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Savigny and Adam Smith*

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Private law has to do with the rights and duties between private individuals, people who do not face each other in the garment of government authority.[I] Public law, in contrast, governs the relations between the public associations and their bodies as well as their members.

It follows from this that private law regulates private life, public law regulates public life. Legislation must, therefore, when it pursues public ends – i.e. political, economic, social ends – seek the means not in private law, but in public law.

This is how one may be allowed to summarize the ideas that dominate our present jurisprudence and modern legislation. And the clear distinction between private law and private life on the one hand and public law and public life on the other hand certainly also has something plausible and pleasing for wide sections of the population. What the buyer can demand from the seller if the goods prove to be defective, or if dry rot is found in the purchased house, can become quite important for the private lives of the parties involved. But for the state, for the yield of national production, and for the stratification of people in society, it is probably quite insignificant. Whether I can forbid my neighbor to obstruct my windows or build a foul-smelling soap factory on his property significantly affects his and my private interest; but how does this concern politics, social policy or political economy?

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* Translated by Karen Horn.
1917. "Savigny und Adam Smith." *Schmollers Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reiche* 41 (I): 135 – 51. A lecture as prolegomenon on investigations under the title: "Privatrecht und Sozialpolitik. Studien zur Rechtsgeschichte Deutschlands im 19. Jahrhundert (Private Law and Social Policy. Studies of the Legal History of Germany in the 19th Century)."

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Yet if one tightens one's grip but a little, one feels the beautiful, smooth distinction crumble.

Slavery, the ownership of human beings, is certainly a matter of private law, for it is a matter of relationships between people, none of whom appear in the garment of government authority. If slavery is abolished and replaced by wage contract law, this undoubtedly exerts a powerful influence on the private lives of the previous masters and slaves. But one must only think of the negro emancipation in the United States to acknowledge the importance of such a transformation of private law for the economy and all cultural life. Presumably, the position of the United States in the current World War would even be a substantially different one, had the aristocracy of the Confederacy not been overcome by Yankeedom through a change in private law 50 years ago.

Now this is of course a very rough example, and a further example is only slightly more refined.

Inheritance law, clearly a part of private law, determines what happens with the farmer's property upon his death in different parts of Germany to different extents. In one part of the country, the children share the father's property equally, while in another the eldest or the youngest son obtains the farm, and the other children are compensated. The effects of this difference not only manifest themselves in the fates[II] of the individuals. Indeed, one can recognize in the farmhouses whether the equal division of Roman and French law[III] applies in the area or whether impartible German inheritance law[IV] applies. The type of farming and the productivity of agriculture depend on it; the social and political role of the peasantry is conditioned by it. Whether one system or the other regulates the succession of farmers is also of crucial importance for the expansion of the proletariat and thus for the development of industry. And just as the inheritance law of peasants exerts far-reaching effects on economic, social, and political conditions beyond the sphere of individual interests, inheritance law is of trenchant importance for the honor and power of the landowning nobility. In order to uproot the Bourbon nobility of France, the Roman principle in the *code civil* that the father's estate should be distributed equally among his children was increased by Napoleon I to the rule that every child can demand an equal share of the father's property in land, and for the sake of this rule he particularly recommended the introduction of the *code civil* to his brother Joseph in Naples, since it would undermine the power of the nobility there. A few years later, however, when Napoleon deemed it important to give his dynasty the firm support of a new high nobility, he replaced the inheritance law of the *code civil* with the private law institute of the family fideicommissum[V] favoring his dukes and princes.

I cannot now try to explain to what extent private law, according to historical experience, affects public life. There is no space for this, and the time for it has not yet come. We still know very little about these relations. At some points they impose themselves even upon a superficial gaze, at others we are informed

about them through studies by economic and legal historians. But comprehensive studies focusing on minutiae are lacking. This is what allows the opinion to prevail that only a few parts and main principles of private law have an influence on the economy, the structure, the entire political and cultural life of the nation, while the public is only interested in the great mass of private law to the extent that it has to wish for some regulation – no matter what the content – for the maintenance of peace and order. This is the case, for example, for a traffic regulation stipulating that cars should avoid each other on the right or on the left; there is such a need, but it does not matter whether avoidance on the right or on the left is prescribed. If private law were examined down to its finest subcomponents as to how it relates to public life, I believe that, on the contrary, one would find that the content of the private law system is irrelevant to public life only in few places. One must, however, not expect sudden and conspicuous changes in the lives of a people from modifications of private law. Amendments[VI] in constitutional law or criminal law may lead to a new course in the lives of a people just as landslides or earthquakes do for a river. Modifications of private law tend to make themselves noticeable only after decades, with the help of jurisprudence.

