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THE ORDER AND THE *VOLK*.
ROMANTIC ROOTS AND ENDURING FASCINATION
OF GERMAN CONSTITUTIONAL HISTORY**

ABSTRACT. *For the German legal historians of the 19th Century, Germany existed as a nation well before the establishment of a unitarian State. Based of shared values and a common spirit, this nation was described as having a constitution (German Verfassung) not enacted by any constitutional power but based on the concrete order of the German communities. After 1920, German social historians took up the torch of this vision of institutional history from the hands of legal historians. Being the most important representative of the German constitutional historiography during the Nazi time, Otto Brunner published a series of essays that largely spread this identitarian view of national laws also outside the borders of Germany. They presented the medieval law as an immanent “order” rather than as a set of State norms. Despite being clearly driven by political and cultural debates of the 19th-20th Century Germany, the key concepts of this historiographical stream (called Vefassungsgeschichte) are still used by French and Italian legal historical research.*

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** This text is a revised version of a talk to the Law Faculty held at Chicago University in April 2016, and appeared in a slightly different version in *De rebus divinis et humanis Essays in honour of Jan Hallebeek*, ed. Harry Dondorp / Martin Schermaier / Boudewijn Sirks, Göttingen 2019, pp. 37-53. I wish to thank William Sullivan for his substantial help in improving my English.

1. History and Law after the First World War

When he gave the last academic talk of his life in Berlin on 4 May 1919,¹ Otto von Gierke was, at age seventy-eight, an old and highly respected professor of law in Germany. He had published thousands and thousands of pages: four big volumes of his celebrated *Das deutsche Genossenschaftsrecht*, three books on *Deutsches Privatrecht* (1895, 1905, 1917), one book on the corporation in German jurisprudence, a six-hundred-page volume of critical essays from 1888 on the draft of the German Civil Code project, and a number of individual essays.²

Nineteen nineteen was a hard year for Germany. It was also a sad one for Gierke himself, who had been a witness to the unification of his country at the beginning of his academic career on the eve of the Franco-Prussian War and who remained an enthusiastic German nationalist. The opening words of his talk offer a vivid portrayal of his mood at the end of the First World War:

“We the survivors, who stand in deep shock over the grave of our hopes, do not want to allow the tragedy of a crushing fate rob us of our faith in the irreplaceable value of what our fathers created.”³

These words express a disappointment that is about much more than a military defeat. Gierke had insisted for more than fifty years on the peculiarity of the German institutions, in public as well as in private law. Now, after the defeat and the burdensome conditions of the Treaty of Versailles, he encourages Germans to look ahead to the future. At the same time, Gierke argues, he who thinks *historically* must also look backwards. German *identity*, the only hope for a safe and fruitful new beginning, is to be

1 O. VON GIERKE, *Der germanische Staatsgedanke*. Vortrag gehalten am 4. Mai 1919, Berlin 1919, now reprinted in: O. VON GIERKE, *Aufsätze und kleinere Monographien*, W. PÖGGELER (ed.), Hildesheim/Zurich/New-York 2001, p. 1066 *et seq.* I give the original pagination.

2 For general biographic information, see the entry *Otto von Gierke* in: G. KLEINHEYER/J. SCHRÖDER (eds.), *Deutsche und Europäische Juristen aus neun Jahrhunderten. Eine biographische Einführung in die Geschichte der Rechtswissenschaft*, 5th ed., Heidelberg 2008, pp. 152-158.

3 “*Wir Überlebenden, die wir tieferschüttert am Grabe unserer Hoffnungen stehen, wollen uns durch die Tragik des zermalmenden Schicksals den Glauben an den unersetzlichen Wert der Schöpfung unserer Väter nicht rauben lassen.*” O. VON GIERKE (note 1) 4.

found in the historical background of the German nation:

“We are a people, with thousands of years of history, who have fulfilled our calling in world culture in part by enriching political and legal life with our own ideas. Before we let foreign cultural attitudes become our masters, we should ask ourselves whether the German idea of the state can still offer us something of higher value for the future. Germanness (*Germanentum*) is what created, after the downfall of the ancient world, the medieval and modern world in which we now live. We Germans are the core Germanic people, the *Urvolk*.”⁴

