THE GERMAN ABSTRACT APPROACH TO LAW

COMMENTS ON THE SYSTEM OF THE BÜRGERLICHES GESETZBUCH

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1. To the foreign student the German Civil Code, *Bürgerliches Gesetzbuch,* of 1896, may seem the most impressive codification that has ever existed. It was not only a monumental embodiment of the newly created legal unity of a great power but also the product of several decades of research by some of the greatest legal scholars ever known. Essentially, it remains untouched by the social changes and revolutions which have taken place since the time of its enactment.

In one of the leading textbooks of the present day Professor Nipperdey describes the characteristic features of the Civil Code as follows: "The *Bürgerliches Gesetzbuch* uses *abstractly conceived general* norms and thus departs from the method of case-by-case regulation. It has a *logically perspicuous structure* and *clear concepts.*"[1]

After trying to grasp the exact meaning of Nipperdey's description I have come to the following tentative conclusion. The drafters of the Code endeavoured to make use of concepts of general applicability concerning certain legal relations. Though occasionally referring to legal effects, these concepts most frequently deal with one or more facts the existence of which is necessary if a rule is to apply. The concepts are not always defined in the Code. Thus, there are no definitions of such fundamental terms as juristic act (*Rechtsgeschäft*) or declaration of intention (*Willenserklärung*).[2] These concepts serve the purpose of indicating the arrangement of various provisions. Therefore, they are placed in relation to one another in accordance with certain specific principles. In fact it can be said that the sequence in which they appear in the Civil Code is determined by specific

[1] "Das BGB enthält *abstrakt gefasste allgemeine* Normen, was eine Absage an die Methoden der kasuistischen Fällesregelung bedeutet. Es zeichnet sich durch einen *logisch klaren Aufbau* und *scharfe Begriffsbildung* aus." Enneccerus—Nipperdey, *Allgemeiner Teil des bürgerlichen Rechts,* vol. 1, 14th ed. 1952, p. 51.

[2] The author has followed Chung Hui Wang in his translations of legal terms in the German Civil Code. See *The German Civil Code,* translated and annotated by Chung Hui Wang, London 1907.

principles. The legal concepts have certain interrelationships with respect to their position which give them a more definite meaning than they would otherwise have.

One purpose of this article is to try to explain how the German system of private law was invented and to describe its general structure. To that extent my study may be of help to foreigners who, like the author, have found some features of German legal thinking strange and artificial and therefore difficult to understand. Further, I will attempt to make a critical evaluation of the German system and to point out possible fallacies through comparisons with the situation in my own country, Sweden. At the end of the article some rather speculative ideas will be presented concerning the German abstract method of arranging legal material and the question whether this method may influence the process of adjudication.

This article was published in Swedish in 1964.[3] In rewriting it in English I have tried to imagine how the peculiar German approach to law could best be presented to Anglo-American lawyers. As a Scandinavian, I occupy a position between the Continental and the Anglo-American legal systems—the former more dogmatic, the latter more pragmatic—a position which may be a qualification for the task of transferring some knowledge about German law to another forum. However, it seems proper to point out that I have had no formal training in German law, but, at most, can claim to be considered as one who has gathered some acquaintance with the subject through frequent visits to the German scholarly world.

I feel it incumbent on me to emphasize that the article deals with a subject which because of its general character is difficult to master. It should be mentioned that my verifications were perforce selected during a relatively short period of search for the relevant facts and that I may have erred in one respect or another because of insufficient knowledge of German law and legal writing, or because of the fact that every line of thought has not been examined as meticulously as would have been desirable.[4]

[3] *Teori och praxis. Skrifter tillägnade Hjalmar Karlgren* (Theory and Practice. Papers dedicated to Hjalmar Karlgren) 1964, pp. 279 ff.

[4] In the introduction to his famous study *Das Recht des Besitzes* (The Law of Possession), 1801, Savigny remarks that scholars often start with an excuse because of the difficulty of the subject. To many of them this is "an introductory praise of their works" ("eine vorläufige Lobrede auf ihr Werk"). This, however, is by no means the purpose of the reservations which I have felt obliged to make.

2. The *Bürgerliches Gesetzbuch* is divided into five books: (1) "General Principles" (*Allgemeiner Teil*), secs. 1–240, (2) "Law of Obligations" (*Recht der Schuldverhältnisse*), secs. 241–853, (3) "Law of Things" (*Sachenrecht*), secs. 854–1296, (4) "Family Law" (*Familienrecht*), secs. 1297–1921, and (5) "Law of Inheritance" (*Erbrecht*), secs. 1922–2385. In what follows I will focus my attention on the separation of the "General Principles" in Book 1 from the rest of the provisions of the Code in Books 2–5. The dividing line between the Law of Obligations in Book 2 and the Law of Things will also be considered. The ideas behind the separation of Family Law and Law of Inheritance as two separate entities will not, however, be discussed.

Book 1, "General Principles", contains provisions common to the legal material which is treated in the subsequent books. Thus each provision of the first book, the "Allgemeiner Teil", is potentially applicable to a sale or a loan, a transfer of property, a marriage, or a will, or any other legal relationship. A glance at earlier codifications created on German soil reveals that this arrangement was an innovation. It is true that the General Code of the Prussian States (*Allgemeines Landrecht für die preussischen Staaten*) of 1794 was introduced by a number of provisions concerning statutory enactments, followed by a chapter "On Persons and their Rights in general" (*Von Personen und deren Rechten überhaupt*), and another "On Things and their Rights in general" (*Von Sachen und deren Rechten überhaupt*). Far from being applicable to all kinds of legal relations, however, the provisions in these two chapters were not even comprehensive or common to all persons or things. Indeed, some of the provisions were rather specific, as, for example, the following definition: "An equipage is the horses, carriage and accessories intended to serve the comfort of the owner." In the Austrian General Civil Code (*Das allgemeine bürgerliche Gesetzbuch für das Kaiserthum Oesterreich*) of 1811, the material is arranged in a manner which has great similarities to the French Civil Code of 1804, with a first part "On Persons", comprising family law.[5]

[5] In the Austrian Code Part 1, "On Persons", and Part 2, "On the Law of Things", are followed by Part 3, containing general principles under the title "On general principles concerning persons and rights to things". But the content of Part 3 is different from that of Book 1 of the German Civil Code. Part 3 of the Austrian Code covers provisions on the matter how to safeguard a right, e.g., by suretyship or pledge, how to change a right substantially, e.g., by novation or assignment, how to terminate a right, e.g., through payment, and how to extinguish a right by provisions on limitation or laches.