Whatever the case may be, the welcome distinction between private law-private life and public law-public life is not correct if, which is beyond doubt, private law affects public life at least in some parts. This is also conceded when it is often said that private law or civil law *primarily* serves private interests, and only secondarily public interests. I leave it unanswered whether it is correct to see the main effect of private law in its influence on private interests and only as a side effect in the influence on public well-being. Perhaps it is more correct to seek in the *salus publica* the purpose and justification of all norms, and the difference between private law and public law only in the difference between the *means* used for the same purpose. In any case, the principle that legislation must only use public law to promote public life, not also private law, cannot be legitimized simply as a logical consequence of the different characters of the two types of law, as soon as it is recognized that norms of private law influence public life, albeit only incidentally. It may be said that coke as a heating medium is the main product of the coking of coal, while other substances obtained during the coking process can be called by-products. Yet it occurs that such by-products become particularly valuable and more valuable than the heating medium itself. Will anyone come up with the idea of saying: That because a substance required for the production of ammunition is only a by-product, coking must not be used for the purpose of extracting that by-product? The main purpose and effect of the railways is certainly the promotion of passenger and freight transport. Does this imply that strategic railways cannot be built? Should one be allowed to say with greater justification: That since we regard influencing public life only as a side effect of private law legislation, it must not be used for the sake of this side effect?

Legal scholars, philosophers, and economists nevertheless think in this manner, even if they only rarely pronounce what appears to be self-evident, and our legislation pays homage to the principle that the means for public purposes should not be sought in private law, but only in public law. Election laws and administrative reforms are intended to improve political life, customs and tax laws to help the economy, labor insurance and labor protection laws to heal social misgivings. Here and there, of course, our legislation allows itself exceptions. But where economic and socio-political considerations are to be found in the motives of private law, they are always merely shy attempts at reparing minor damage to our economic and social conditions; and signs of a bad conscience often reveal that legislators, by using private-law means for public purposes, believe they are doing something that is actually not appropriate. When private law means are readily available to satisfy public needs, this shyness is usually overcome. But it is too strong for the legislators to feel legitimized and prompted to thoroughly examine private law and consider whether it can provide effective means for the uplifting of the economy and the recovery of political and social life. If it were otherwise, our economic and social policies would presumably have achieved better results than they can boast so far.

In view of this and of the tasks that we will see ourselves confronted with by the war, perhaps the question to which a *preliminary* answer is to be sought here, the historical question, finds some interest: How did the belief arise that legislation *must* not use the individualistic means of private law for public, i.e. supraindividualistic purposes, how did it come to dominate?

I am not asking: Since when has legislation for public purposes preferred to use public law means? I would not know how to give a specific answer to that. This has probably always been the case since legislation gained strength[VII] in the German cities and territories. Whenever public grievances made it necessary for legislation to intervene, one always sought assistance through criminal and police laws, and little thought was accorded to private law. For the police state of the 18th century this was nearly self-evident. The same applied to the jurists, the majority of whom concluded from the fact that private law delimits individual spheres of interest that it could not have any effect beyond the individual interests. If private law *cannot* influence public conditions, the question of course never even arises whether legislation *may* use it for public purposes. But for centuries and in increasing numbers there have been people who have learned from practical observation or from history that the shaping of private law, even if only in individual parts and *secundario*, as one used to say, asserts itself in public life. From where, I ask, does the opinion emanate that dominates their minds as well that legislation has to seek the means for public purposes in public law?

One will seldom be able to date the emergence of a maxim dominating the present as firmly as here. In 1814 Friedrich Carl von Savigny wrote his famous

essay on the vocation of our age for legislation, in 1815 he introduced his *Zeitschrift für geschichtliche Rechtswissenschaft* with a programmatic essay, and in 1816 he supplemented these two confessional papers of the Historical School with a number of reviews. In these writings of the years 1814 – 1816, i.e. 100 years ago, Savigny laid the foundation for the dogma that legislation must not use private law means for public purposes.