In this lecture, given right at the outset of the controversial Weimar Republic period, just after the First World War, Gierke points the way forward for his country by turning to the past. As a great legal historian, Gierke relies on the Romantic-era notion of the guiding role of history in shaping national identity and character.⁵

In fact, Gierke had already used the same Romantic notion in a different context some forty-six years earlier, in a lecture given at Breslau in 1873. That earlier lecture starts with the image of Kaiser Wilhelm I being crowned in January 1871 at Versailles, on the throne of the Bourbons. For many Germans, this historic event at the gates of Paris signaled a national revival, the triumph of a wise return to medieval values over the dangerous innovations imposed on European civilization by the French culture. For some, Gierke observed, the new German Empire represented a *return* to the *ancien régime*. For others, the Second Reich was an absolute novelty, a new experiment in politics, public law, and diplomacy. Yet in Gierke’s vision, Germany was neither reactionary nor

4 The new Germany should found its new State on the solid base of its history, says O. VON GIERKE (note 1) 5: “Heute müssen wir alle vorwärts blicken ... Aber wer geschichtlich denkt, wird nunmehr ... den Blick auch rückwärts ... wenden. Sollen wir denn wirklich bei dem Neubau unseres Staates wieder, wie schon oft, uns von fremden Gedanken überfluten lassen? ... Wir sind doch ein Volk mit mehrtausendjähriger Geschichte, das in Erfüllung seines weltumspannenden Kulturberufs auch das Staats- und Rechtsleben mit eigenen Gedanken befruchtet hat. Bevor wir fremde Volksgeister zu unseren Herren machen, sollten wir uns doch besinnen, ob nicht der germanische Staatsgedanke uns auch für die Zukunft höhere Werte zu bieten vermag. – Das Germanentum ist es nun einmal gewesen, das nach dem Untergange der antiken Welt die mittelalterliche und moderne Welt, in der wir bis heute leben, geschaffen hat. Wir Deutschen aber sind das germanische Kernvolk, das Urvolk.”

5 The particular importance of history for German national self consciousness is stressed by E.-W. BÖCKENFÖRDE, *Die Einheit von nationaler und konstitutioneller politischer Bewegung im deutschen Frühliberalismus*, in: E. W. BÖCKENFÖRDE (ed.), *Moderne deutsche Verfassungsgeschichte (1815-1918)*, Köln 1972, pp. 27-39.

revolutionary: it was just true to its national identity.

In victorious 1873 as in tragic 1919, Gierke developed the same basic argument: that the German idea of law was different in its essence from the Roman one, and that this difference should be enhanced and exploited to unleash the extraordinary potential of the German people.

At the end of his 1919 lecture, Gierke sums up the main points of his vision, and we cannot help but think that the old professor was dictating the terms of his intellectual legacy for the new twentieth century:

“*Unser Staat soll nationaler Staat sein und bleiben!*”: “Our state should be based on our national identity!” – meaning also that a common national spirit joins Germany and Austria together.

“*Unser Staat soll geschichtlich fundamentiert bleiben.*” “Our state should stand on a historical foundation”: history does not represent, for Gierke, the historical reconstruction of doctrines and social contexts of public law through time, but the ancient, unchangeable foundations of a distinctly German legal identity.

“*Unser Staat soll ein organisch aufgebautes Gemeinwesen germanischer Prägung bleiben.*” Gierke asserts that municipalities and local government entities are autonomous in Germany; they do not derive their legal existence or authority from the state.

“*Unser Staat soll sozialer Staat sein. Sozial, aber nicht sozialistisch!*” Our state should remain a *community*, conceived by Gierke as an *organism*. “It should be then a *social state*. Social but not socialist!”

“*Unser Staat soll Kulturstaat sein und bleiben.*” “Our state should be and remain a cultural state.” The English translation of *Kulturstaat* does not do justice to the meaning of the German concept, which has deep roots in German constitutional thought.⁶

“*Unser Staat soll Rechtsstaat sein.*” *Rechtsstaat* is often translated as “rule of law.” In Gierke’s vision, the concept means more, both public authority and private initiative are never completely free from their legal framework. Embedded in popular feelings, legal rules oblige each person to respect his or her legal *duties* while enjoying his or her legal *rights*.