The Civil Code of Saxony (*Das Bürgerliche Gesetzbuch für das Königreich Sachsen*) of 1863 provided the first example of the method of collecting in an introductory part provisions applicable to all kinds of legal relations. Here the arrangement of the material was essentially the same as that later used by the first official draft of the German Civil Code, 1888. Thus, the Saxon Code had the same five books as the German Code. In accordance with the fashions of the textbooks of the 19th century, however, the Law of Things was presented before the Law of Obligations. Part 1 of the Saxon Code, "General Provisions" (*Allgemeine Bestimmungen*), foreshadowed on relevant points the content of the "General Principles" in the official draft of 1888.

The idea of bringing together and of treating as a separate unit principles common to all kinds of legal transactions is a part of what has been called the modern German Pandect system. It is a product of scholarly activity. For our purpose it is sufficient to examine a limited number of 19th-century textbooks written by persons who in their time were highly regarded as teachers. There is no reason to make any distinctions between the various authors from the point of view of the school—the Historical School or Legal Positivism—to which each is supposed to belong.

If one reads Gustav Hugo (1764–1844), Heise (1778–1851), Savigny (1779–1861), Puchta (1798–1846), Vangerow (1808–70), Windscheid (1817–92), and Dernburg (1829–1907),[6] one will recognize how piece by piece the material is arranged in accordance with some rigid system. Windscheid's *Lehrbuch des Pandektenrechts* represents the final development. Windscheid's arrangement of the material is essentially the same as that of the official draft of the Code of 1888. Incidentally, Windscheid belonged to the group of eleven eminent practitioners and scholars who were commissioned by the Federal Council to prepare a draft "citizens' code"

[6] The author has had available the following works:

Gustav Hugo, *Lehrbuch eines civilistischen Cursus,* various editions 1818–1824.

Heise, *Grundriss eines Systems des gemeinen Civilrechts,* 2nd ed. 1816.

Savigny, *Das Recht des Besitzes,* 4th ed. 1822; *System des heutigen Römischen Rechts,* vols. 1–3 1840, vols. 4 and 5 1841, vol. 6 1846, vol. 7 1848, vol. 8 1849; *Das Obligationenrecht,* vol. 1 1851, vol. 2 1853.

Puchta, *Vorlesungen über das heutige römische Recht,* printed posthumously in 1852.

Vangerow, *Leitfaden für Pandekten-Vorlesungen,* vols. 1–3, 3rd ed. 1845–47.

Windscheid, *Lehrbuch des Pandektenrechts,* vols. 1 and 2, 4th ed. 1875.

Dernburg, *Lehrbuch des Preussischen Privatrechts,* vols. 1–3, various editions 1878–80; *Pandekten,* vols. 1 and 2, 1st ed. 1884–86.

—excepting commercial law and allied matters—for the German Empire. The draft of 1888 has sometimes been called the "Little Windscheid".

As stated by Andreas Schwarz,[7] the modern German Pandect system originates from Heise's *Grundriss eines Systems des gemeinen Civilrechts,* 1st edition 1807.[8] In an early work of 1789 Gustav Hugo had trodden the same road, but later he abandoned it. However, it is more profitable to study Savigny than any of the others because he presents and discusses his methods of research, including the question of the principles on which the legal material shall be arranged. Probably Savigny has influenced posterity more than any other contemporary legal scholar. Yet it would seem paradoxical to claim that the abstract systematic approach of the *Bürgerliches Gesetzbuch* is based upon Savigny's method of legal research, as Savigny himself was strongly opposed to the idea of codification. However, his standpoint was rather that the time was not yet ripe than that codification was something basically wrong.

From the Enlightenment—the period when the modern natural sciences were born—Savigny took over the idea that nature is subject to certain general laws, such as the law of gravity, and that these laws might be revealed by the observation of facts. It is true that in accordance with the general trends of liberalism the human will was considered a creative element,[9] but this did not break the alliance Savigny felt to be inherent between society and the natural sciences. However, the external world with its social relations was not the immediate object of study. First, he considered it his task to make observations about the unruly mass of citations from various classical authors in the Pandects of the *Corpus juris.* The student of Savigny and his contemporaries must bear in mind that, as Roman Law had been received in Germany, the Pandect was considered a source of law like a body of cases. As Savigny[1] emphasized, every German state drew upon two sour-

[7] Andreas Schwarz, "Zur Entstehung des modernen Pandektensystems", *Zeitschrift der Savigny-Stiftung* 1921, pp. 581 f. Cf. Siegmund Schlossman, "Willenserklärung und Rechtsgeschäft" in *Festgabe der Kieler Juristen-Fakultät Ihrem hochverehrten Senior Dr. Albert Hänel dargebracht zum fünfzigjährigen Doktor-Jubiläum am 28. Dezember 1907,* 1907, pp. 59 ff.

[8] Cf. Coing, "Bemerkungen zum überkommenen Zivilrechtssystem", *Vom deutschen zum europäischen Recht. Festschrift für Hans Dölle,* Tübingen 1964.

[9] See, on this point, in particular Coing, *op. cit.,* pp. 26 f.

[1] Savigny, *System,* vol. 1, Book 1 § 2.

ces for its law; on the one hand, the law of that particular state and, on the other hand, the received common law ("gemeines Recht"). The formal dissolution of the Holy Roman Empire in 1806 had not changed the actual state of law.

In his monograph *Das Recht des Besitzes* Savigny[2] sets himself the task of defining the concept of possession. As a student he was obliged to investigate the role of possession as a legal relation in Roman private law. Savigny endeavoured to find a definition applicable to all kinds of situations[3] where possession was relevant. In the first volume of his paramount work *System des heutigen Römischen Rechts*[4] Savigny deals in a preliminary way with the arrangement of the legal material organically, under the headings of law of things, law of obligations, family law, and law of inheritance. Yet within a great number of legal categories identical issues would arise. Instead of repetitions and references it seemed proper to separate whatever was common to all situations and to place such propositions before any treatment of the more particular subjects. In the preface to the eighth volume, with his famous study on the domain of the legal rules in space and time, Savigny makes the statement that the volumes so far published represented a complete study covering the general part, and this study should be supplemented by later studies on the law of things, the law of obligations, family law, and the law of inheritance. To the title of the existing eight volumes there should be added as a subtitle the words "Allgemeiner Teil", which later became the title of the first book (General Principles) of the *Bürgerliches Gesetzbuch*.

