1993); for England, see the contributions to the volume edited by Beatson & Zimmermann (previous note). Cf. also Leonie Breunung & Manfred Walther, *Die Emigration deutschsprachiger Rechtswissenschaftler ab 1933: Ein bio-bibliographishes Handbuch*, vol. I (2012).

'the constitution of freedom'[142] and reminded German lawyers that by fighting the Jew, they were doing the work of the Lord.[143]

[B] German Lawyers and the 'Third Reich'

The history of the perversion of the legal system[144] after 1933 is as sad as it is complex. Attempts to come to grips with the past only started in the late 1960s. Onedimensional or monocausal explanations have remained highly unsatisfactory. Among practising lawyers as well as law professors there were certainly those who tried to do their best, according to traditional standards of morality, within a largely hostile environment. They refused to be influenced by the new ideology, even if they occasionally had to pay lip service. Often they were unable to pursue the career that would normally have been their first choice. Others were simply unconcerned about the broader issues and continued to do their job as if nothing had happened. They contributed to an image of normality within a highly anomalous situation.[145] Then, of course, there were the fellow travellers who saw attractive career opportunities. But there was also a sizeable group of lawyers and professors who actively supported the new system, both politically and in their capacity as judges or law teachers. Not that they had all been appointed by the Nazi rulers. It is well known that many members of the legal professions (particularly of the judiciary and the civil service) had been at best sceptical of, and at worst outright hostile towards, the Weimar democracy. That was reflected, for instance, in the cavalier treatment of right wing political extremists by the criminal

142. Carl Schmitt, 'Die Verfassung der Freiheit', *Deutsche Juristen-Zeitung* 1935, 1133.
143. Carl Schmitt, 'Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist', *Deutsche Juristen-Zeitung* 1936, 1193 et seq. On Carl Schmitt, *see* Bernd Rüthers, *Entartetes Recht: Rechtslehren und Kronjuristen im Dritten Reich* (1988), pp. 99 et seq.; *idem*, *Carl Schmitt im Dritten Reich: Wissenschaft als Zeitgeist-Verstärkung* (2nd ed. 1990); Anna-Maria Gräfin von Lösch, *Der nackte Geist* (1999), pp. 429 et seq.; Reinhard Mehring, *Carl Schmitt – Aufstieg und Fall: Ein Biographie* (2009).
144. To quote the title of the influential book by Fritz von Hippel, *Die Perversion von Rechtsordnungen* (1955). For more recent studies *see* Bernhard Diestelkamp & Michael Stolleis (eds), *Justizalltag im Dritten Reich* (1988); Bernd Rüthers, 'Recht als Waffe des Unrechts – Juristische Instrumente im Dienst des NS-Rassenwahns', *Neue Juristische Wochenschrift* 1988, 2825 et seq.; Ralf Dreier & Wolfgang Sellert (eds), *Recht und Justiz im 'Dritten Reich'* (1989); Lothar Gruchmann, *Justiz im Dritten Reich 1933–1940* (3rd ed. 2001); Franz Jürgen Säcker (ed.), *Recht und Rechtslehre im Nationalsozialismus* (1992); Michael Stolleis, *Recht im Unrecht* (1994) (American edition published in 1998 under the title *The Law under the Swastika*); cf. also the study by Rainer Schröder, '*… aber im Zivilrecht sind die Richter standhaft geblieben!*' *Die Urteile des OLG Celle aus dem Dritten Reich* (1988) and the overview by Michael Stolleis, 'Nationalsozialistisches Recht', in: *Handwörterbuch zur deutschen Rechtsgeschichte*, vol. III (2nd ed. 2016), cols. 1806 et seq. For the perversion of a supposedly 'value-neutral' and technical subject such as tax-law, *see* Reimer Voß, *Steuern im Dritten Reich: Vom Recht zum Unrecht unter der Herrschaft des Nationalsozialismus* (1995). On the dichotomy between law and justice see, in this context, Bernd Rüthers, *Das Ungerechte an der Gerechtigkeit* (3rd ed. 2009).
145. *See* the analysis by Ernst Fraenkel, *Der Doppelstaat* (reprint 1984, the English original 'The Dual State' appeared in 1941).

courts.[146] These lawyers were now willing to lend a helping hand in building the new society. They drafted the notorious 'Nuremberg laws' and wrote learned commentaries on them, they hailed the *Führer* as the supreme legislator and guardian of the law[147] and they set about drafting a 'people's code' (*Volksgesetzbuch*)[148] better suited to a national spirit emanating from a 'people's community based on blood and soil' (*Gemeinschaft von Blut und Boden*) than the BGB. Significantly, point 19 of the National Socialist Party Programme had demanded, as early as 1920, the replacement of the received Roman law, which was seen as serving a 'materialistic philosophy of life',[149] by a legal system based on the German people's community values.[150] This was partly implemented by drafting enactments based on vaguely defined notions of the 'public welfare' (*Gemeinwohl*).[151]

The Nuremberg laws, and the subtle casuistry to which they gave rise, provide examples of the type of legislation that could be expected from the Nazi-rulers.[152] In a way, however, these and many other acts of legislation suffused with Nazi-ideology still preserved a semblance of the rule of law: they were publicly enacted, commented upon, interpreted by the courts and could even be used, sometimes, as a safeguard against ideological zealots. There were other areas, however, where the rule of law had been replaced by the arbitrary use of power and by unchecked violence. And then, of course, there were many fields where the old law still prevailed. The Civil Code provides the best example. Here, during the 1920s, the courts had started to use the 'general provisions' of the BGB for far-ranging judicial interventionism, most famously, perhaps, in their attempts to deal with the consequences of the First World War on the performance of long-term contracts.[153] Perspicacious critics had started to realize that

146. Cf. Hugo Sinzheimer, Ernst Fraenkel, *Die Justiz in der Weimarer Republik: Eine Chronik* (1968); Ingo Müller, *Furchtbare Juristen: Die unbewältigte Vergangenheit unserer Justiz*, (1987), pp. 19 et seq.; and *see* the documents in: *Im Namen des Volkes. Justiz und Nationalsozialismus: Katalog zur Ausstellung des Bundesministers der Justiz* (1989), pp. 7 et seq., 28 et seq.
147. For a notorious statement, *see* Carl Schmitt, 'Der Führer schützt das Recht', *Deutsche Juristen-Zeitung* 1934, cols. 945 et seq., after the Nazis had, in the early summer of 1934, killed about one hundred persons who were regarded as hostile to their rule (so-called Röhm-*Putsch*).
148. On which *see* Hans Hattenhauer, 'Das Volksgesetzbuch', in: *Festschrift für Rudolf Gmür* (1983), pp. 255 et seq.; Gerd Brüggemeier, 'Oberstes Gesetz ist das Wohl des deutschen Volkes: Das Projekt des "Volksgesetzbuches"', *Juristenzeitung* 1990, 24 et seq.; and *see* Werner Schubert (ed.), *Volksgesetzbuch* (1988).
149. In the 1930s, Roman Law was regarded by those in the Nazi-party, who cared for these matters, as corrupted by Jews and as a bastion of everything that was now odious: individualism, formalism, liberalism, sophistry, and the cult of the letter.
150. *See* Peter Landau, 'Römisches Recht und deutsches Gemeinrecht: Zur rechtspolitischen Zielsetzung im nationalsozialistischen Parteiprogramm', in: Michael Stolleis & Dieter Simon (eds), *Rechtsgeschichte im Nationalsozialismus: Beiträge zur Geschichte einer Disziplin* (1989), pp. 11 et seq.
151. For the implementation of point 24 of the National Socialist Party Programme ('Gemeinnutz geht vor Eigennutz' – public welfare has priority over self-interest), *see* Michael Stolleis, *Gemeinwohlformeln im nationalsozialistischen Recht* (1974).
152. For startling intellectual links to the American race legislation, *see* now James Q. Whitman, *Hitler's American Model: The United States and the Making of Nazi Race Law* (2017).
153. RGZ 107, 78; Bernd Rüthers, *Die unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus* (12th ed. 2012), pp. 40 et seq.; Rudolf Meyer-Pritzl, in: Mathias Schmoeckel, Joachim Rückert & Reinhard Zimmermann (eds), *Historisch-kritischer Kommentar*, vol. II/2 (2007), §§ 313–314, nos 18 et seq.

this kind of recourse to the general provisions could conceivably entail grave 'dangers for state and law'.[154] These misgivings were fully confirmed by what happened after 1933. General standards such as those contained in § 138 BGB (*boni mores*) and § 242 BGB (good faith) were among the most convenient points of departure for imbuing the legal system with the spirit of the new, 'national' (*völkisch*) legal ideology.[155] A study of the history of private law within those years reveals the frightening flexibility of the methodological tools available to lawyers inspired by ideological premises and preconceptions. The 'unlimited interpretation' was an important key to the insidious perversion of the legal system by those charged with its preservation.