6 See, among many other studies: G. METTELE/A. SCHULZ (eds.), *Preußen als Kulturstaat im 19. Jahrhundert*, Paderborn 2015.

Gierke's last lecture is thus a real roadmap for the construction of the new Germany. It is, in my view, both a cornerstone for the democratic constitution of the Weimar Republic and one of the legal justifications for the Nazi state, the frightening outcome of a large part of the interwar constitutional German thought.

2. *Verfassung and History*

Gierke was a lawyer but, in the tradition of the German historical school of law, he was also a very important and respected German social historian. As a legal historian, he clearly connected legal history to a sort of legal anthropology, a description of the popular customs that formed a shared heritage for the whole national community. In the Romantic culture of the nineteenth century, the deep grounding of a legal system in the spirit of the nation was the only true pledge of the real lawfulness of the legal order. This tendency to explain the historical development of law as emanating from the spirit of the people was present in scholarship on both private and public law. In private law, Pandectists built their extraordinary successful school on the assertion that Roman law, the basis for modern German private law, had been "taken over" by the Germanic peoples when they invaded the Roman Empire. The same connection between history, identity and legality was drawn for public law: in public law, historians of German law since the eighteenth century had posited the existence of an ancient German constitution that long predated the creation of a unified German state.⁷ Georg Waitz's 1844 *Deutsche Verfassungsgeschichte*, one of the earliest classic texts on German constitutional history, is very much in this vein. For Waitz, "constitution" means something very different from what we (Western Europeans) usually understand under this definition. The German *Verfassung*, for Waitz, could not be reduced to a collection of fundamental constitutional rules on which the state is based. It is much more: it is some-

7 The public law of Germany was nothing but its history, wrote Justus H. Böhmer already at the beginning of the 18th century: *Ius publicum regiminis Germanici nulla olim lege comprehensum non ab alio fere principio accersitur, quam a longaeva consuetudine: quae quid <aliud> est, quam antiquitatis Germanicae historia?* J. H. BÖHMER, *Ius ecclesiasticum protestantium. Usus hodiernum iuris canonici iuxta seriem Decretalium ostendens et ipsis rerum argumentis illustrans*, I (quinta editio), Halle, 1756 (first ed. 1714-37) 214-215 § 21. On Böhmer's book, see E. CONTE, *Ius ecclesiasticum protestantium... in The Formation and Transmission of Western Legal Culture*, in: S. DAUCHY et al, *150 Books that Made the Law in the Age of Printing*, Springer 2016 (Studies in the History of Law and Justice, 7).

thing that can and must stand also *without* a state, because after all, in 1844, Germany was not a state. It is, rather, the legal identity of a nation: Waitz describes the customs of the Germans as based on the history of the nation, with a kind of anthropological flavor. Rules governing inheritance, popular games, folk music, peculiar ideas of contract and marriage law: all of it was part of the German constitution for Waitz.⁸

Of course, after 1871 a real German state did exist. But, as Gierke had clearly said, it was a peculiar State. Its constitution was not given from above, from the ruler to the people, because the ruler simply gave written form to the feelings of the people.

On this point both strands of the German historical school – *i.e.*, scholars who focused on Germanic law on the one hand and Roman law on the other – shared the same opinion: a legal norm is binding not because of the power conferred by the ruler but because the rule reflects the spirit of the whole people. But the two groups of scholars put different glosses on the concept. For Roman-law scholars, this “spirit” had a more active and subjective character: it was identified with the will of the people. In his famous book on customary law, the Romanist Georg Friedrich Puchta developed his theory of *Volksüberzeugung* (“popular conviction”)⁹ and his basic argument was that the strength of customary law lay in the “common conviction” that a particular behavior was legal. This means that it was not the pure *fact* that people had been doing something for a long period of time that gave rise to a customary rule. Rather, it was the public’s being persuaded to believe that certain behavior is lawful that made the behavior into a binding legal rule.