Savigny was not able to complete his great plan. He published *Das Obligationenrecht* as a first part of a treatise on the institutions of private law. Here again Savigny[4] deals with the question whether one should separate the general principles as a special entity from the particular concepts and rules applicable respectively to contracts and delicts, the two most relevant grounds for creating obligations.[5, 6]

[2] Savigny, *Das Recht des Besitzes*, § 1 at the end.
[3] See Erik Wolf, *Grosse Rechtsdenker*, 1963, p. 485.
[4] Vol. 1, Book 2, § 58.
[5] Savigny, *Das Obligationenrecht*, vol. 1, p. 2.
[6] In his *Das Obligationenrecht* Savigny found time to deal only with two of four chapters of a study of the general principles of the law of obligations, namely chapter 1, "The Nature of Obligations" (*Natur der Obligationen*) (vol. 1) and chapter 2, "The Creation of Obligations" (*Entstehung der Obligationen*) (vol. 2).

3. I hope I have succeeded in demonstrating that the 19th-century legal scholar had an approach to law similar to that of the natural scientist. The book "General Principles" (*Allgemeiner Teil*) which introduces the German Civil Code is the product of scholarly endeavours to organize the legal material by laying down certain laws or rules common to all kinds of legal relationships, or at least to a number of important categories of these. Others have explained the origin of this approach differently. Andreas Schwarz emphasizes the influence of Natural Law on the German Pandect system. To the scholar of Natural Law it was highly expedient to indulge in the exposition of general principles, since, in the absence of positive sources, principles of higher dignity afforded the only method for erecting a rational structure of law.[7] The influence of the ideas of Natural Law is indisputable, but it does not explain what is specific to the German codification as opposed to other codifications, namely its rigid logic. Hugo and Heise were the first inventors of the modern German Pandect system. They, like Savigny, are considered representatives of the Historical School, the new movement which succeeded the Natural Law of the Enlightenment.

In my opinion Fritz von Hippel comes closer to the relevant point. Like the present author, he emphasizes the influence of the natural sciences. The legal research of the 19th century follows the method of arranging material in accordance with quasi-scientific points of view.[8] Von Hippel has in mind the relations between fact described in legal norms and the effects that result from them. Just as Nature gives certain qualities to human relations and to things, so Law gives a certain quality to particular facts, and as part of legal norms a certain legal effect is attached to them. Von Hippel finds the most characteristic feature in the idea that such facts produce legal effects.[9] However, in the author's opinion his statements are too general and give no more than one part of the picture.

Concepts of private law are intermediaries between facts and

[7] "Der naturrechtlichen Methode musste es in besonderem Masse naheliegen, vor allem die allgemeinen Grundsätze zu entwickeln: denn der Anlehnung an positive Quellen entbehrend, lässt ein rationalistisches Gebäude sich nur aus oberen Prinzipien ableiten." *Op. cit.*, p. 588.

[8] Fritz von Hippel, *Zur Gesetzmässigkeit juristischer Systembildung*, 1930, pp. 25 f.

[9] Fritz von Hippel's idea that fact situations produce legal effects is described by Coing as the doctrine of juridical causation ("Theorie der juristischen Kausalität"). See Coing, *op. cit.*, p. 29, footnote 9.

legal effects. This function they may serve in two ways. When a concept is part of a legal rule it may denominate some specific facts which have to exist in order that the rule shall apply. In other situations the concept is used to describe some specific legal effect that must result. The greater part of the concepts in the book "General Principles" of the German Code are of the former kind. This is the case with concepts like juristic act, declaration of intention, and contract which all refer to facts. But in the book "Law of Things" it is the legal effects that are envisaged. Thus the concept of right to a thing (*in rem*) is considered the element which creates certain characteristic legal effects. It can be enforced against everyone.[10] It is sufficient to mention the famous definition of ownership in the *Bürgerliches Gesetzbuch,* sec. 903: "The owner of a thing may, in so far as the law or the rights of third parties permit, deal with the thing as he pleases and exclude others from interference with it."[1]

4. As indicated before, Savigny tried to arrange the legal material in accordance with the principle that *the general should be distinguished from the specific.* This method was taken over by the drafters of the German Civil Code when certain rules (secs. 1–240) were brought together in Book 1 under the heading "General Principles" (*Allgemeiner Teil*). Provisions were included which were applicable to all fields of private law. In comparison, the provisions of Book 2, "Law of Obligations", Book 3, "Law of Things", Book 4, "Family Law", and Book 5, "Law of Inheritance" concern more specific subjects. And within Books 1, 2, and 3 one can find subdivisions based on the same principle that the more general should be presented before the specific.[2]

Besides the distinction between the general and the specific there is another boundary which has influenced the arrangement of the material in the *Bürgerliches Gesetzbuch,* namely the distinction between the law of obligations and the law of things. Compared with the distinction between the general and the specific this latter boundary is of minor importance. It has a bearing upon the distribution of the material between Book 2 and Book 3

[10] Cf. Savigny, *System,* vol. 1 § 58.

[1] BGB § 903. "Der Eigentümer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache nach Belieben verfahren und andere von jeder Einwirkung ausschliessen."

[2] Cf. Rheinstein, "The Approach to German Law", *Indiana Law Journal* 1959, pp. 550 and 552.

chiefly. The order in which the rules are arranged in the *Bürgerliches Gesetzbuch* is demonstrated by Table 1.

Rules applicable to an ordinary sale of a moveable can be traced in Book 1, "General Principles", as well as in Book 2, "Law of Obligations", and Book 3, "Law of Things". As will be seen from Table 2, they are found on different levels of abstraction and partly on different sides of the partition between the law of obligations and the law of things.