Savigny had been called to Berlin from the Bavarian town of Landshut in 1810 for the founding of the university. This was the era of Hardenberg's legislation. It was necessary to fill the coffers of the state which had been depressed, impoverished, and reduced in size by the events near Jena, in order to be able to meet the most urgent requirements. In addition to the sale of domains and church property, new taxes were to serve this purpose, and it included abolishing the tax privileges of the nobility. But furthermore, as pronounced by Hardenberg, it was necessary to increase general prosperity in order to place the people in a position to bear the new burdens and to open up the prospect of a happier future. In the October Edict of 1807, Stein already had the king proclaim that it was just as much in accordance with the indispensable demands of justice as with the principles of a well-ordered state economy to remove everything that had hitherto prevented the individual from attaining the prosperity that one was capable of achieving given his powers. At that point already, the farmers' subservience to the manor was being decreed away, along with its restrictions on marriages and freedom of movement as well as with the obligation of the children to become servants, which had hitherto provided the landed nobility with its labor force. The personal freedom of all was proclaimed. Now Hardenberg went further. The new system – so he announced – is based on the ability of every inhabitant of the state, personally free, also to develop and use his powers freely without being hindered by the arbitrariness of another, and that the merit, to whichever estate one may belong, may strive upward without impediment.[VIII] To this end, full freedom is to be granted to industry and agriculture. The peasant shall not merely be personally free, but he shall also receive free property, at least a part of the land formerly belonging to the aristocratic lord, and he shall enjoy the fruits of his property and his work unabridged by services and levies to the landlord, so as to be able to pay more taxes to the state.

Such radical new regulations had to meet with resistance. The nobility of the Mark [Mark Brandenburg, the editors] saw itself threatened in its possessions, its economic mode,[IX] its social and political position. But it was not alone in rebelling against the regulations, and it was not merely naked selfishness that prompted the opposition. Those who wanted to make sacrifices for the sake of their fatherland also did not want to be forced to do so, and some who were not cast to make sacrifices could still not condone the ruthlessness with which the Hanoverian [Hardenberg, the editors] shook the foundations of Prussia's political, economic, and social order. Contrary to Hardenberg's impetuous and vio-

lent rationalism, these interest-driven politics are associated with *Romanticism*. In Berlin, this alliance finds its expression in the Christian-German Table Society. It also found an inconspicuous but influential medium in Heinrich von Kleist's *Berliner Abendblätter*, which, however, the state chancellor had soon killed through censorship. Earlier, he had already suppressed the opposition of the estates by imprisoning their leaders at Spandau fortress without a sentence or justice.

But why do I remind here of what can be read better and in more detail in Meusel's, Marwitz's, and Steig's book about Heinrich von Kleist's Berlin battles? What do Savigny and the view regarding the incompetence of private law legislation vis-à-vis public affairs have to do with all this?

Savigny was a landowner, but his estate was far away from the Prussian border. Although it was of noble origin, the Frankfurt-born offspring of an old Lorraine knightly dynasty had nothing in common with the rebelling Brandenburg junkerdom. He was therefore not one of the interest-driven politicians. He was no politician at all. When one reads his letters, one is surprised to see, even though one knows that political interest and understanding were back then even less widespread in academic circles than today, how completely they are filled with scientific discussions and questions of appointment in those eventful days. And when Savigny later became a Prussian minister, he proved extensively how much the great researcher and teacher lacked the skills to become a practical politician.

Neither was Savigny a real Romantic. Bettina von Arnim has occasionally shown how poorly her rapturously excited Romanticism could be reconciled with Savigny's nobly serene *scientific nature*. Her brother Clemens Brentano once turned to his scholarly brother-in-law for help when he was visited with the urge to study jurisprudence in order to rejoice in the spirit of Roman law. Savigny then pointed him to a number of works in many volumes; he should first study these. One can imagine how little such *thoroughness* the Romantic was comfortable with. I am not aware of any statements by Savigny about his relationship to Romanticism. But Savigny, who was one of the first to recognize Ranke's importance, always found his satisfaction in recognizing, in Ranke's sense, how it really was. This entailed close relations to Romanticism, but excluded the proper affiliation with Romanticism.

On this basis it will be understandable that it was Savigny who – together with Brentano, Achim von Arnim, and Adam Müller – founded the Christian-German Table Society, and that the program of the Historical School grew out of the conservative Romantic opposition to Hardenberg's absolutist rationalism.