[C] Reluctance to Glance in the Mirror

The quest for *Lebensraum* and racism were the central, and interrelated, fountainheads of Hitler's ideology.[156] The first, ultimately, meant war, the second was to culminate in the gas chambers of Auschwitz. When the war was over and the Jews had been 'exterminated', Germany was ruined, both physically and morally. Yet, the pace of the *physical* reconstruction astounded the world. Germany became the country of the proverbial economic miracle (*Wirtschaftswunder*). None the less, for many of those who had emigrated, Germany was not a country to which they wanted to return.[157] Those who had remained often took great umbrage if émigrés expected the Germans to confess their guilt and moral failure. These sentiments erupted with particular vehemence when Germany's most famous writer, Thomas Mann, publicly declined to follow a fellow writer's exhortation to return to Germany and, like a good doctor, help cure the wounds inflicted on the German nation.[158] Mann rejected the simplistic separation between the Nazi-rulers and a large majority of Germans who had, in a way, become Hitler's first victims, and he considered any genuine communication between those who had experienced the pandemonium from outside and who had taken part in it to be fraught with difficulties. The attempt to pick up the thread as if those twelve

154. Justus Wilhelm Hedemann, *Die Flucht in die Generalklauseln: Eine Gefahr für Recht und Staat* (1933). A few years later, and under the influence of national-socialist legal thinking, Hedemann radically changed his views; he now referred to the general provisions as 'shining ever more brightly' on the firmament of German private law; cf. Heinz Mohnhaupt, 'Justus Wilhelm Hedemann als Rechtshistoriker und Zivilrechtler vor und während der Epoche des Nationalsozialismus', in: Michael Stolleis & Dieter Simon, *Rechtsgeschichte im Nationalsozialismus: Beiträge zur Geschichte einer Disziplin* (1989), pp. 107 et seq.

155. The seminal publication on the subject is Bernd Rüthers, *Die unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus* (1st ed. 1968, 7th ed. 2012). For § 138 BGB, *see* now Jens Wanner, *Die Sittenwidrigkeit der Rechtsgeschäfte im totalitären Staat: Eine rechtshistorische Untersuchung zur Auslegung und Anwendung des § 138 Absatz 1 BGB im Nationalsozialismus und in der DDR* (1996), pp. 88 et seq.; *Historisch-kritischer Kommentar*/Haferkamp (n. 83), § 138, nos 23 et seq.

156. Ludolf Herbst, *Das nationalsozialistische Deutschland 1933–1945* (1996).

157. Only between four and five percent of those who had been persecuted for racial reasons (and that was the large majority of all émigrés) returned to one of the three successor states of the 'Greater' German *Reich* after the *Anschluß.* For details, and for a discussion of the obstacles impeding remigration, *see* Zimmermann (n. 140), 61 ff.

158. *See* Klaus Schröter (ed.), *Thomas Mann im Urteil seiner Zeit: Dokumente 1891 bis 1955* (1969), pp. 334 et seq.

years had never happened was, to him, 'the sign of a certain naiveté and insensitivity'[159]

Yet, by and large, Thomas Mann's analysis was correct. For in many respects the Federal Republic of Germany, its politicians, its cultural élites and West- German society in general, did indeed attempt to live 'as if those twelve years had never happened'. Thus, for instance, the legal system was not completely remoulded but only the openly national-socialist acts of legislation were repealed. As a result, many of the old textbooks could appear in new editions, with only minor and, one might be inclined to say, cosmetic adjustments.[160] The ideological veneer with which their authors had attempted to demonstrate their political correctness had been removed. 'Denazification' also did not leave too many traces on the composition of the legal establishment. Some of the most prominent and vociferous supporters of the Nazi-regime were removed from their posts, but by the early 1950s all the others, as long as they had not reached retirement age, 'were back at their old desks'.[161] Some of the academics who had jumped on the Nazi bandwagon turned away from politically sensitive subjects. Others who had been fellow-travellers apologetically maintained that they had been caught up in the great excitement; that they had merely been commenting on the positive law; or that they had subtly sprinkled their reservations between the lines of their books and articles.[162] All of them had one thing in common: the reluctance to glance in the mirror.[163] Even those who recognized and seriously regretted the aberrations of their early years were not normally inclined to talk about them. And most of those who did not have to hide anything, also for a variety of different reasons, took the pragmatic approach of letting sleeping dogs lie:[164] They tended to turn their energies to more constructive tasks than to investigate the details of an unfortunate past from which German law had now happily emerged. Thus, it took a long time before 'those twelve years' in the history of German law became the subject of scholarly attention and before it was increasingly accepted that they could not simply be repressed or eliminated from the collective memory.[165] There persists a fairly

159. Thomas Mann, 'Brief nach Deutschland [Warum ich nicht nach Deutschland zurückgehe]', in: *idem*, Essays VI (1945–1950), edited and with commentary by Herbert Lehnert (2009), p. 76.
160. *See* Joachim Rückert, 'Abbau und Aufbau der Rechtswissenschaft nach 1945', *Neue Juristische Wochenschrift* 1995, 1251 et seq.
161. Michael Stolleis, *Reluctance to Glance in the Mirror: The Changing Face of German Jurisprudence after 1933 and post-1945* (The Maurice and Muriel Fulton Lecture Series of the Law School, University of Chicago) (2001), p. 8. The path towards a far-reaching re-integration of the old élites was paved, first, by the way in which the denazification procedures were, in practice, gradually converted into rehabilitation procedures (*see*, e.g., Gertrude Lübbe-Wolff, in: Horst Dreier (ed.), *Grundgesetz: Kommentar*, vol. III (2000), Art. 139, no. 7) and then, for those who had been employed in the civil service before 1945, by an Act passed by the Federal Parliament in 1951 specifying the provision of Art. 131 GG: *see* Lübbe-Wolff, Art. 131, no. 5; Rückert, *Neue Juristische Wochenschrift* 1995, 1256.
162. Stolleis (previous note), 10–11.
163. To quote the title of Michael Stolleis' booklet.
164. Stolleis (n. 161), 11.
165. For an overview of the efforts undertaken by German legal historiography to come to terms with the period of the 'Third Reich', *see* Rainer Schröder, 'Die Bewältigung des Dritten Reiches durch die Rechtsgeschichte', in: Heinz Mohnhaupt (ed.), *Rechtsgeschichte in den beiden deutschen Staaten* (1988–1990) (1991), pp. 604 et seq.

wide-spread uneasiness that in spite of denazification and in spite of the trials against the 'war criminals', the legal system had ultimately proved unable to cope with the actions of those implicated in the atrocities of the 'Third *Reich*'; and that although everything possible has been done to prevent a recurrence of those events, we are still, essentially, at a loss as to how to explain them.

[D] Another Aberration

This uneasiness, incidentally, has not been alleviated by the fact that the German legal system had to wrestle, for a second time within fifty years, with the legal and ideological consequences of yet another regime inspired by a totalitarian ideology and based on a fundamental disregard for human rights and the rule of law.[166] According to which law do the actions of the marksmen along the 'antifascist wall' protecting the German Democratic Republic have to be judged?[167] Can those who shot a fugitive defend themselves by claiming that they were ordered to do so? But did these orders not violate the Natural Law?[168] And is it just to punish the individual officer who fired the shot while the politicians in charge of the entire system remain largely unscathed? The release of Erich Honecker[169] was watched with mixed feelings by many observers from both the East and West of Germany. Germany's reunification has given rise to more problems than originally envisaged. From a legal point of view, incidentally, we are not dealing with a 'reunification' but with an accession of what used to be the German Democratic Republic to the Federal Republic of Germany. As a result, West German law has, in principle, become applicable to the five new *Länder* and to East Berlin. Thus, for instance, the BGB has been reintroduced.[170] It had been superseded, in part, by a family code in 1965 and, for the remainder, by a socialist civil code in