5. The principle of distinguishing the general from the specific in the arrangement of the material implies that the juristic act (*Rechtsgeschäft*), the declaration of intention (*Willenserklärung*), and the contract (*Vertrag*) form a sequence represented by a number of consecutive subtitles in secs. 104 ff. The concept "juristic act" goes back to the old idea of two major categories, namely acts intended to create legal effects and acts which *per se* have such effects. It is the modern counterpart to Gaius' proposition that every obligation arises either from contract or from delict (*omnis enim obligatio vel ex contractu nascitur vel ex delicto*).[3] The juristic act covers more than declaration of intention and still more than contracts.[4] Nipperdey[5] explains why there is a need for the concept "juristic act". Often a declaration of intention will have no legal effect as such; it will not create legal effects unless supported by some other facts. In such situations the declaration of intention is only a part of the set of facts (*Tatbestand*) which are called the juristic act (*Rechtsgeschäft*). Thus in German law the juristic act is constituted either by a single declaration of intention, e.g. the giving of a promissory note, which is binding as such, or it is composed of several declarations of intention, or of one or more declarations of intention plus something more.[6] The transfer of ownership of personal property may be mentioned as an illustration. The transfer will not take place in law simply because of an agreement between the parties. There is a further requirement, namely delivery of possession.[6a]

The term "declaration of intention" which is used, *inter alia*,

[3] *Gai Institutiones, 3,* 88.

[4] See Müller-Freienfels, *Die Vertretung beim Rechtsgeschäft,* 1955, p. 123 note 9.

[5] Enneccerus—Nipperdey, *Allgemeiner Teil,* vol. 2, 15th ed. 1960, p. 895.

[6] See Titze's article on "Rechtsgeschäft" in *Rechtsvergleichendes Handwörterbuch,* vol. 5, 1936, pp. 790 f.

[6a] It is not required that the thing be delivered physically. Fictional delivery (*constitutum possessorium*) may serve as a substitute.

TABLE 1. *Main features of the system of the* Bürgerliches Gesetzbuch.

General Principles ("Allgemeiner Teil")

Persons ("Personen"), 1–89 Things ("Sachen"), 90–103 Various general provisions, 186–240

Juristic Acts ("Rechtsgeschäfte"), 104–185

Law of Obligations ("Recht der Schuldverhältnisse"), 241–853			Law of Things ("Sachenrecht"), 854–1296	Family Law ("Familienrecht"), 1297–1921	Law of Inheritance ("Erbrecht"), 1922–2385
Obligations *ex contractu* ("Schuldverhältnisse aus Verträgen"), 305–361	Unjustified Benefits (Enrichment) ("Ungerechtfertigte Bereicherung"), 812–822	Unlawful Acts (Torts) ("Unerlaubte Handlungen"), 823–853			
Sale and Exchange ("Kauf und Tausch"), 433–515	Gift ("Schenkung"), 516–534	Ordinary Lease. Usufructuary Lease ("Miete. Pacht"), 535–597	et cetera		

TABLE 2. *The sale of moveables.*

Different levels of abstraction. The division between the law of obligations and the law of things:

General Principles ("Allgemeiner Teil")

Persons ("Personen"), e.g. legal capacity ("Rechtsfähigkeit"), 1–89

Things ("Sachen"), e.g. the difference between fungible and specific things, 90–103

Juristic acts. Disposing capacity ("Rechtsgeschäfte". "Geschäftsfähigkeit"), 104–115

Declaration of intention ("Willenserklärung"), e.g. principles of interpretation, 116–144

Contract ("Vertrag"). General principles, e.g. the binding effect of an offer and principles of interpretation of contracts, 145–157

Law of Obligations ("Recht der Schuldverhältnisse")

Law of Things ("Sachenrecht")

Scope of obligation, e.g. obligation of performance ("Verpflichtung zur Leistung"), 241–304

Ownership. The rights of the owner ("Eigentum, Inhalt des Eigentums"), 903–924

Obligations *ex contractu* ("Schuldverhältnisse aus Verträgen") (certain general provisions), e.g. the effect of impossibility of performance, 305–361

Acquisition and Loss of Ownership of Moveables ("Erwerb und Verlust des Eigentums an beweglichen Sachen"), 929–984

Sale and Exchange ("Kauf und Tausch"), e.g. the duty of the seller to transfer ownership of the thing, 433–515

in the heading to secs. 116–144, is not, as might have been expected by the reader, identical with one of the components of the contract, the offer or the acceptance. It is true that offers and acceptances constitute the overwhelming majority of all declarations of intention. But the concept "declaration of intention" covers even acts that are not promises, such as notice of termination.

Within the chapter entitled "Juristic Act" a comparison between secs. 104–115, provisions concerning disposing capacity, secs.

116–144, provisions concerning declaration of intention, and secs. 145–157, provisions applicable to the contract or the promise, reveals the logical sequence. The legislators have put in the first part (104–115) provisions on disposing capacity, because they concern all juristic acts, and in the last part (145–157) provisions applicable only to the contract or the promise. The intermediate part (116–144) under the heading "declaration of intention" represents a lower level of abstraction than the first part. However, it claims priority over the provisions on the contract or the promise, which are placed at the end, as the contract (the promise) is a narrower category than the declaration of intention.

6. The principle of distinguishing the more general from the more specific appears in the two tables as a number of horizontal lines on different levels. The second basic principle of the German system, or the distinction between the law of obligations and the law of things, may be regarded as a vertical line. The idea of obligations and rights to things as being two separate categories has its origin in Roman law and Roman law teaching and as such is common to all Western European legal systems. As will shortly be demonstrated, this vertical line is a characteristic feature of German law. The distinction between the Law of Obligations and the Law of Things represents an abstraction, too, but of another kind than that of the abstractions determining the horizontal lines.

As mentioned before, the distinction between the general and the specific sprang from the search for principles common to ever wider spheres of legal phenomena or even to the whole legal system. Someone made a comparison of the law of sales with the law of other contract types and raised the question what principles were common to all contracts. Later he covered new ground and asked himself whether some observations might be valid with respect to declarations of intention in general. Incidentally, when the level of abstraction of each provision determines its sequence in the code, it is not a matter of rank giving the earlier provisions priority over those at the end. Rather, the situation is the opposite. Rules on a lower level are intended to supplement rules on a higher one by filling gaps. But rules on a lower level may contain exceptions to rules on a higher level, and in such a case a later provision will take precedence over a provision located earlier in the sequence.