Scholars who focused on Germanic legal sources, on the other hand, tended to follow the position of Georg Beseler, who stressed much more the *fact* of an ancient be-

8 See F. GRAUS, *Verfassungsgeschichte des Mittelalters*, *Historische Zeitschrift* 243 (1986), pp. 539-540: “Nicht mehr in geschriebenen Konstitutionen, die durch Grundgesetze (lois fondamentales-constitutionelles des 18. Jahrhunderts) bemüht waren, die Willkür der Herrscher einzugrenzen, sah man die Lösung. Man interpretierte die Verfassung als gewachsenes Ergebnis des freien Spiels historischer Kräfte—der Begriff wurde dementsprechend erweitert und zugleich auf das ‘staatliche Leben’ begrenzt, gegenüber anderen entscheidenden Gebieten des wirtschaftlichen und sozialen Lebens abgegrenzt. Man sucht die Kontinuität in Gesetzgebung und Herrschaftsformen und hob sie lobend hervor. Die Betonung der Kontinuität zeichnet die deutsche Verfassungsgeschichte des Mittelalters von allem Anfang an aus.”

9 P. LANDAU, *Die Theorie des Gewohnheitsrechts im katholischen und evangelischen Kirchenrecht des 19. und 20. Jahrhunderts*, ZRG KA 108 (1991), pp. 156-196.

havior, deemphasizing the importance of the subjective will of the sovereign people.¹⁰ In his *Volksrecht und Juristenrecht*, the Germanists' 1843 intellectual manifesto, Georg Beseler wrote:

“Law, in its initial formation, is not the product of chance or human discretion, deliberation, or wisdom; it is created neither by legislation nor by philosophical abstraction. Rather, it develops directly in the life of the people, like morals and language, on the broad basis of general human relations; it lives in the common consciousness of the people, from whose individual constitution it also receives its special character.”¹¹

For both Romanists and Germanists, however, the nation was a large community of people, with its legal system deeply rooted in its history. Knowledge of national law could be obtained only through the study of the national history, which revealed the basic principles of a shared legal inheritance.¹²

Influenced by these accepted theories, legislation promulgated under the Second Reich was mainly thought as the writing down of self-imposed rules whose force and effect derived from their acceptance by the German people.

3. *Verfassungsgeschichte as the history of an “order”*

We can understand now how important this self-consciousness of a German national legal tradition was after the defeat of 1918, far beyond any political and military achievements of the German state, and how important the work of historians, i.e., their search for the ancient shared roots of Germany's national legal tradition, was for this self-consciousness.

10 E. CONTE, *Consuetudine, Coutume, Gewohnheit and Ius Commune. An Introduction, Rechtsgeschichte*, 24 (2016), pp. 234-243.

11 G. BESELER, *Volksrecht und Juristenrecht*, Leipzig 1843, 59: “Das Recht ist in seiner ersten Entstehung nicht das Produkt des Zufalls oder der menschlichen Willkür, Ueberlegung und Weisheit; weder die Gesetzgebung, noch die philosophische Abstraktion hat es geschaffen. Auf der breiten Basis allgemein menschlicher Verhältnisse entwickelt es sich unmittelbar im Volksleben, wie die Sitte und die Sprache; es ist lebendig in dem gemeinsamen Bewusstseyn des Volkes, von dessen individuellen Beschaffenheit es auch seinen besonderen Charakter erhält.”

12 G. DILCHER, *The Germanists and the Historical School of Law: German Legal Science between Romanticism, Realism, and Rationalization, Rechtsgeschichte* 24 (2016) 20-72.

It was thus no accident that, starting in the 1920s, German historians concentrated increasingly on what they called *Verfassungsgeschichte*, the study of the German society as it evolved during the Middle Ages, developing the main legal institutions that would ultimately constitute Germany's national legal *order*. An "order" more than a state, because the relationship between the German nation and the German state had already been difficult before the unification. Even after the First World War and under the Weimar Republic, the dominant German theories of constitutional law refused to accept the idea of a state that imposed legal norms on the people.

During the interwar period, a number of medieval historians increasingly focused attention on the "unifying characteristics" of the German nation. Social historians largely took the place of Germanic legal historians, as if they were moving the focus of nineteenth-century historiography in German law into the broader field of German social history.¹³

The Middle Ages were, of course, the core of this new historiography, because the medieval period was seen as the age of the triumph of the German *Volk* over the Romans and of the establishment of the German identity both within German territory and all across Europe.