166. Klaus Lüderssen, *Der Staat geht unter – das Unrecht bleibt?* (1992); Walter Odersky, *Die Rolle des Strafrechts bei der Bewältigung politischen Unrechts* (1992); Josef Isen*see* (ed.), *Vergangenheitsbewältigung durch Recht* (1992).
167. BGHSt 39, 1; BGHSt 39, 168; BVerfGE 95, 96.
168. Cf. the discussion by Joachim Hruschka, 'Die Todesschüsse an der Berliner Mauer vor Gericht', *Juristenzeitung* 1992, 665 et seq.; Klaus Adomeit, 'Die Mauerschützenprozesse – rechtsphilosophisch', *Neue Juristische Wochenschrift* 1993, 2914 et seq.; Hartmut Horstkotte, 'The Role of Criminal Law in Dealing with East Germany's Past: The Mauerschützen Cases', in: Werner F. Ebke & Detlev F. Vagts (eds), *Democracy, Market Economy, and the Law: Legal, Economic and Political Problems of Transition to Democracy* (1995), pp. 213 et seq.; Robert Alexy, *Der Beschluß des Bundesverfassungsgerichts zu den Tötungen an der innerdeutschen Grenze vom 24. Oktober 1996* (1997). More generally on 'pre-positive' law as object and task of legal science, *see* Joachim Hruschka, 'Vorpositives Recht als Gegenstand und Aufgabe der Rechtswissenschaft', *Juristenzeitung* 1992, 429 et seq.
169. On the basis of *Verfassungsgerichtshof des Landes Berlin* (Berlin Constitutional Court), *Neue Juristische Wochenschrift* 1993, 515 et seq.; on which *see*, for example, the discussion by Eckart Klein & Andreas Haratsch, 'Landesverfassung und Bundesrecht – BerlVerfGH, NJW 1993, 515', *Juristische Schulung* 1994, 559 et seq.; cf. also BVerfG, *Neue Juristische Wochenschrift* 1993, 1577.
170. For a discussion of the problems on the level of private and commercial law arising from the transition from a socialist to a free market economy, *see* Norbert Horn, *Das Zivil- und Wirtschaftsrecht im neuen Bundesgebiet* (2nd ed. 1993); cf. also *idem*, Die Rolle des Zivilrechts im Prozess der Wiedervereinigung Deutschlands, *Archiv für die civilistische Praxis* 194 (1994) 190 et seq.

1975.[171] Again, however, the courts in the German Democratic Republic had paved the way for these reforms by interpreting many of the BGB's provisions in the light of Marxist ideology.[172]

§1.12 LEGAL EDUCATION IN GERMANY

[A] Hereditas Borussica

A legal culture is shaped considerably by the way in which lawyers are trained. Thus, the emergence of the 'learned' lawyer is one of the characteristic features of the Western legal tradition as a whole.[173] To this day, lawyers continue to be educated at a university, in Germany as much as in France or Italy. Nineteenth-century German universities were the leading contemporary exponents of legal learning in the traditional sense, and German pandectism has been enormously influential in moulding the modern legal mind: both within and outside of Germany. Yet, at the same time, legal education in Germany[174] displays a variety of features which have tended to set it apart from other European countries. They have contributed to the sophistication of German law but have also led to a remarkable rigidity and (international) isolation. The training of lawyers has, for more than a century, been the subject of continued discussions among German legal practitioners and academics. Sporadically, these discussions have culminated in calls for far-reaching reforms. This happened, for instance, in the early 1970s and again in 1990.[175] Throughout the 1990s, various individuals and interest

171. Jörn Eckert & Hans Hattenhauer (eds), *Das Zivilgesetzbuch der DDR* (1995).
172. For a brief legal history of the 'German Democratic Republic', *see* Kroeschell (n.77), 152 et seq.; for the development of private law, *see* Rainer Schröder (ed.), *Zur Zivilrechtskultur der DDR*, vol. I (1999); vol. II (2000); vol. III (2001). A history of how justice was administered in East Germany, based on the files of the city Wismar between 1945 and 1989, has been written by Inga Markovits, *Gerechigkeit in Lüritz* (2006).
173. Stefan Vogenauer, 'Legal Scholarship', in: *Max Planck Encyclopedia* (n. 3), pp. 1077 et seq. On the historical development of the legal training, *see* Thomas Rüfner, 'Historischer Überblick: Studium, Prüfungen, Berufszugang der Juristen in der geschichtlichen Entwicklung', in: Christian Baldus, Thomas Finkenauer & Thomas Rüfner (eds), *Bologna und das Rechtsstudium* (2011), pp. 3 et seq.
174. For discussions in English, *see* Jutta Brunnée, 'The Reform of Legal Education in Germany: The Never-Ending Story and European Integration', *Journal of Legal Education* 42 (1992) 399 et seq.; Juergen R. Ostertag, 'Legal Education in Germany and the United States – A Structural Comparison', *Vanderbilt Journal of Transnational Law* 26 (1993) 301 et seq.; Ingo von Münch, *Legal Education and the Legal Profession in Germany* (2002); Stephan Korist, 'Legal Education in Germany Today', *Wisconsin Law Journal* 24 (2006) 86 et seq.
175. Cf., in particular, the comprehensive survey and the reform proposals, eventually largely rejected, by Winfried Hassemer, Friedrich Kübler, 'Welche Maßnahmen empfehlen sich – auch im Hinblick auf den Wettbewerb zwischen Studenten aus den EG-Staaten – zur Verkürzung und Straffung der Juristenausbildung?', in: *Verhandlungen des 58. Deutschen Juristentages*, vol. I (1990), pp. E 1 et seq. For a more conservative view, *see* Horst-Diether Hensen & Wolfgang Kramer, under the same title and at the same place, pp. F 1 et seq. Both papers were presented for consideration at the *Deutscher Juristentag*, a biannual meeting of all German legal professions (on the history of which *see* Hermann Conrad, 'Der deutsche Juristentag 1860–1960', in: *Hundert Jahre deutsches Rechtsleben: Festschrift Deutscher Juristentag*, vol. I (1960), pp. 1 et seq.).

groups have expressed their dissatisfaction with the *status quo*.[176] In 1998 a group of more than twenty academics and practitioners under the chairmanship of Ernst-Wolfgang Böckenförde tabled a model curriculum which was distinguished by its strong emphasis on foundational subjects.[177] This initiative was as unsuccessful as an attempt by the conference of German ministers of justice to merge the two phases of the present legal training system.[178] On 1 July 2003, however, a reform bill finally entered into effect which, while essentially perpetuating the traditional system, introduced some significant modifications.[179] It has not, however, stopped the reform discussions;[180] indeed, a reform of the reform appears to be imminent.[181]

The basic pattern of German legal education, which has been preserved with extraordinary tenacity, still reflects its origins in 18th-century Prussia.[182] It owes its existence to the need to train a homogeneous, highly qualified, and loyal body of