The German law of things has a peculiar character which distinguishes German law from other legal systems—not only from the

English and American systems, but from the Roman and the Scandinavian systems as well.[7] The Book on the law of things in the German Code does not cover the law of real and personal property in general. Nor do the Germans, like the Scandinavians, look upon the law of things as rules concerning the effect of a juristic act in relation to third parties, specifically the creditors of the other party to a contract of sale, a contract of pledge, or other similar contracts. In German law the transfer of property or the creation of a right of pledge is not regarded as part of the contract of sale or of pledge but as an independent legal transaction. In the *travaux préparatoires* of the *Bürgerliches Gesetzbuch* "das dingliche Rechtsgeschäft" (the juristic act with respect to a thing) was described as "ein von dem Verpflichtungsgrunde losgelöstes, selbständiges Geschäft"[8] (a juristic act separated from the obligations created by the contract between the parties and thus independent). In other words, in this case abstraction means that the juristic act of the transfer of property (i.e. in case of a sale of personal property the agreement on the transfer of property and the delivery of possession)[9] has certain definite legal effects which occur irrespective of conditions in the sales contract between the parties.

The special juristic act of transfer of ownership is the technical device to protect the owner against third parties. What lawyers in other countries consider as one contract, the Germans divide into two, namely the contract of sale governed by the law of obligations and the juristic act with respect to transfer of ownership governed by the law of things. The former may perish, yet the latter will remain. Thus, there may be a valid transfer of property although there is no valid contract of sale, even in situations where rights of third parties are not involved. The seller who has delivered the goods has to rely upon remedies other than the ordinary ones of voidable contracts, such as restitution of unjust enrichment.[1] When German lawyers speak of the transfer of property as an abstract juristic act, the term "abstract" means that one has to disregard the contractual relation between the parties when judging the effect of the transfer of property.

[7] Cf. E. J. Cohn, *Manual of German Law*, London 1950, pp. 112 f.
[8] Entwurf, 1888, vol. 1, p. 127.
[9] *Bürgerliches Gesetzbuch*, sec. 929.
[1] See Cohn, *op. cit.*, pp. 119 f., and "Zur Lehre vom Wesen der abstrakten Geschäfte", *Archiv für die civilistische Praxis* 1932, pp. 67 ff.

7. In the preceding part of this article I have described the German abstract approach to law and demonstrated its historical background and its embodiment in the *Bürgerliches Gesetzbuch*. There remain the tasks of critical evaluation and of comparison with other possible ways of systematizing statutory material.

The introduction of the first official draft in 1888 gave rise to a lively debate on the merits and fallacies of an abstract approach to law. Otto Gierke[2] made a vehement attack, claiming that the draft code was addressed to learned lawyers alone. It did not speak to the German people. It reached neither their ears nor their hearts. The code handed over the rich German inheritance of ideas and organic institutions as a sacrifice to rigid formalism and barren systems. According to Gierke, in essence the drafters had satisfied themselves with the codification of the *usus modernus pandectarum*. There was the well-known Pandect system with a book "General Principles" placed ahead of four other books. In the organizing of the material of the different books the drafters were influenced by the current textbooks on Pandect law ("die gebräuchlichen Pandektenkompendien").

In all epochs the great lawgiver has envisaged himself as speaking to the ordinary citizen—the farmer, the artisan or the merchant. Certainly the German drafters were anxious to use simple and plain language. However, abstract terms of the kind met in the *Bürgerliches Gesetzbuch* require a knowledge of the structure of which they are part and are therefore not easily grasped by laymen. Up to that point Gierke's criticism was justified. In spite of great simplicity with respect to language, the "conceptual world" of the *Bürgerliches Gesetzbuch* will remain the preserve of learned lawyers.

However, the use of special legal concepts is not peculiar to German law. Indeed, they may be a necessary element of the legal system of every highly developed society. In judging a legal system it is rather the quality of its concepts that should be the decisive factor. In the eyes of the foreign observer German law appears in a favourable light as compared with English law. The German approach is more rational. German law is not encumbered with relics of the past to the same extent as is English law. After all, a concept or a term has no inherent claim to survival merely because it is time-honoured.

[2] Otto Gierke, *Der Entwurf eines bürgerlichen Gesetzbuches und das deutsche Recht*, 1889, pp. 3, 80.

Behind Otto Gierke's attack on the Draft Code lay a resentment against what he considered an undesirable foreign element impinging on German legal traditions. He lived in a period when strong national feelings were part of the general cultural pattern, and many contemporary Scandinavian scholars concurred in Gierke's opinion that the Teutonic elements of the law should be revived. The present author evaluates matters differently. To him Roman law is the common property of the Western world. Close association with this element of our history is one of the great merits of the *Bürgerliches Gesetzbuch.*

8. It is self-evident that abstract concepts and systematic principles may be useful because they help us to master legal material better than would otherwise have been possible. In the first place, this means a saving of time for the readers because the drafters have expressed themselves concisely. From this simple point of view much may be said in praise of the *Bürgerliches Gesetzbuch.* The Code has a total of 2,385 sections. Considering the vast field covered by rather detailed provisions, this is a very small number indeed. Professor Rheinstein,[3] moreover, makes another, weightier observation. The German abstract method results in a great economy of thought. The lawyer does not have to store up separately in his memory the rules on the effects of misrepresentation in sales, leases, insurance contracts, loans, conveyances, mortgages, etc. He only studies the rules on misrepresentation in connection with legal transactions of each and every kind, observing that they are the same except for some special transactions such as marriage, the execution of wills, or subscribing to corporate stock. On the other hand, as stated by Rheinstein, the German mode of arranging material requires a special training on the part of the user. The present author would add the point that the requirement of legal training involves an investment of time. If the time spent at the law school is taken into account as a cost, it is difficult to judge whether a balance in favour of the German system exists. A possible measure would be the law-school curriculums of different countries. In order to give some guidance, such a comparison should take into account the complexity of existing social institutions as well as the final product.

The present author is inclined to take the position that there is another and still more essential criterion, namely whether the

[3] *Op. cit.*, p. 552.

system enables its user to have a view over a wide field on one and the same occasion. The value of measuring with this standard is even more dubious. Possibly one might base one's opinion upon the qualifications of German lawyers generally. A reader of German legal writing or German law reports will find the standard high, but this may be due mainly to other factors, such as a rich supply of trained persons, an inclination to give special credit to academic training, etc. However, any conclusion based upon general assumptions of this kind is no more than guesswork. A critical judgment of a system should concern more specific points.