On this soil one has to seek the source of the thought that the law must not arise from the teleologically determined will of the legislator, that *the legislator only has to observe and make plain what the spirit of the nation, necessarily*

determined by the entire past, has formed as law. And the nature of the soil is decisive for the version in which the spring brings the water to light. The veins that feed the water to the spring lead far away. It was not only in Berlin that Savigny was overcome with reluctance against all attempts to reshape the world by laws according to a plan supposed to make a people happy, irrespective of whether they came from above or below. The French Revolution and the despotism that Savigny had seen at work in the Bavaria of Count Montgelas had already achieved this before, and personal antipathies against innovators such as the jurists Gönner and Feuerbach had increased to enmity the aversion to all revolutionary impetuosity. From the history of Roman law he had learned to despise its late period replete with laws, and to appreciate the older development of Roman law wherein the law played a minor role, as also occurred in the German Middle Ages. In the rejection of natural law, in which for centuries the basic ideas governing legislation had been found as much as the limits of legislative power, others had preceded him. The emphasis on emergence as opposed to spontaneous, purposeful creation[X] had been brought to him by men of very different kinds, by the historian Spittler, the Catholic theologian Sailer, the statesman Rehberg, in the background probably also by Montesquieu, Justus Möser, Herder, and Goethe's brother-in-law, Schlosser. In Berlin, the influence of Schelling and, above all, of Niebuhr was added. But it was only the contrast to Hardenberg's rationalist legislation, in which Savigny joined conservatism and Romanticism, that helped the quietly gathered strength to achieve its breakthrough. The confessional writings of the Historical School emerged from this connection. Recently, a political economist was quite right to state regarding the emergence of the Historical School of Law:

> It is vital human questions that move the spirits igniting the passions; questions of existence are on the agenda here, not just theoretical questions, but extremely important problems of practical action.

Had Savigny not cleverly concealed the moving passion, the legal scholars would probably also have realized long since that the program of the Historical School originated in political moods and resentments of those days, and that for this reason, as much as one may sympathize with it today given similar moods and resentments, it cannot make any claim to universal validity.

But if I now further asserted that the program of the Historical School also laid the foundation for the dominant doctrine that *private* law, in contrast to public law, should not be used as a means for economic, social and political purposes according to the will of the legislator, this would not yet be justified by what has been said.

However, if private law is only allowed to extend roads that have already been taken up by traffic, this means that private law must not aim at the satisfaction of economic, social, and political needs – just as the principle that the railways must follow the given traffic routes would exclude the construction of

railways for purposes of national defense or for the improvement of low-traffic areas. For just as the roads between towns, villages, and farms which are formed by people's walking and driving or are laid out by neighbors are not intended and little apt to promote the trade or agriculture of the people as a whole, or to satisfy the demands of the state in war and peace, so the norms of private law created by customary law are seldom oriented to the welfare of the community as a whole, and only by chance are they capable of bringing about or facilitating progress in the economic, social, and political life of the people. Were Savigny's teaching such that *private law* only has to implement customary law, it would appear harmless to associate with it the principle that *private law* should not presume to seek influence in public affairs. But is Savigny's view limited to *private law* legislation, is that all he wants to place in chains while giving free rein to public law legislation?

I must admit that this is not the case. In the *Vocation of our Age*, Savigny speaks a lot and predominantly of "civil law." But although he had obtained his habilitation in Marburg for criminal law, Savigny was a Romanist and as such he was primarily referred to the part of the law that we today call civil law or private law.

The essay of the *Vocation of our Age for Legislation* was directed against a brochure of the Heidelberg pandectist Thibaut under the title *On the Necessity of a General Civil Code for Germany*. With this, Savigny was given further reason to defend civil law, preferably, against codifying legislation and against the interference of legislation in general.

However, Thibaut had also counted criminal law and procedural law as belonging to civil law, which we now classify as public law. The boundary between civil law and public law, which our current doctrine delineates, was by no means clear at the time. And to the uncertainty in the use of language corresponded an uncertainty in substance. Public law and private law have often been indistinguishably interwoven since the Middle Ages. In the relations between the lords of the manors and the peasants which Hardenberg's legislation attacked, private law and public law were intertwined as well.