176. *See*, for example, Hein Kötz, 'Zehn Thesen zum Elend der deutschen Juristenausbildung', *Zeitschrift für Europäisches Privatrecht* 4 (1996) 565 et seq.; Axel Flessner, 'Deutsche Juristenausbildung', *Juristenzeitung* 1996, 689 et seq.; Ernst- Wolfgang Böckenförde, 'Juristenausbildung – auf dem Weg ins Abseits', *Juristenzeitung* 1997, 317 et seq.; Hans-Uwe Erichsen, 'Thesen zum Elend und zur Reform des Jurastudiums', *Jura* 1998, 449 et seq.; Filippo Ranieri, 'Reform der Juristenausbildung ohne Ende?', *Juristenzeitung* 1998, 831 et seq.
177. The so-called *Ladenburg*-model: *see Neue Juristische Wochenschrift* 1998, 2797 et seq. (based on the *Ladenburg*-manifesto; *see Neue Juristische Wochenschrift* 1997, 2935 et seq.).
178. Ulrich Goll, 'Praxisintegrierte Juristenausbildung als Chance', *Zeitschrift für Rechtspolitik* 2000, 38 et seq.
179. *See infra* under [F].
180. *See*, e.g., Matthias Kilian, *Juristenausbildung* (2015), pp. 51 et seq. The most significant reform proposals are contained in the recommendations of the *Deutscher Wissenschaftsrat* (German Council for Science and Humanities) under the title *Perspektiven der Rechtswissenschaft. Situation, Analyse, Empfehlungen* (Perspectives of Legal Scholarship in Germany. Current situation, Analyses, Recommendations) (2012), pp. 53 et seq. For comment, *see* the contributions to *Juristenzeitung* 2013, 693 et seq. Most recently, *see* Friedhelm Hufen, 'Der wissenschaftliche Anspruch des Jurastudiums', *Juristische Schulung* 2017, 1 et seq. – The English version of the recommendations of the *Deutscher Wissenschaftsrat* contains a useful glossary on the terminology concerning accademics in Germany (pp. 7 et seq.).
181. *See* Joachim Lege, 'Zum Stand der Koordinierung der Juristenausbildung', *Juristenzeitung* 2017, 88 et seq. – Mainstream German legal education has not been affected by what is often referred to as the 'Bologna process'. None the less, a number of institutions (particularly *Fachhochschulen* – universities of applied sciences) have started to offer Bachelor- and Master-degrees in law; they do not, however, provide access to the classical legal professions. *See* Kilian (n. 180), 54 et seq.; *Deutscher Wissenschaftsrat*, *Perspektiven der Rechtswissenschaft* (n. 180, English version), pp. 56 et seq.; and *see* Heiner Schöbel (Head of the Bavarian Examination Office for Law) 'Einführung des Bologna-Modells in der deutschen Juristenausbildung?', in Baldus, Finkenauer & Rüfner (n. 173), pp. 253 et seq. (expressing the widely prevailing scepticism towards an introduction of the Bologna-model for law in Germany).
182. On the history of legal education in Germany *see* Gerhard Dilcher, 'Die preußischen Juristen und die Staatsprüfungen: Zur Entwicklung der juristischen Professionalisierung im 18. Jahrhundert', in: *Festschrift für Hans Thieme* (1986), pp. 295 et seq.; Hans Hattenhauer, 'Juristenausbildung – Geschichte und Probleme', *Juristische Schulung* 1989, 513 et seq.; Ina Ebert, *Die Normierung der juristischen Staatsexamina und des juristischen Vorbereitungsdienstes in Preußen (1849–1934)* (1995); Filippo Ranieri, 'Juristen für Europa: Wahre und falsche Probleme in der derzeitigen Reformdiskussion zur deutschen Juristenausbildung', *Juristenzeitung* 1997, 801 et seq.; Peter Krause, 'Geschichte der Justiz und Verwaltungsausbildung in Preußen und Deutschland', in: Christian Baldus, Thomas Finkenauer & Thomas Rüfner (eds), *Juristenausbildung in Europa zwischen Tradition und Reform* (2008), pp. 95 et seq.; for an overview, *see* also Kilian (n. 180), pp. 21 et seq.

executive and judicial officers to administer a far-flung and fairly heterogeneous territory. Thus, a 'preparatory service', run by the State, was introduced to equip university graduates with the necessary practical skills to perform their various functions; this preparatory service was also made a mandatory requirement for admission as a private legal practitioner or notary; the academic legal training at the universities was subjected to detailed regulation; and the State assumed responsibility not only for the examination at the end of the preparatory service but also for the one concluding the academic legal training. What used to be a genuine university degree was thus, essentially, converted into an entrance examination for the preparatory service which, in turn, became the needle's eye through which candidates for all legal professions had to pass. The glory and the misery of German legal training have remained intimately linked to these constituent features.

[B] The State Examination: A Key Feature of German Legal Training

German law students continue to conclude their university studies, usually lasting between ten and eleven semesters, not by obtaining a university degree but by passing a 'first legal examination' (*Erste Juristische Prüfung*) which used to be, and still very largely is, a State examination. It is run in all of the 16 German states (*Länder*) by a specific office within the administration of justice of the respective state (*Landesjustiz-prüfungsamt*) which also appoints the examiners. For more than 100 years professors have participated in the process of examining. As a result, the papers are normally graded by one practitioner (usually an appeal court judge, or a senior member of the state administration) and by one professor, and each panel for oral examinations is usually composed of professors as well as practitioners. In most states, students are required to write six (formerly eight) five-hour papers, which can cover the entire disciplinary spectrum within the three fields of private law, public law, and criminal law, as far as it is part of the obligatory curriculum. In each of these papers the student is usually presented with a set of hypothetical facts and has to provide a reasoned legal opinion as evidence of the fact that he or she does not just *know* the law (including, in particular, the relevant legal doctrines) but that he is able to *apply* it. The characteristic emphasis on application rather than regurgitation of what has been learnt is underlined by the fact that the text of all relevant codes and statutes are always available to students in the course of their examination. After all papers have been graded, each student whose aggregate mark reaches a certain minimum level has to submit to an oral examination. An oral examination session, which lasts several hours, is attended by up to five students who are examined, in turn, by several examiners in private law, public law, and criminal law. Once again, the focus is on legal reasoning. At the end of a long and gruelling morning, often lasting well into the afternoon, each student receives individual marks for the different parts of his oral examination; these marks, together with those obtained in the written tests, provide the basis for calculating the aggregate mark. The eccentric German grading scale for legal examinations ranges from 0 to 18 points, with 0 to 3 points indicating failure, while the designations for

passing an examination are 'sufficient' (*ausreichend*: 4–6 points), 'satisfactory' (*befriedigend*: 7–9 points), 'fully satisfactory' (*voll befriedigend*: 10–12 points), 'good' (*gut*: 13–15 points), and 'very good' (*sehr gut*: 16–18 points).[183]

Legal education in Germany is traditionally regulated by the various German states; the Federation only provides a general framework.[184] As a result, the details differ from state to state, both as far as the procedure and the substantive content of the state examination is concerned. Thus, for example, while the German Judiciary Act determines that students have to be familiar with 'the core areas of private law, criminal law, public law, and procedural law, including the relationships with European law, legal methodology, and the philosophical, historical, and social foundations', the legal training and examination regulations of the various states specify what exactly counts as core area (labour law, company law, the different branches of administrative law, which of the many specific crimes in the criminal code?). By regulating the admission requirements for the traditional legal professions, the State is thus determining the agenda of the academic legal training. For in whatever way the law faculties might like to see their own mission, their primary function is to prepare their students for the first examination. Unfortunately, however, they are neither particularly well-placed nor ideally equipped to attain this aim.

[C] Students, Professors, and the Private Cram Schools

To start with, there are no university entrance examinations. Anybody who has graduated from Secondary School comprising the 'secondary level II' (*Gymnasium*), i.e., who has attended twelve or thirteen years of school and successfully passed the *Abitur*, may apply for admission to a faculty of law. All applicants have a right to be admitted, though not necessarily at the university of their first or second choice. The ceiling figures fixed by state regulation for the individual law faculties are high;[185] they far exceed the maximum capacity for which the faculties have originally been designed. First- or second-year courses with 300 or 400 students are the rule rather than the exception. All faculties operate according to their own model curricula; these do not, however, differ from each other in significant respects.

In principle, students are free to choose which courses they want to take at what time. They do not have to attend lectures at all, as long as they formally register for a

183. This is determined in a regulation with the unwieldy title *Verordnung über eine Noten- und Punkteskala für die erste und zweite juristische Prüfung*, known under the even more unwieldy abbreviation JurPrNotSkV. As far as the aggregate mark for the state examination is concerned, the designations at the upper and of the scale are different ('fully satisfactory': 9–11.5 points; 'good': 11.5–13.99 points; 'very good': 14–18 points). In calculating the aggregate mark, the marks for the oral part of the examination usually count one-third, those of the written tests two-thirds.

184. *See* §§ 5 et seq. of the *Deutsches Richtergesetz* (German Judiciary Act); cf. also § 4 *Bundesrechtsanwaltsordnung* (Federal Lawyers' Act), § 5 *Bundesnotarordnung* (Federal Act concerning Notaries Public), both of them referring to the Deutsches Richtergesetz. It is highly significant for the German legal training tradition that the key requirements for a legal qualification are laid down in the *Judiciary* Act.