9. The foreign student of German law will perhaps first ask whether all these distinctions between different levels of abstraction are truly necessary. Would it not be possible to arrange the material and describe the relevant rules without resort to such a great number of specific concepts? Is it necessary to distinguish between juristic act (*Rechtsgeschäft*), declaration of intention (*Willenserklärung*) and contract (*Vertrag*) with the offer (*Antrag*) as a component of the contract? The Anglo-American legal systems have a less intricate terminology; their palette has only two colours, the contract and the promise. In Scandinavian legal writing there is a tendency to consider the declaration of intention (*viljeförklaring*) as the principal tool, although the 1915 Swedish Act on Contracts and Other Juristic Acts in the Field of Rights to Property (Contracts Acts) seems to use the same conceptual instruments as the German Civil Code.[4] In fact the Anglo-American terminology appears suited to the Scandinavian countries as well. The author claims that the Scandinavian drafters would have been able to express the relevant points equally well with the help of only two terms, contract and promise. He admits, however, that in such a case some amendments might have been required, e.g. that provisions on void or voidable promises also be made applicable to other juristic acts, such as the giving of notice.

10. Let us start from the assumption that it is useful to have a set of conceptual tools like the German ones. However, the arranging of the material in the consecutive order of the juristic act, the declaration of intention, and the contract is not a necessary

[4] The Danish and the Norwegian Acts, which are uniform with the Swedish Act, attribute another meaning to the concept "declaration of intention" ("viljeserklæring").

consequence. In the Swedish Contracts Acts the drafters have made use of these three terms. There are a number of provisions on the effect of the offer and the acceptance, too. In that act the material is arranged in three main chapters, Chapter 1, "On the Formation of Contracts", Chapter 2, "On the Power of Agency", and Chapter 3, "On the Invalidity of Certain Juristic Acts". The central idea behind this arrangement is to describe the ordinary mechanism of a contract *inter absentes,* or by an agent, before the more particular situations when something goes wrong because of duress, undue influence, mistake, etc. In the *Bürgerliches Gesetzbuch* the same subjects appear in the following order: 1. Invalidity of Declarations of Intention (secs. 116 ff.), 2. Formation of Contracts (secs. 145 ff.), 3. Power of Agency (secs. 164 ff.). Thus, the German method of putting the general before the specific is only one possible choice. Whether one considers the Swedish alternative preferable or not must depend on one's opinion as to the instructive effect of the Scandinavian idea that legislators should deal with ordinary cases before concerning themselves with those which seldom occur.

11. To the foreign observer the German system seems rather artificial. This is particularly the case with the distinction between the law of obligations and the law of things, whereby it is implied that an ordinary sales contract is divided into two parallel transactions, namely the contract of sale, belonging to the sphere of the law of obligations exclusively, and the transfer of property, a transaction within the domain of the law of things. By a fictitious operation what in daily life is a single phenomenon is classified as two separate juristic acts.[5] As mentioned before,[6] this is a technical device used to achieve certain standardized effects with the transfer of ownership. This legal transaction becomes abstract in the sense that exceptions based upon the relation between the two parties to the sales contract are generally disregarded. For the protection of trade activity and, to some extent, of the interest of his creditors, the buyer is granted certain privileges in his capacity as owner. However, as a comparison with other legal systems will indicate, one can protect third parties in good faith and creditors at least as effectively as does German law without resorting to the abstract transaction of transfer of property. The usefulness of this

[5] Cf. Enneccerus–Wolff–Raiser, *Sachenrecht,* 10th ed. 1957, pp. 237 f.
[6] *Supra,* p. 145.

method has been much debated in Germany, too. Ludwig Raiser maintains that the legislators have split a natural unity into two parts, so creating meaningless conveyances which have to be restituted later on with the help of claims for unjust enrichment.[7]

12. There are further aspects to consider when judging the German method of arranging legislative material in accordance with the requirements of an abstract logic. In a rigid logical system the rules laid down in a certain chapter on a specific category should be applicable to all phenomena belonging to that category. Under those circumstances one should find on lower levels of abstraction rules only on other topics than those already dealt with on the higher levels of abstraction. The critical observer may question whether the drafters of the *Bürgerliches Gesetzbuch* were able to live up to this standard. Have they collected all directives on an issue and put them in their proper place?

In this respect the German Civil Code falls short of the goal. Often rules on lower levels of abstraction constitute far-reaching exceptions to rules on a higher level. A comparison of sec. 133 with sec. 157 will illustrate the case. In sec. 133, which is part of the chapter on declaration of intention, the rule is laid down that in interpretation "the true intention is to be sought without regard to the literal meaning of the expression". Sec. 157, which is placed on a lower level in the chapter on Contract, prescribes that "contracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration". In the former provision the legislators demand a subjective standard of interpretation, while in the latter an objective standard is required. The two standards are not always compatible, and the outcome of an issue may depend upon which standard is to apply.

The *Bürgerliches Gesetzbuch* employs precise and clear language. Therefore one might possibly expect the distinction that sec. 133 was applicable solely to those declarations of intention which do not constitute a contract or part of a contract. But such a distinction, which in practice would have meant little, does not seem to exist. Sec. 157 is supposed to cover the same field as sec. 133.[8] Consequently, the courts are faced with a choice between

[7] Enneccerus-Wolff-Raiser, *op. cit.*, p. 4. Cf. Enneccerus-Nipperdey, *Allgemeiner Teil des bürgerlichen Rechts*, vol. 2, 1960, pp. 916 f., and E. J. Cohn, *Manual*, p. 120.

[8] See *Staudinger's Kommentar zum Bürgerlichen Gesetzbuch*, vol. 1, 11th ed. 1957, at sec. 133.

ance, on real estate, the village community, trade and commerce, etc., each group of rules in its own *balk* (book). The drafters had intended to include provisions on the Church. Had they done so, the different books would have covered the whole structure of the medieval rural society of Sweden. The General Code of 1734 relied upon the same principle within its more limited sphere, and several of its books have names taken from the books of the medieval code. The tradition is still carried on. Thus, in 1949, a number of statutes on legitimate birth, on the status of legitimate children, illegitimate children, and on custody, were consolidated in a Parents and Children Book. The Americans, too, unfettered in this regard by traditional elements, have a functional approach. The United States Code, which covers federal legislation, contains a number of titles that are mostly functional, like "Banks and Banking", "Commerce and Trade", "Labor", and "Shipping". In the endeavour to formulate uniform laws it has been natural to consider the function. The most important piece of uniform legislation, the Commercial Code, is a typical functional unit.