It is thus equally understandable that Savigny mainly thinks and talks about private law, and that his view of the tasks of legislation is by no means limited to private law. The introductory essay of the *Zeitschrift für geschichtliche Rechtswissenschaft* also states the following in general: "The Historical School assumes that the material *of the law* is given by the entire past of the nation, though not by arbitrariness in that it could happen to be this or another by chance, but instead as emerged from the innermost essence of the nation itself and its history. The special activity of each age – in particular the business of legislation – must be directed towards seeing through, rejuvenating, and preserving this material given with inner necessity." Nowhere is there mention, and be it with merely one word, of a contradiction between private and public

law legislation, of a divorce between public and private life. On the contrary, Savigny will have been in complete agreement with what Schelling had already written in 1803:

> Private life and with it also private law have separated from the public; but the former has, separated from the latter, so little absoluteness as is the case in nature with the being of the individual bodies and their special relationship to each other.[XI] Since, in the withdrawal of the general and public spirit from individual life, the latter has been rendered as the purely finite side of the state and completely dead, it is quite impossible to apply any ideas to the regularity which prevails in it, merely at most a mechanical ingenuity[XII] to explain its empirical reasons in individual cases or to decide controversial cases.

How then should it be in Savigny's writings that the basis[XIII] was to be found for the doctrine prevailing today according to which only public law, not private law, is available to legislation for public purposes?

A second concern is added. One can read quite often that Savigny's view about the emergence of law found almost universal approval quite quickly. But that is not true. Prussian conservative politicians such as Ancillon, Stahl, and Radowitz have sought to use it against constitutional amendments, i.e. in the field of public law. It also gained followers on lecterns outside Prussia; in the codification question an influence can be shown, for example, on the government and estates of Württemberg. A professor even popularized it in novels. In wider circles, however, it has not become known, let alone gained understanding and influence. Here and there Savigny's view may have contributed to slowing down the legislation against which it was directed, but it has not been able to halt the ultimate success of such legislation. In the whole of Germany, contrary to Savigny's recipe, the manorial rights have been abolished. How should something that proved so powerless in the first half of the 19th century be effective in general opinion at the beginning of the 20th century?

Nevertheless, I abide by this position: It is to Savigny's programmatic writings from 1814–1816 that the prejudice goes back which at present excludes private law legislation from the care of public interests. I would like to indicate how this has been done, as well as it is possible in due brevity.

Savigny turned against Hardenberg's legislation, but behind this legislation stood Adam Smith's economic liberalism. Adam Smith's teaching called for legislation to ruthlessly remove obstacles to the free play of forces. That is why his followers in Germany, among them many Prussian officials, demanded above all the abolition of the privileges of the lord of the manor, which burdened the peasants and inhibited their agriculture, no matter whether they had formed themselves into private or public law rights. While the individualistic pursuit of justice for the oppressed peasant may have often played into this, the driving force behind the great movement that achieved victory in the agrarian reform of the first half of the last century was, however, the optimistic belief

that equal rights for all would make the entire nation rich and happy. Equal rights for all, however, as is well known, did not mean in the eyes of the great Scotsman that there should also be equal claims for all to the commodities of this world. Only those norms were to be cleared away which gave the members of one estate a competitive advantage and thus put the members of other estates at a disadvantage. The existing legal order, however, insofar as it made the same provisions for all human beings and did not impose unnecessary restrictions on economic freedom, was to remain untouched, even if it had led and inevitably continued to lead to a great diversity of life endowments. Poor and rich, creditor and debtor, owner and leaseholder should and must continue to exist; in the eyes of the Scottish philosopher this was not just good, but self-evident – it was laid down in an eternal *natural law*. The political economy of Adam Smith, the professor of moral philosophy, has grown out of the philosophy of natural law. Economic life is to run free from any bondage and restriction by human statutes, but in stating so, the moral philosopher presupposes, as free of any doubt, that the legal order remains unaffected. He considers that the legal order is based on nature herself and therefore secured against overthrow or unsettling through human statutes. Whence he drew the natural law order which provides him with the firm basis for the economic system of *laissez-faire* should be quite certain after Hasbach's investigations. It was mainly the natural law theory of the German legal scholar Pufendorf.

Received by many in Germany like a gospel, perhaps not least because they detected familiar undertones, Adam Smith's teachings at first demonstrated their destructive side. After all, people in Germany had suffered even more than in England from the differences in the laws applicable to the nobility, the citizens, and the peasants, to the members and non-members of guilds, and here – completely contrary to there – the burdens which the peasantry had to bear in tithes and compulsory labor were felt to be oppressive and harmful to the community. Liberalism succeeded through protracted battles in which one did not shirk from interfering with legitimately acquired private rights from eliminating the statutes dating back to the Middle Ages and the police state.[XIV] In a sense, one of the adversaries who was overcome was Savigny.