185. *See* the statistics provided by von Münch (n. 174), 79–80.

certain number of courses and obtain a certain number of certificates by means of writing tests or home exams. In theory, they are largely free to determine for themselves how best to organize their studies. Since, however, they lack the experience required for independent academic study, many of them actually start to drift. German professors, in turn, do not find it congenial to teach huge classes with ill-equipped and badly motivated students and do not always put in an inspired performance during their mandatory eight to ten hours of teaching per week.[186] Also, traditionally they prioritize research rather than teaching, since it is very largely on the basis of their research record (as well as on their ability to attract external funding for their research) that they manage to secure attractive offers from other universities (allowing them either to accept those offers, or to re-negotiate the conditions for staying where they are). A distinguished detachment from the hustle and bustle of university life is not an uncommon attitude among German professors, in law as much as elsewhere.[187]

As a result of these, and a variety of other, contributing factors, the large majority of students have traditionally been driven into the arms of private cram school teachers which have for some generations been an unfortunate but well-established part of German legal education.[188] These cram schools (*Repetitorien*) charge substantial fees (which universities do not do) and enforce a rigorous work discipline (which law faculties do not do either). They are not interested in sophisticated academic discourses but teach the nitty-gritty of the case-method: how to tackle hypothetical sets of facts such as those presented in the State examination. For a German law student does not only have to have a very broad and detailed knowledge of substantive law (statutes, case law, legal doctrine) and to be able to apply that knowledge in one single,

186. The teaching year in the State University consists of about thirty weeks divided into two semesters.

187. German Professors are normally civil servants of the state within which their university is situated. While relatively well paid (in comparison with professors in other European countries, though not in comparison with lawyers practising in international law firms, or public notaries), they may, within limits, engage in private practice. They are much sought after to provide expert opinions, they are involved in high-profile litigation or arbitration, or they serve as (part-time) judges in a Regional Appeal Court (Oberlandesgericht). Hardly any professor will, however, contemplate giving up his chair for full-time legal practice or for appointment as a regular judge. Elevation to the Bench of the Federal Constitutional Court (Bundesverfassungsgericht) presents an exception. About half the sixteen judges of that Court are usually law professors who, for the period of their court tenure, cease to be full-time teachers. – Professors are paid according to a special salary scale. The one in force since 2005 (introduced by an act with the attractive title *Professorenbesoldungsreformgesetz* was, in part, struck down by the Federal Constitutional Court in a decision of 14 February 2012 as evidently disregarding the established principle of 'adequate alimentation' concerning civil servants. The reform legislation thus required has the even more attractive title of *Professorenbesoldungsneuregelungsgesetz*.

188. *See* Wolfgang Martin, *Juristische Repetitorien und staatliches Ausbildungsmonopol in der Bundesrepublik Deutschland* (1993); Kilian (n. 180), pp. 151 et seq. (who relates, on the basis of a survey conducted among lawyers admitted to legal practice between 2004 and 2010, that 86% of them have attended a *Repetitorium* – in spite of the fact that many law faculties have themselves mounted ambitious repetition courses preparing their students for the first legal examination; cf. also Thorsten Deppner, Matthias Lehnert & Friederike Wapler, *Examen ohne Repetitor* (2011).

comprehensive examination at the end of his studies; equally important is the mastery of a highly formalized 'method' of preparing a legal opinion and 'solving the case',[189] that is enforced with unrelenting rigour. This method is designed to ensure that the student considers the case under all relevant legal aspects, that he explores every conceivable argument either supporting or defeating the plaintiff's claim and that, in the process, he avoids discussing any issue that is not strictly relevant. Of central importance is the notion of an *Anspruch* ('claim')[190] by means of which the leading 19th-century scholar Bernhard Windscheid managed to remould the Roman *actio* into a term of substantive, rather than procedural law.[191] It invariably provides the point of departure for any case analysis in German law and has, more generally, become one of the fundamental conceptual pillars of modern private law doctrine.[192] This way of thinking is designed to cure students of any temptation to approach the case with a naïve and unselfconscious sense of what is right and wrong. It nurtures a mental discipline that is widely regarded as a specific attribute of lawyers. It both requires and encourages a style of writing that is precise, detached and 'neutral'; or, as may also be said, entirely colourless and devoid of any literary grace and personal flavour. And it possesses a sublime, if faintly pedantic, inherent logic.

It is not probably surprising, under those circumstances, that in the first legal examination there is regularly a startlingly high failure rate. While, until the middle of the 1970s, it used to be below 20%, it has over the years risen to close to 30%, occasionally even slightly above that margin.[193] More than two-thirds of those who pass merely achieve a result of 'sufficient' or 'satisfactory'. All in all, the average mark, counting all those who sit for the first examination, is not quite 6 points.[194]

[D] The 'Preparatory Service' and Legal Practice

Those who have passed the first examination usually start with their 'preparatory service' or practical legal training (*Referendardienst*). It takes two years and is intended to introduce them to the various legal professions and to school them in the art of

189. For a comprehensive instruction concerning private law cases *see* Uwe Diederichsen & Gerhard Wagner, *Die BGB-Klausur* (9th ed. 1998); Dirk Olzen & Rolf Wank, *Zivilrechtliche Klausurenlehre und Fallrepetitorium* (8nd ed. 2015).
190. Defined in § 194 I BGB as 'the right to demand an act or an omission from another' ([*D*]*as Recht, von einem anderen ein Tun oder Unterlassen zu verlangen*).
191. *See* Bernhard Windscheid, *Die Actio des römischen Civilrechts vom Standpunkte des heutigen Rechts* (1856); Bernhard Windscheid & Theodor Kipp, *Lehrbuch des Pandektenrechts* (9th ed. 1906), §§ 43, 106.
192. For a general discussion, *see* Dieter Medicus, 'Anspruch und Einrede als Rückgrat einer zivilistischen Lehrmethode', *Archiv für die civilistische Praxis* 174 (1974) 313 et seq.; Bernhard Großfeld, 'Examensvorbereitung und Jurisprudenz', *Juristenzeitung* 1992, 22 et seq.; Jan Schapp, 'Das Zivilrecht als Anspruchssystem', *Juristische Schulung* 1992, 537 et seq. In his tremendously successful book *Bürgerliches Recht: Eine nach Anspruchsgrundlagen geordnete Darstellung zur Examensvorbereitung* (now continued by Jens Petersen: 25th ed. 2015), Dieter Medicus has provided an analysis of the BGB which is strictly based on the various *Ansprüche* recognized in German private law.
193. Kilian (n. 180), pp. 136 et seq., with speculations about the cause of this increase.
194. Kilian (n. 180), pp. 133.

drawing up pleadings, drafting administrative acts, writing judgments, etc. The *Referendardienst* is run entirely by the State, which contributes towards the maintenance of the trainees (*Rechtsreferendare*). The latter have to complete a number of obligatory stages (with a civil division of a court, a criminal division of a court or public prosecutor, an office within the public administration, and with a lawyer in private practice), plus one or two optional stages. In addition, *Rechtsreferendare* are required to attend practical legal training courses run by judges or civil servants.

The preparatory service ends with the second State examination (*Zweite Staatsprüfung*) which follows a pattern similar to the first. Up to eleven (Bavaria) five-hour tests have to be written over a period of less than three weeks and, after these tests have been marked, an oral examination takes place which lasts several hours. This time, only judges, senior civil servants, and senior practising lawyers serve as examiners. Again, candidates receive a final overall mark (on the same scale as for the first examination) which determines their professional prospects. Even at that stage, between 10% and 20% of all candidates fail (they may repeat the examination once). Only around 20% receive a distinction of 'fully satisfactory' or better, i.e., a mark of 9 points or above; only around 2% attain a distinction of 'good' or 'very good'.[195] In hardly any other field is the final grade as significant for an aspiring youngster's career prospects as in the law; some career options are effectively closed for those who have not at least achieved 9 points.

Those who pass may call themselves *Assessor*. They are fully qualified lawyers and may now try to secure an appointment as a judge (the judiciary in Germany constitutes a career office within the civil service), as a notary public, as a public prosecutor, or as an adviser in the legal department of a firm. Alternatively they may join a law firm or open their own office as a private practitioner. They have survived two intense and remorseless examinations and have received a rigorous training 'to think like a lawyer'. In reality, however, they have been taught to think like a judge; for in the course of their legal training, particularly at the university, the focus has generally been on the impartial assessment of a legal conflict. Yet, paradoxically, only a minority of *Assessoren* embark on a judicial career. But even as private practitioners representing party interests they have to be committed ultimately to serving justice in a higher and more disinterested sense. This, at least, is the ideology behind what must appear to an outsider to be a somewhat skewed approach to legal training.

But quite a few lawyers do not even enter one of the traditional legal professions. Law is still regarded as one of the best general educations available and lawyers are therefore widely taken to be well qualified for senior management positions, for appointments within the civil service, and for other careers. At the same time, however, it is obvious that the market cannot absorb around 8,000 newly qualified lawyers every year.[196] And even those who can be absorbed have bought their career

195. *See* Kilian (n. 180), pp. 209 et seq.