To the arrangement of the material in the German Civil Code various principles have been applied. The last two books, Book 4, "Family Law", and Book 5, "Law of Inheritance", are functional units. The first three books, however, have another character. As mentioned, the distinctions between the general and the specific and the distinction between the law of obligations and the law of things are decisive. But functional aspects play a secondary role within the three first books, too. In the latter part of the book on the Law of Obligations we find a large section devoted to different types of contract, such as sale and exchange, gift, ordinary lease and usufructuary lease, loan for use, loan for consumption, etc. Even within the book on the Law of Things functional aspects have been considered to a certain extent.

The doing of justice is not an end in itself. Justice has to be administered for the achievement of human goals, to secure peace, to mitigate conflicting interests, to promote industry and commerce, or to protect vested rights. The goals vary from field to field even within the same period of time, and the accomplishment of one goal is not always compatible with another. In each situation where there is a conflict the legislators have to give priority to one interest before another, or to find some compromise. Within the law of property two goals dominate: that the intention of the parties be accomplished as expressed by their instrument, the contract, and that a party in good faith shall be

able to rely upon the effect of a legal transaction lawfully formed. In Germany the conflict between these points, which are partly irreconcilable, is solved by adopting an arrangement whereby Books 1 and 2 of the Code are based upon the principle that the promissor shall not be bound against his free will and that in Book 3 a limited number of transactions, *inter alia,* transfer of property, are made abstract in the sense that the effect of the transaction is emancipated from the contractual relation between the two parties. As to the merits of this solution I will add no comments to what I have already said under section 12. The purpose of my present remarks is to emphasize that the distinction between the law of obligations and the law of things has a functional aspect, too.

It is a part of the picture that the drafters of the *Bürgerliches Gesetzbuch* did not satisfy the need of modern society to take the social inequality of the parties into consideration. It should be noted that the contemporary provisions on instalment sales—at that time a modern device—were laid down in a separate statute, the *Gesetz betr. die Abzahlungsgeschäfte* of 1894, and not embodied in the Code. Nor were there any attempts to integrate the provisions of the *Reichshaftpflichtgesetz,* 1871, on strict liability in case of railway accidents.

In his criticism of the official draft of 1888 Otto Gierke accused the drafters of being incapable of taking social considerations into account. He asks ironically: Is there a social policy inherent in the Draft? If so, it is the extreme individualistic and capitalistic policy of the pure Manchester School. Gierke considers it ridiculous for the drafters to claim credit because the provisions on torts were based upon the law of negligence without resort to strict liability.[2] It is, he says, a fatal error—an error committed by the drafters of the Civil Code—to think that social work can be left to special legislation and that general private law can be shaped in a purely individualistic manner, without regard to the fact that the task has thus been shifted.[3]

It is not my purpose here to argue about the social evaluations of the German Civil Code. Incidentally, later amendments to the draft went some way towards meeting Gierke's criticism. I should like to stress one point only. During this century the functional approach has come to the forefront in Germany, too. New fields

[2] *Op. cit.,* p. 259.
[3] Otto Gierke, *Die soziale Aufgabe des Privatrechts,* 1889, p. 16.

like insurance law, transportation law, labour law, the laws of copyright and industrial property claim independence and attract specialists. In part these fields belong to the sphere which is governed by the German Commercial Code (*Handelsgesetzbuch*), which came into force on the same day as the Civil Code, i.e. January 1, 1900. Other fields like labour law are essentially innovations.[4] It is currently fashionable to say that private law is losing ground to public law. The author is not convinced that this is true. There are better reasons for the opinion that the subjects governed by the *Bürgerliches Gesetzbuch*—although possibly still constituting the very core of private law—are no longer so dominant as they were at the turn of the century.

14. The decades before and immediately after the enactment of the *Bürgerliches Gesetzbuch* have been called the period of conceptual jurisprudence. To the present author conceptual ways of thought appear still to influence German legal writing and judicial administration. In this section I shall venture to discuss the question whether the method of arranging and presenting legislative material in accordance with certain abstract principles offers an explanation of this. It should be noted that we are now turning to a new subject. The object of the following comments is not the legislative technique as such, but the question whether the methods actually applied by the legislators may influence the working methods of the scholar or the judge.

Laband, one of the great conceptualists, describes the conceptual method in the preface to the second edition of his famous study *Das Staatsrecht des Deutschen Reiches* (1887). In an answer to some of his critics Laband declares himself aware of the valuable contributions of history, economics, political science, and philosophy to the study of law. He admits that legal science cannot be Dogmatics solely, but emphasizes that Dogmatics is one of its parts. "The construction of legal institutions, the tracing of specific legal rules back to more general concepts, on the one hand, and the deduction from these concepts of implicit legal effects, on the other, are the tasks of the Dogmatics of a certain positive legal system."[5] For the following discussion it is enough to keep in mind

[4] The scanty provisions on the contract of service (the employment contract) in secs. 611–630 are of minor importance nowadays.

[5] The translated passage runs in German as follows: "Die wissenschaftliche Aufgabe der D o g m a t i k eines bestimmten positiven Rechts liegt aber in der Konstruktion der Rechtsinstitute, in der Zurückführung der einzelnen Rechtssätze auf allgemeinere Begriffe und andererseits in der Herleitung der aus diesen Begriffen sich ergebenden Folgerungen." The quotation is taken from the reprint in the 5th edition (1911) of the preface to the 2nd edition.

that the deduction of legal effects from postulated concepts is considered a characteristic feature of conceptual jurisprudence.

The present author has already mentioned[6] that the *Bürgerliches Gesetzbuch* was a product of the scholarly activity of the 19th century. The legal writer had an approach to his subject similar to that of a social scientist, but the contemporary external world with its social relations was not the immediate object of his observations. Rather he was immediately concerned with the confused mass of citations from various classical authors which formed the Pandects of the *Corpus juris*. The scholar applied a method of abstraction as he searched for qualities common to different phenomena. Abstract concepts like the juristic act, the declaration of intention, and the contract served as his tools. Thus, abstract meant what was in common as opposed to the specific features of an individual legal transaction. Yet the observation of similarities was not the only matter of concern. If there were similarities, the legal scholar considered himself bound to express them in general doctrines. A comparison of Gaius' *Institutiones* with Windscheid's *Lehrbuch des Pandektenrechts* reveals the evolution towards construction of rules covering yet wider fields of the legal system.