One of the basic features of the German popular constitution described by *Verfassungsgeschichte* historians was that it called into question the concept of the state. As we have seen, for the politics and law of the nineteenth century a German nation could perfectly exist in the absence of a German state. A German constitution existed before the state, and it continued to exist with a degree of independence from the state. This peculiar vision was at the core of the historical research into the original characteristics of the German nation, the characteristics that historians could date back to the time of the "entrance of the Germans into history."¹⁴

13 See the classical book by E. W. BÖCKENFÖRDE, *Die deutsche verfassungsgeschichtliche Forschung im 19. Jahrhundert*, 1st ed. 1961, 2nd ed., Berlin 1995. Italian translation by P. SCHIERA, *La storia costituzionale tedesca nel secolo decimonono*, Milano 1970.

14 The German expression "*Eintritt der Germanen in die Geschichte*", or "*in das römische Culturleben*" was pretty diffused since the middle of the 19th century. An example in F. DAHN, *Die Könige der Germanen*, vol. 4, Teil 7.1 und 7.2, Leipzig 1894, p. 274.

The state that did not exist for historians of the Middle Ages was the state described by Gierke as a fictional person created to rule the people, as had been the case for the Roman Empire. In his monumental *Das deutsche Genossenschaftsrecht* and in a number of minor works, Gierke had insisted on denying the existence of a German state during the Middle Ages, at least in the sense given to the word by the doctrine of natural law. Instead, in the artificial figure of a sovereign state, Gierke saw a superstructure imposed on the German people through the evil influence of Roman law. By contrast, the German form of a political corporation was not based on a fiction: it was founded, according to Gierke, on the concrete order of German *Verbände* and was never transformed into the abstract unity of an all-powerful state.

German social historians in the 1920s took up the torch of a history of real, practiced institutions from the legal historians, merging the modern vision of law as a function of society with the old ideas of the legal creativity of the German *Volk*.¹⁵ The result was a historiography quite in tune with the ideas that were affirmed by the totalitarian dictatorship in 1933.¹⁶

In that very year, Theodor Mayer, one of the most important representatives of the new *Verfassungsgeschichte*, stressed a peculiarity of the German state of the Middle Ages, one that marked it as substantially different from the modern state. Whereas the modern state is built as an *institutioneller Flächenstaat*, a political organism in which all power is derived from the centre, the German medieval state was a *Personenverbandstaat*, in which many independent powers were federated in a complex structure.¹⁷ Every part

15 This is clearly said by T. MAYER, *Die Ausbildung der Grundlagen des modernen deutschen Staates im hohen Mittelalter* (a paper given on August 30, 1938 in Zurich), HZ (1939) 457-487, 457: "Die deutsche Geschichtswissenschaft hat seit etwa einer Generation die Interesse in steigendem Masse den Fragen nach dem Werden von Volk und Staat der Deutschen zugewandt Die neue Aufgabe fand eine neue wissenschaftliche Methode zu ihrer Lösung und beide haben sich gegenseitig angeregt und befruchtet, so dass das Bild der mittelalterlichen Geschichte sich grundlegend verändert und erweitert hat. Die statische, dogmatisch-institutionelle Betrachtungsweise der Historiker, die auf der Urkundenforschung aufgebaut ist, ist umgestaltet und ergänzt worden."

16 An extremely useful account of the development of the German historiography after 1930 is H. LEHMANN-J. VAN HORN MELTON, *Paths of Continuity. Central European Historiography from the 1930s to the 1950s*, Cambridge 1994, pp. 263-292.

17 Cfr. R. HEINZEL, Theodor Mayer. *Ein Mittelalterhistoriker im Banne des „Volkstums“ 1920-1960*, Paderborn 2016, p. 94.

of this complex organism had its own legal autonomy, so that the idea of a German state cannot stand solely on obedience; it must be based on a principle of voluntary collaboration. This feature created an important difference, said Mayer, between the Roman and the German notions of state. Whereas the Roman state was a despotic, centralized entity removed from the feelings of the people, the German state was the union of many free and independent corporate bodies, gathered together by the common desire to participate in the larger national community.¹⁸