196. Even though the number of judges in Germany is high compared to that, for example, in the United Kingdom, only a very small percentage of those who have passed both State examinations are appointed as members of the judiciary. By the end of 2014, there were 20,301 judges in active service in Germany. A career path that enjoys great exclusivity and prestige (as well as a very good income) is that of notary public. Admission is severely restricted and available

opportunities at a cost: they are normally well beyond twenty-five years of age and, if they have obtained a postgraduate degree at a foreign university[197] and/or a doctorate, beyond the age of thirty.

[E] A Career in Itself: The Path to the Chair

A doctorate is a much appreciated extra qualification for those who want to enter legal practice, for German clients tend to be impressed by academic titles.[198] A doctorate may, however, also be the starting point for what remains one of the most prestigious legal careers: that of a law professor. But the path to the first 'call' to a chair is extraordinarily arduous. The potential member of the academic community must have received high grades in the legal examinations. His (much more often than her) thesis – written, normally, within a period of between two and three years – must have received the distinction of *magna cum laude*, or *summa cum laude*; normally it will have been published as a book. This is followed by some years of apprenticeship with an established professor. For that purpose, the latter usually makes available one of the posts of 'academic assistant' (*wissenschaftlicher Assistent*) attached to his university chair or Max Planck Institute[199] (unless the postdoc has been successful with an application for a scholarship, granted e.g., by the *Deutsche Forschungsgemeinschaft* (German Research Foundation)). The assistant, on the one hand, has to do a limited number of tutorials and to support the incumbent of the chair in his research projects. On the other hand, he has to work on a second thesis called *Habilitation* which has to constitute an even more fundamental and original contribution to knowledge. Completion of that work can easily take five years. The *Habilitation* has to be accepted by the faculty, to which the professor, under whose *aegis* the work is written, belongs. The faculty bestows on its new member the *venia legendi*, i.e., the permission to teach a legal subject in his own responsibility.

After some tense months (hopefully not years) during which he may have acted as a substitute for a professor in another faculty and during which he may have given

only to the very best. Thus, for example, in the city state of Hamburg, in 2016 only seventy-four notaries were practising, compared to 10,231 *Rechtsanwälte* (private practitioners). In the same year, a total of more than 165,000 *Rechtsanwälte* were practising in Germany (i.e., close to 200 per 100,000 inhabitants). Many of those who have passed their examination with a below average mark and who are unable to secure employment in an established law firm, in a business enterprise, insurance company, etc. are struggling hard to make a living. For comprehensive statistical material, broken down by states, *see* Kilian (n. 180), pp. 347 et seq.; cf. also the figures in von Münch (n. 174), pp. 56 et seq.

197. For details, *see* Kilian (n. 180), pp. 248 et seq.

198. On all questions concerning and surrounding doctoral degrees in Germany, *see* Ingo von Münch & Peter Mankowski, *Promotion* (2013); cf. also Kilian (n. 180), pp. 231 et seq. The number of successfully completed proceedings for the degree of doctor of laws (Dr iur.) has constantly increased from 511 in 1985 to 1,906 in 2005. Since then, the number has decreased; in 2013 the figure was 1,438.

199. Max Planck Institutes are a unique feature of the German academic landscape. They are independent bodies under the umbrella of the Max Planck Society, a private organization mainly financed by the State. The mission of these Institutes is foundational research. Throughout Germany, there are eight Max Planck Institutes entirely or partly devoted to law.

a variety of presentation lectures, the 'private lecturer' (*Privatdozent*) receives his first 'call' to a professorship or chair. (As his reputation spreads, he will apply to, and may expect to receive offers from, other universities.) A healthy convention requires faculties to choose applicants from outside rather than to appoint in-house candidates. By the time an academic starts teaching as an associate or full professor, he is usually between 35 and 40 years old. He is exceptionally well qualified (as a researcher; much less so as a teacher), has written two major monographs as well as a variety of articles, case notes, and book reviews; but he has never been in a position of independent responsibility, academic or otherwise.

[F] Changes

The peculiarities of the German legal training system, particularly its rigid regulation by the State and the system of State examinations, have largely, so far, prevented the forty-five law faculties in Germany from competing with each other by developing their own characteristic profiles. Students, by and large, receive the same type of legal training everywhere. They tend to choose a university because it is in an attractive city or close to the mountains, because it has a long tradition (or, conversely, because it is one of the new universities with, possibly, more modern buildings and better equipment), because it is very big (and can thus offer a broad variety of optional courses and 'focus areas') or because it is fairly small (which makes it easier to establish contacts between staff and students), because it is the place where their parents have studied, where the traditional student fraternities continue to exist or, very often, simply because it is close to home.[200] Law faculty rankings have started to be published in the second half of the 1990s; however, they are widely regarded as not very sophisticated and as methodically suspect. Teaching evaluations have also only established themselves comparatively recently.

The reform legislation of 2003 has, however, made a number of changes to the traditional system.[201] It has attempted to provide a better preparation for private legal practice as a *Rechtsanwalt* and (cautiously) to emphasize the international and interdisciplinary dimensions of the law. In particular, it has brought about a significant change in the rules for the first examination. For 30% of the aggregate mark, mentioned above, now result from grades determined by the individual law faculties in their own academic responsibility and concerning 'focus areas' (*Schwerpunktbereiche*) offered as part of the *curriculum* and to be chosen by every student. (Before the reform, the examination in an optional subject had been part of the normal first state examination.) The grades obtained for the university part of the first examination are significantly better than those in the State examination relating to the obligatory subjects (5.0% as

200. For a characteristic comment, *see* Victor Ehrenberg, in: Hans Planitz (ed.), *Die Rechtswissenschaft der Gegenwart in Selbstdarstellungen*, vol. I (1924), p. 60: 'When would German law students ever have been guided, in the choice of their university, by the quality of a faculty?'

201. For an assessment, *see* Ute Mager, 'Die Ausbildungsreform von 2002: Ziele, Inhalte, Erfahrungen und Folgerungen für weitere Reformen', in: Baldus, Finkenauer & Rüfner (n. 173), pp. 239 et seq.

opposed to 0.1% 'very good'; 19.4% as opposed to 2.9% 'good'; 32.3% as opposed to 13.5% 'fully satisfactory' for the year 2015).[202]

This is the reason why the university component of the first examination, which is shown separately on the first examination certificate, is often taken less seriously by prospective employers, scholarship agencies, etc. The impending reform of the 2003 reform[203] thus intends to reduce its weight from 30% to 20%; in addition, it sets out to standardize the way in which the law faculties organize the 'focus areas' and assess their students' performances. And it sets out to do what has, again and again, been demanded: to reduce the range of obligatory subjects required for the two legal examinations.

But there have been other important developments affecting legal education and the legal professions. In October 2000 the first private institution offering legal education in Germany was opened. The Bucerius Law School in Hamburg is financed largely by a wealthy private foundation (*Zeit-Stiftung*) but also, partly, by tuition fees paid by its students and funds raised from law firms and other sponsors. It offers an interesting alternative to what used to be a monopoly on legal education by the traditional State universities[204] and has quickly acquired an excellent reputation. Also, recently, the Federal legislature has attempted to downgrade the significance of the *Habilitation* for an academic career.[205] German law faculties, none the less, effectively continue to insist on a second major monograph as a prerequisite for appointment to a chair; for the time being, they even continue with their traditional *Habilitation*-procedure. In addition, another career-track has been opened up for academics by introducing so-called junior professorships.[206] The profession of private practitioners in law (*Rechtsanwalt*) has also changed significantly over the past twenty-five years. New forms of co-operation between *Rechtsanwälte* (such as the establishment of a company with limited liability)[207] and between *Rechtsanwälte* and members of related professions (such as tax consultants or accountants: partnership association)[208] have been established. Legal practitioners may now advertise their services (though the – dispassionately drafted – advertisement may only contain factual information and must relate to the professional activities of the practitioner or his firm),[209] and they may apply for the title of *Fachanwalt* (i.e., legal practitioner in a specialized field of expertise).[210] Legal practitioners from Member-States of the European Union may

202. Bundesamt für Justiz, 'Ausbildungsstatistik', available online. The aggregated grades for the first examination in total are, for 2015: 0.13% 'very good'; 2.94% 'good'; 13.52% 'fully satisfactory', 27.6% 'satisfactory'; 25.2% 'sufficient'; 30.6% 'failed'. There were a total of 12.744 participants.
203. *See supra*, n. 181.
204. *See* von Münch (n. 174), 31 et seq., 82 et seq.; Sascha Leske, 'Bucerius Law School in Hamburg – Ein neuer Weg in der Juristenausbildung', *Juristische Schulung* 2001, 414 et seq.; Christoph Luschin, 'A German Ivy: The Bucerius Law School', Southwestern Journal of International law 19 (2012), 1 et seq., 20 et seq.
205. § 44 *Hochschulrahmengesetz*.
206. §§ 45, 47 *Hochschulrahmengesetz*.
207. §§ 59c et seq. *Bundesrechtsanwaltsordnung*.
208. *Gesetz über Partnerschaftsgesellschaften Angehöriger Freier Berufe* (1994).
209. §§ 6 et seq. *Berufsordnung für Rechtsanwälte*.
210. *Fachanwaltsordnung* (1999).