The 19th-century scholars, and with them the drafters of the *Bürgerliches Gesetzbuch,* worked in another direction when they presented their general norms to the public. In his research the scholar followed a road leading from the specific to the general. But in presenting the statutory material to the readers of the code the drafter pursued the opposite path. The general was placed before the specific.

Obviously, there was a didactic idea behind this approach. As mentioned before,[7] the drafters of the *Bürgerliches Gesetzbuch* had the ordinary textbooks on Pandect Law before their eyes. The use of the textbook model in the new Code implied a recommendation to the practising lawyer and to the judge: in their analysis of the legal problems involved in a case they should go from the more general to the more specific. Thus, in the administration of the law the judge was prompted to follow the same road as the student learning the law.

One is tempted to speculate on the impact of the formal arrangement of the statutory material in the Code. That a legal writer should use abstract concepts as tools in his analysis of legal phenomena can hardly be considered wrong in itself. This is a generally accepted method in other branches of science. The same

[6] *Supra,* pp. 136 ff.
[7] *Supra,* pp. 136 f.

method might be equally useful in the administration of justice. Nor should there be anything wrong with an order starting with the more general and passing to the more specific, although I am less certain on this point. I am willing to accept as advantageous, too, the use of the method of drawing conclusions from concepts. Here nothing more is necessarily involved than an acceptable logical operation: If, in a certain case, we are able to establish the existence of the facts referred to in the concept, then we shall have the legal effects typical to this case. It is the classic legal syllogism.

I suggest that there is some other reason than Dogmatics for the bad reputation of conceptual jurisprudence. It is a part of the technique of the German Code that the general principles are presented with great emphasis. Possibly this may lead the judge to attach greater weight to the general than to the specific. In his administration of the law he will be more formal and not so inclined as are judges of some other countries to consider the circumstances of the case. This thesis on the spirit of conceptual jurisprudence can be taken for what it is worth. There can hardly be said to be any means of verification available, but, after all, most theories on cultural patterns have the same hypothetical character.

I should like to add one statement which is less disputable. As mentioned before, in German law the term "abstract" juristic act is used to indicate a transaction that has to be judged upon its face and have a standardized effect, irrespective of the intentions of the individual parties. The transfer of personal property through agreement and delivery of possession provided an example. When the legislators use the technique of the abstract juristic act, they have to disregard the specific. In those cases the legislators have definitely emphasized the general at the cost of the specific.

15. My belief is that in the study of a new field the natural scientist must start with a number of observations of facts. He should then postulate some possible explanation for the phenomena and state what might be called a general theory. The making of new observations for the purpose of verification will be the next step. Should he find that his observations are contradictory or cannot be explained by his theory, he must amend or modify his theory or substitute a new one. Possibly, this description of the process is not very accurate in its details. But generally it can be stated that the natural scientist goes back and forth between the

observation of facts and the construction of theories or explanations to analyse and generalize his data.

The legal scholar may apply a similar method. He studies the case material within the law in search of regularities. On several occasions I have emphasized how the German 19th-century scholars used the Pandects of the *Corpus juris* as their primary source material. Several of the concepts of the *Bürgerliches Gesetzbuch* are products of the Pandect jurisprudence.

It should be noted that a concept used by learned writers will tend to change its character when it is introduced into the statute book. Previously, the concept was the scholar's instrument for the description of his observations. With its transfer to the statute book it becomes part of a system of norms.[8] The majority of the concepts which were embodied in the German Code refer to fact situations. Consequently, we have the following situation: If you define the different elements of the concepts, you define the conditions under which a certain legal effect will occur. Therefore, an erroneous scholarly definition of a concept which has been made a part of the code will have far-reaching consequences. The drafters of the *Bürgerliches Gesetzbuch* were aware of these relations and for that reason they avoided putting any express definitions in the Code itself. In the official draft of 1888 it is mentioned that the concept "juristic act" was defined in the Saxon Code of 1863—the forerunner of the *Bürgerliches Gesetzbuch*—but that the results had not encouraged the drafters to follow this lead. The drafters emphasized the danger that a definition, even a carefully drafted one, would mislead the readers. They considered this danger greater than the converse danger of uncertainty in adjudication for the reasons that on some occasions provisions on juristic acts were applied to acts of a different character and that on other occasions they were not applied to true juristic acts.[9]

In these remarks, however, the drafters missed one relevant point, namely that by arranging the legal concepts in a definite

[8] Siegmund Schlossman criticized the system of the *Bürgerliches Gesetzbuch* on similar grounds to those which follow in his study "Willenserklärung und Rechtsgeschäft", in *Kieler Festgabe für Dr Albert Hänel*, 1907, pp. 5 ff. (pp. 80 f. in particular).

[9] *Motive zu dem Entwurfe eines bürgerlichen Gesetzbuches*, 1888, vol. 1, p. 126. — The definition of juristic act is found in sec. 88 of the Saxon Code, 1863: If the intention of an act is, in accordance with the law, to create, to extinguish, or to change a legal relation, that act is called a juristic act. ("Geht bei einer Handlung der Wille darauf, in Uebereinstimmung mit den Gesetzen ein Rechtsverhältniss zu begründen, aufzuheben oder zu ändern, so ist die Handlung ein Rechtsgeschäft.")

order they had themselves given the concepts certain attributes. The fact that the concept "juristic act" (*Rechtsgeschäft*) appears before the concept "declaration of intention" (*Willenserklärung*) indicates that the former concept belongs to a higher section of the hierarchy and thus has a broader meaning than the latter. Thus, in the arrangement of the material a definition of the concepts is implied, in part at least.

I take it for granted that natural scientists are clearly aware that concepts should not be used without paying constant regard to the observations upon which they were based or, in other words, to the purposes the concepts had to serve originally. The same standard applies to legal research. However, with respect to concepts which are part of statutory provisions the situation is delicate. Such concepts are part of a norm system, the meaning of which the legislators decide at their discretion. Then scholarly concepts have become more rigid than before. The legal scholar will lose the incentive to return to the source material in order to investigate whether a concept should be modified or perhaps replaced by one or several new concepts. What previously was tentative or of an open texture achieves the rigidity of an established legal norm.

In the opinion of the author it is a characteristic feature of German law that the legislators make use of a great number of scholarly concepts. Here we may have an explanation why Dogmatics seems to attract scholars more than do some other branches of legal research. Possibly German scholars have not always paid full regard to the yet more important task of the relations between goals and aims.