Yet the more economic liberalism achieved this success, the more its other – one might say its conservative – side gained importance. The legal substance which it regarded as sacrosanct from the point of view of natural law was, however, not exactly the same in Germany as for Adam Smith. The natural law ground on which Adam Smith stood was already strongly interspersed with *Roman* elements, although Roman law could not have been known to the British from their own lived experience. But the natural law foundation had been prepared for Adam Smith by Samuel Pufendorf, and Pufendorf, more than many other natural law scholars, consciously or unconsciously, had made his natural law system follow Roman law. In Germany, however, where Roman law had been in force for centuries, it necessarily gained far greater significance.

While the attack of German liberalism had been directed against the special rights of the estates which had been established on *German soil* in the Middle Ages, and against the arbitrariness of the police state, it had found in *Roman* law the foundation, equivalent to the ideal of the equality of rights, removed from all unsettling by natural law. Admittedly, Roman law, in its time, had sanctioned many legal inequalities, too; it treated free people and slaves, citizens of Rome, Latini, and Peregrines, soldiers and civilians, nobles and lesser ones differently. But these legal inequalities had already fallen by the wayside from Roman law on the long road it had travelled before gaining a foothold in Germany. When it came to us, it really did proclaim equal rights for all. What the *corpus juris* determined could be applied without great difficulty to the German conditions of the 19th century, especially since it granted greater freedom of interpretation than the paragraphs of a modern code of law. For even at the time of the Roman empire and of late Roman despotism had the peasant-national law of ancient Rome become a strangely balanced – though colorless – law asking little about the peculiarity of climate, soil, and inhabitants. Endowing this universal Roman law, at least in its basic features, with natural law consecration was nothing new. This had been done by many Romanists when it was brought to them, since unfortunately not even Roman law protects against the narrow-mindedness of those who deal with it. But such Romanists – Savigny was certainly not one of them – would not have been able to provoke the Romanist current that profoundly penetrated legal practice around the middle of the 19th century. It was only now that the principles of Roman law, as presented in lectures and textbooks on the Pandects, gained the validity of eternal legal truths immune to legislative interference; and that which could not be constructed with the means of Roman law was considered to be legally impossible. This was not the work of the Historical School. The members of the Historical School would not have had the power to make these views dominant. But these views also were not theirs. For they denied that there could be a law of reason or natural law that would be decisive always and everywhere, and therefore, insofar as they wanted to remain true to themselves, they could also not proclaim Roman law as a law of reason or natural law. To do so was, instead, the work of German liberalism.

Now Pandect law, in whose principles German liberalism found the natural and therefore inviolable basis of free competition corresponding to its ideal of the same law for all, was *private law*. Whatever the reception of Roman law had brought to the Roman Empire of the German Nation in terms of norms of a public-law character was eliminated by the formation of territorial powers. Apart from private law of Roman origin, only a few general legal questions and legal terms had been left to the Pandects for discussion among the numerous disciplines that had branched off from them over the course of time.

This is how it comes about that, under the influence of liberalism, the view that legislation should not be creative, but merely observing and clarifying, is

limited to private law, which Savigny indeed had in mind foremost, but not exclusively, when he set out this view.

But this is also how it comes about that this view develops into the *dogma* that legislation must not employ private law for public purposes.

As I have already noted above, when the lectures first on constitutional law, then on criminal law and procedural law, and finally on administrative law spun off in the teaching activities of the German universities, the Pandects' lecture was left, apart from the main task of presenting contemporary private law of Roman origin, with the secondary task of making known the basic concepts of valid law. In fulfilling this secondary task, the Pandect professors, of course, also sought its basis in his *corpus juris*. There, right at the beginning of Justinian's *Digests*, he found, written down as a statement made by the jurist Ulpian, the following sentence:

> *Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem*.[XV]

So there it was written in black and white that private law, in contrast to public law, has nothing to do with the common good, but that it only aims at the well-being of individuals. If this is incontestable, nothing more can be said against the conclusion that legislation must not use private law to promote the common good.