under certain circumstances practise in Germany without having passed the First and Second State examinations.[211] Most importantly, perhaps, a wave of mergers, first between German firms but then also increasingly between German and international law firms, has swept over the legal profession.[212] Thus, for example, the firm of Freshfields Bruckhaus Deringer now consists of over 25 offices (five of them in Germany) with more than 2,500 practitioners (over 500 of them in Germany). Twenty-five years ago, such dimensions were unheard of in Germany. Other German law firms have become part of large transnational alliances.[213]

§1.13 BROADENING THE HORIZON

The growing international orientation of legal practice at the top level reflects a development which has characteristically started to shape private and commercial law over the past thirty or forty years. For private law in Europe has acquired an increasingly European character.[214] The Council and the Parliament of the European communities have enacted a string of directives deeply affecting core areas of German law.[215] Increasingly, therefore, rules of German law have to be interpreted from the point of view of the relevant community legislation underpinning it.[216] The case law of the European Court of Justice, too, acquires an ever greater significance for the development of German private law. For some time, the prospect of a European contract code has seriously been pursued;[217] and even if that project has now collapsed, it has left behind a number of 'textual layers', i.e., successive attempts to establish academic restatements of European contract law.[218]

The internationalization of private law is also vigorously promoted by the uniform private law based on international conventions covering significant areas of commercial law. The United Nations Convention on Contracts for the International Sale of Goods, in particular, has been adopted by about eighty-five states (amongst

211. This is as a result of the Directive of the European Union on the Right of Establishment of Legal Practitioners (1998); on which *see* Martin Henssler, 'Der lange Weg zur EU-Niederlassungsrichtlinie für die Anwaltschaft', *Zeitschrift für Europäisches Privatrecht* 7 (1999) 689 et seq.; von Münch (n. 174), 65 et seq. (who also lists the admission requirements in Germany for practitioners from other EU states).
212. *See* von Münch (n. 174), 71 et seq.
213. For the alliance operating under the name CMS, *see* von Münch (n. 174), 73.
214. *See*, e.g., Nils Jansen, 'European Private Law', in: *Max Planck Encyclopedia* (n. 3), 637 et seq.
215. For private law, *see* the directives collected in Oliver Radley-Gardner, Hugh Beale & Reinhard Zimmermann, *Fundamental Texts on European Private Law* (2nd ed. 2016).
216. *Supra* n. 118.
217. *See*, for example, Jürgen Basedow, 'Das BGB im künftigen europäischen Privatrecht: Der hybride Kodex', *Archiv für die civilistische Praxis* 200 (2000) 445 et seq.; Martin Schmidt-Kessel, 'European Civil Code', in: *Max Planck Encyclopedia* (n. 3), 153 et seq.; Horst Eidenmüller et al., 'The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law', *Edinburgh Law Review* 16 (2012) 301 et seq.
218. Nils Jansen, *The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective* (2012); Reinhard Zimmermann, '"Wissenschaftliches Recht" am Beispiel (vor allem) des europäischen Vertragsrechts', in: Christian Bumke & Anne Röthel (eds), *Privates Recht* (2012), pp. 21 et seq.

them twenty-one member-states of the European Union); in Germany it entered into force on 1 January 1991 and has started to generate a significant amount of case law.[219] In the first (legal) examination familiarity with the basic principles of European Union law is required.[220] A significant number of students spend a period of one or two semesters at a law faculty in another member-state of the European Union under the auspices of the successful Erasmus/Erasmus + programmes.[221] Also, it has become very popular, particularly among young lawyers with top grades and aiming for employment in one of the big law firms, to acquire an additional, post-graduate qualification in other countries, particularly in Great Britain or the United States.[222] Conversely, the number of foreign students at German law faculties is increasing. More and more faculties have sought to obtain a 'Euro'-profile by offering a broad range of language courses, by establishing international summer schools or integrated programmes on an undergraduate and post-graduate level,[223] by flagging out chairs for European private law, or European legal history, or by creating research centres in European private law. Legal periodicals have been established pursuing the objective of promoting the development of a European private law[224] and textbooks have been written analysing particular areas of private law under a genuinely European perspective and dealing with the rules of German, French, or English law as local variations of a common theme.[225] Interest has been rekindled in the 'old' European ius commune, and legal historians are busy rediscovering the common historical foundations of modern private law and restoring the intellectual contact with comparative and modern private lawyers.[226] Yet, all these developments have not fundamentally changed the specifically German approach towards legal education, legal thinking, and legal writing. A comprehensive internationalization is still one of the challenges faced by legal scholarship in Germany today.[227]

219. *See* the regular reports by Ulrich Magnus beginning in *Zeitschrift für Europäisches Privatrecht* 3 (1995) 202 et seq.; most recently, *see Zeitschrift für Europäisches Privatrecht* 25 (2017) 140 et seq.
220. Heino Schöbel, 'Privatrecht und Europarecht in der Ersten Juristischen Staatsprüfung', Zeitschrift für Europäisches Privatrecht 3 (1995) 139 et seq.
221. Generally on study periods abroad, as far as law students are concerned, Kilian (n. 180), 115 et seq.
222. For details, *see* Kilian (n. 180), pp. 248 et seq.
223. *See*, for example, Stefan Grundmann, Jacqueline Dutheil de la Rochère & John Phillips, 'The European Law School (Network)', *European Review of Private Law* 2009, 249 et seq.
224. Zeitschrift für Europäisches Privatrecht, since 1993; cf. also Europäische Zeitschrift für Wirtschaftsrecht, since 1989.
225. *See*, in particular, Hein Kötz, Europäisches Vertragsrecht (2nd ed. 2015) (English translation by Gill Mertens & Tony Weir, European Contract Law, 2nd ed. 2017); cf. also Christian von Bar, Gemeineuropäisches Deliktsrecht, vol. I (1996); vol. II (1999) (English translation: The Common European Law of Torts, vol. I (1999); vol. II (2001)); Peter Schlechtriem, *Restitution und Bereicherungsausgleich in Europa*, vol. I (2000); vol. II (2001); Filippo Ranieri, *Europäisches Obligationenrecht* (3rd ed. 2009).
226. *See*, e.g., Reinhard Zimmermann, 'Europa und das römische Recht', Archiv für die civilistische Praxis 202 (2002) 243 et seq.
227. For an instructive analysis of the strengths and weaknesses of legal scholarship in Germany, *see* the study by the *Deutscher Wissenschaftsrat*, referred to *supra*, n. 180.

APPENDIX

It may not be inappropriate to append to this essay some remarks of a more practical nature. They are designed to help foreign lawyers orient themselves in the complex world of German legal materials.

The only formal source of law, of course, is legislation (including subordinate legislation). All statutes are published in the official law gazette of either the Federation (*Bundesgesetzblatt*) or the State by which they have been issued. Since, however, it is much too cumbersome always to refer to the law gazettes, private publishing houses sell compilations of the most important statutes. Two of the compilations are owned by virtually every German lawyer who has ventured beyond the first or second year of study: *Schönfelder, Deutsche Gesetze* (containing around 100 statutes in the fields of private law, commercial law, criminal law, and procedural law, including, for example, the BGB (*Bürgerliches Gesetzbuch* – German Civil Code), HGB (*Handelsgesetzbuch* – Commercial Code), and StGB (*Strafgesetzbuch* – Criminal Code))[228] and *Sartorius, Verfassungs- und Verwaltungsgesetze der Bundesrepublik Deutschland* (with the most important federal statutes in the fields of administrative and constitutional law)).[229] *Schönfelder* and *Sartorius* are hefty loose-leaf tomes in a characteristic red cover. They are updated several times a year; and the regular sale of the supplements earns their publishing house a fortune. Since administrative law is largely a matter for the individual States, each of them has its own equivalent of the *Sartorius*; the one for Bavaria, for instance, is called *Ziegler/ Tremel, Gesetze des Freistaates (!) Bayern* (loose-leaf). Within their area of specialization, lawyers normally also make use of more convenient, pocket-size editions of certain of the central statutes.[230]

German statutes are normally subdivided into sections, referred to as *Paragraph* (§); the German Constitution (*Grundgesetz*, or 'Basic Law'), however, is composed of the more dignified 'articles'. Each section (or article) may be broken down into sub-sections (*Absatz*; indicated, for short, by a Roman numeral), each sub-section into sentences (*Satz*; indicated by an Arabic numeral). Thus, for instance § 305 I 1 BGB refers to section 305, first sub-section, first sentence of the German Civil Code.

Most of the important cases of the various Federal courts are published in a quasi-official series edited, normally, by members of the respective court; thus, there are *Entscheidungen des Bundesverfassungsgerichts* (abbreviated *BVerfGE*, followed by the volume number and page reference),[231] *Entscheidungen des Bundesgerichtshofes in Zivilsachen*[232] (*BGHZ*), *Entscheidungen des Bundesgerichtshofes in Strafsachen*

228. Schönfelder, *Deutsche Gesetze: Sammlung des Zivil-, Straf- und Verfahrensrechts* (loose-leaf ed.), C.H. Beck, Munich. In January 2002, Schönfelder was effectively split into two volumes (though the second one is merely entitled 'supplementary volume') with a number of statutes of particular relevance for practice as *Rechtsanwalt*. The main volume consists of around 4,000 pages. The 167th supplement has appeared in January 2017.
229. Also published by C.H. Beck, Munich. There are two further volumes for International Treatises and European Union Law (Sartorius II) and for further administrative statutes (Sartorius III). Also for the original Sartorius (I) there is now a supplementary volume.
230. *See*, e.g., *BGB – Bürgerliches Gesetzbuch (Beck-Texte im dtv)* (79th ed. 2017).
231. Mohr Siebeck, Tübingen, most recently vol. 141 (2017).
232. Karl Heymanns Verlag, Köln-Berlin; currently (spring 2017) in its 210th volume.

(*BGHSt*), *Entscheidungen des Bundesarbeitsgerichts (BAGE)*, etc. Most of the decisions published in these series are also reported, though often in a shortened version, in one or several law journals. These journals sometimes also publish cases not included in the 'official' series and important cases from the lower courts. Today, the more recent decisions (in the case of the Federal Constitutional Court from 1998, in the case of the Federal Supreme Court from 2000) are available online.

Legal writing usually takes one of five forms: commentaries, textbooks, monographs, legal articles, and case annotations. Commentaries (*Kommentare*) are one of the most useful and convenient research tools.[233] They relate to a specific code or statute and follow the order of §§ or Articles of that code or statute. Each section is first cited verbatim and then elucidated in detail. The relevant case law and legal literature is referred to and the reader is thus presented with a more or less comprehensive picture of the *interpretatio moderna* of that § or Article as well as with the relevant sources for further research. The commentator is not normally supposed to advance extravagant opinions of his own.

As far as the BGB is concerned, we find commentaries of all shapes and sizes: many more than one could ever wish for.[234] The standard commentary in one volume is *Palandt*. It has become a household name and is certainly one of the more remarkable institutions of German legal culture in the field of private law. Since the date of its first appearance in 1939[235] the team of commentators has undergone repeated changes; at the moment it is composed of ten authors, one of them a professor of Bucerius Law School, two notaries public, five (active or retired) presiding judges in Regional Appeal Courts, and one judge in the Federal Supreme Court. Every year a new edition is produced[236] and since almost every judge and every private practitioner in the field of private law will want to have his own copy, we are dealing here with another big money-spinner for Germany's leading legal publisher. One copy of the massive grey tome (3,247 pages in small print) sells for €115.00. The *Palandt* is a stunning achievement. It is always up to date, it is as concise as it is comprehensive and it is well-balanced in its views. On the other hand, however, it is almost incomprehensible to outsiders since it uses a very refined and technical telegraphese and is riddled with unfamiliar abbreviations.[237] The small print type does not enhance its readability either. *Palandt* focuses on court decisions (as constituting the law in action); references to legal literature are sparse. It is the quintessential practitioner's commentary which

233. For the cultural history of the commentary, *see* David Kästle-Lamparter, *Die Welt der Kommentare* (2016).
234. For criticism, *see* Reinhard Zimmermann, 'Juristische Bücher des Jahres', *Neue Juristische Wochenschrift* 2011, 3557.
235. On the history of *Palandt*, *see* Dieter Medicus, 'Palandt – 50. Auflage', *Neue Juristische Wochenschrift* 1991, 887 et seq.; cf. also the *Festschrift zur 75. Auflage des Kurz-Kommentars Palandt, Bürgerliches Gesetzbuch* (2016). Otto Palandt (1877–1952) was a prominent lawyer who, after 1933, turned to national socialism; he thus became head of department in the Imperial Ministry of Justice and President of the Imperial Legal Examination Board.
236. Currently the 76th ed. 2017, is in use.
237. For a typical example, *see* Überbl v § 194, n. 17: 'Die VerjEinrede ist unbeachtl, wenn sie gg das Verbot unzuläss RAusübg verstößt'; for criticism, *see* Jürgen Basedow, 'Euro-Zitrone für den Palandt?' *Zeitschrift für Europäisches Privatrecht* 1 (1993) 656 et seq.

has, however, managed to become equally indispensable for the German academic. With only some slight exaggeration it may be said: 'Quidquid non agnoscit Palandt, non agnoscit curia'.

In its own way also a masterpiece of conciseness is *Jauernig* (now in its 16th edition, 2015), a short commentary written by a team of five authors (all of them professors). It provides a reliable overview of the current state of case law and legal doctrine and is written in full sentences and without too many abbreviations. Thus, it is probably today the most convenient, and affordable, key to modern German private law for neophytes.

The *Münchener Kommentar zum Bürgerlichen Gesetzbuch* has managed to establish itself, within a surprisingly short time, as probably the leading multi-volume commentary.[238] The seventh edition started to appear in 2015 and will consist of twelve volumes with a total of about 28,000 pages; each of these volumes is written by between ten and twenty professors and senior practitioners.

A commentary on an even larger scale than *Münchener Kommentar*, and a phenomenon in its own right, is *Staudinger*. It was initiated by Julius von Staudinger (1836–1902), a senior practitioner, in 1898, i.e., two years before the BGB entered into force. After it had taken twenty-six years to complete the 12th edition, the publishers (Sellier – de Gruyter) have given up the idea of publishing new editions; instead, the volumes are individually revised. Thus, for example, the volume on testamentary executors (§§ 2197–2228 BGB) has appeared simply as 'Neubearbeitung 2016' (revised edition 2016). Today, the *Staudinger* consists of 105 volumes, with a total of more than 70,000 pages. A phalanx of around 180 commentators is involved in this gigantic project. Staudinger, of course, provides a most thorough compilation of material and extensive analysis. Many of its volumes contain masterly expositions which leave no question unanswered. The commentary to § 823 BGB (by Johannes Hager),[239] for example, comprises over 1,300 marginal notes, spread over 1,100 pages.[240]

Commentaries make it fairly easy to discover the law on a particular topic; provided, of course, one knows where to look. This, in turn, depends on some degree of familiarity with the BGB. Essentially, of course, a commentary follows the sequence of its sections. When it comes to legal doctrines *praeter legem*, however, certain conventions have evolved as to where they are discussed. Thus, for example, the contract with protective effect vis-à-vis third parties is normally discussed within the context of § 328 BGB (contract in favour of a third party), forfeiture (*Verwirkung*) in the context of § 242 BGB (good faith), and transfer of ownership *in securitatem debiti* in the context of § 930 BGB (transfer of ownership by constructive delivery).

238. It is edited by Franz Jürgen Säcker, Roland Rixecker, Hartmut Oetker & Bettina Limperg, i.e., two professors, the President of the Regional Supreme Court of the Saarland, and the President of the Federal Supreme Court; and it is published by C.H. Beck, Munich.
239. § 823 A–D (revised ed. 2017), § 823 E-II, 824, 825 (revised ed. 2009).
240. Spin-offs of the Staudinger are a useful synoptic overview of the various amendments that the provisions of the BGB have undergone between 1896 and 1998 (*BGB-Synopse 1896–1998* (1998)), and a collection of treatises on the cornerstones of private law: Michael Martinek (ed.), *Eckpfeiler des Zivilrechts* (revised ed. 2014/2015).