Now, of course, in recent times, it has been established with a high degree of probability, even if it has not been entirely proven, that the author of the famous passage of the *Digests*, from which the words *Staat, état, stato,* etc. flowed into modern languages, understood private law and public law in a completely different way than we do. We call private law that law which regulates the relations of private individuals, and we call public law that law which regulates the relations of public associations and their bodies with each other and with their members. In our view, therefore, private and public law norms differ in terms of their *content*. The Roman jurist, however, probably understood *ius privatum* to mean the law that emerged without the participation of a political or religious authority, recognized but not created by the state, and *ius publicum* to mean the law which comes into being by the creative will of a political or religious power, independent of such emergence. In his view, the legal norms differed according to their *creation*. Understood this way, Ulpian's statement contains historical truth. The experiences of more recent times unfortunately confirm, too, that the formations of law pertaining to trade, when left to its own devices, take into account the individual interests of those involved, but not the health or recovery of state and society. What is right for the *ius publicum* and *privatum* in the Roman meaning of these words is however certainly not to be recognized as right without proof for public and private law in the other sense that we associate with it.

If, instead of trying to prove this, one claimed, by the *authority* of the *corpus juris*, that private law only served and only ought to serve private interests rather than the common good, this was not in accordance with the principles of the Historical School. For although there was no dearth of errors, this school repeatedly stressed that, for as long as Roman law applied to us at all, *authoritative* significance was attributed to the received norms of Roman law only but not the doctrines of Roman jurists. The German followers of Adam Smith were free from such scruples. For them, the sentence that private law, in contrast to public law, must only take the *utilitas singulorum* into consideration, was endowed, as part of the doctrine of the Pandect, with the authority of *natural law*. And in this capacity, the passage from the Pandects became very valuable to them.

Knies, in the second edition of his *Politische Ökonomie vom geschichtlichen Standpunkt* (1883), said of Adam Smith's teaching of classical political economy:

> It may have been at the forefront that individuals who are "equal and endowed with the same rights by nature" should be freed, in their interpersonal exchange and in their free "social" associations as much as in their isolation, from the patronizing ban and coercion by the state administration exploiting them. Yet restrictions imposed by way of legislation, removed from administrative arbitrariness and by statutory legal institutions, also had to appear like hostile violence in contrast to the fierce demand for the full liberation of individuals and the liberation of society from political pressure. This led to the demand not only that the state government should refrain from all administrative directives regarding the management of private economic activities, but also that state *legislation* should be limited to that *unavoidable minimum* of regulations which ensure the freedom of the person and the protection of property. And it was precisely this remnant of legal provisions described as necessary that was then considered or treated as a stock of institutions which had to be permanently and everywhere available in a very specific form, and it was tacitly assumed that they, for their part, were without any influence on the organization of economic acquisition and on the distribution of economic property. It is of the utmost importance that the complete groundlessness of the latter condition is clearly recognized.

The fundamental error of classical political economy demonstrated correctly here gained apparently unbreakable support in Ulpian's exposition. For if private law only has the benefit of the individual in mind, then it is in private law also that the natural minimum of regulations is to be found which is indispensable for the economy of *laissez-faire*, and which lacks any influence on the shaping of economic acquisition and the distribution of economic property – that is, on the economy and social policy.

I sought to show in brevity how the opinion *arose and came to gain dominance* that legislation must not use private law for public purposes. Savigny's program of the Historical School, Adam Smith's teaching of classical political economy, the belief in natural law were the components; a passage from the

Pandects was its support. Savigny's program no longer finds many followers, Adam Smith's teaching has gone out of fashion, natural law counts only few believers, and the passage from the Pandects has been recognized as having been misunderstood. How it comes that this opinion nevertheless still prevails today is a question the answer to which could fill another extensive chapter in the history of great errors.

Annotations

[I] "in einem obrigkeitlichen Kleid".

[II] "in den Lebensschicksalen".

[III] "die Gleichteilung des römischen und französischen Rechts".

[IV] "deutsches Anerbenrecht".

[V] "das privatrechtliche Institut des Familienfideikommisses".

[VI] "Neuerungen".

[VII] "zu Kräften kam".

[VIII] "und daß das Verdienst, in welchem Stande es sich finde, ungehindert emporstreben könne".

[IX] "Wirtschaftsweise".

[X] "Die Betonung des Werdens gegenüber dem spontanen, zielbewußten Schaffen".

[XI] "so wenig Absolutheit, als es in der Natur das Sein der einzelnen Körper und ihr besonderes Verhältnis zueinander hat".

[XII] "höchstens die eines mechanischen Scharfsinns".

[XIII] "Grundstein".

[XIV] "Polizeistaat".

[XV] "Public law is concerned with the Roman state, private law belongs to the utility of individuals".

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