Many of the main points of the old legal-historical theories of the Germanists of the nineteenth century were also reworked to form the basis of a new historiography whose results fitted nicely with the ideas of the new Nazi government. As a consequence of this new way of seeing the relationship between the state, the rule of law, and the people, a new term was increasingly used to avoid any confusion between the two competing models of state. Instead of being called “state”, the German political organism was called “order”, *Ordnung*.¹⁹ *Ordnung* quickly became an extremely successful substitute for *Staat*. The domestic and international successes of the Third Reich encouraged both historians and political scientists in Germany to think of the Germans as propagators of a new order. In 1942, Karl Richard Ganzer sold more than 850,000 copies of his book *Das Reich als europäische Ordnungsmacht*, testifying to the wide success of the idea of a legal order that could impose itself without the enforcement mechanisms of a modern state.²⁰

18 The same ideas, probably mediated by the French legal historians of the 20th Century, are still present in the works of B. KRIEDEL (Barret-Kriegel). See further, text at note. 35.

19 On the very use of the word *Ordnung* in the Nazi time, see L. RAPHAEL, ‘*Ordnung*’ zwischen Geist und Rasse: Kulturwissenschaftliche Ordnungsemantik im Nationalsozialismus, in: H. LEHMANN-O. G. OEXLE (eds.), *Nationalsozialismus in den Kulturwissenschaften 2.*, Göttingen 2004, 115-137.

20 T. VORDEMAYER, *Bildungsbürgertum und völkische Ideologie*, Berlin / Boston 2016, 309-310; E. WADLE, *Visionen vom Reich. Streiflichter zur Deutschen Rechtsgeschichte zwischen 1933 und 1945*, in: J. RÜCKERT-D. WILLOWEIT (eds.), *Die deutsche Rechtsgeschichte in der NS-Zeit. Ihre Vorgeschichte und ihre Nachwirkungen*, Tübingen 1995, 241-300, 254 ff.

4. Otto Brunner: From German Law to *Verfassung* and Society

A power that guarantees a social *order*: that is what the Third Reich wanted to be. This was considered a very “German” ambition, rooted in the spirit of the medieval (and hence German) society studied by historians of the national “constitution.” This is particularly evident for Otto Brunner, whose book *Land and Lordship*²¹ was published in 1939 and remained a great scholarly success up through the end of the century.

As recent research has shown, Brunner was an “extremely active and deeply convinced supporter of National Socialism.”²² Besides reading newly discovered archival material concerning his attempts to enter the *Nationalsozialistische Deutsche Arbeiterpartei* (NSDAP),²³ Hans-Henning Kortüm has also been able to see the unpublished book that Brunner had written for a larger audience, which lay in proof in 1944 under the title *Der Schicksalsweg des deutschen Volkes* but never came out. It is an astonishing piece of militant historiography, which uses the “*völkisch*” view of medieval history to strengthen the determination of the German people in the hour of their final struggle.

Brunner presents himself as a soldier:

“The soldier knows his opponent; he is determined to fight him until the destruction. He brings to his opponent the respect he deserves. This soldierly attitude is also valid with respect to the past, that is, the object that deeply concerns the historian.”²⁴

This extreme vision was in fact the natural development of the historical view of Brunner. Medieval German society, for Brunner, was made up of a diverse assortment of powers that, while politically autonomous, all observed a general rule that unified

21 O. BRUNNER, *Land and Lordship: Structures of Governance in Medieval Austria*, trans. H. Kaminsky/J. Van Horn, Philadelphia 1992.

22 H. KORTÜM, „Gut durch die Zeiten gekommen.“ *Otto Brunner und der Nationalsozialismus*, *Vierteljahrschrift für Zeitgeschichte* 66 (2018), pp. 117-160, p. 119: “Die hier präsentierten Quellen zeigen Brunner eindeutiger und stärker als bislang bekannt als äusserst aktiven und zutiefst überzeugten Anhänger des Nationalsozialismus.”

23 Also mentioned by J. VAN HORN MELTON, *From Folk History to Structural History: O. Brunner (1898-1982) and the Radical-Conservative Roots of German Social History*, in: *Paths of Continuity* (note 16), p. 267. J. Van Horn Melton has also gathered some evidence of a less convinced support of Brunner to Nazism: he also helped a Jewish colleague of his wife to escape arrest in 1942 (270). On the other hand, Van Horn maintains that “his support for National socialism went well beyond the bounds of political opportunism” (p. 271).

24 H. KORTÜM (note 22), p. 145, quoting p. 11 of the print draft.

the whole nation. This general rule is called *Ordnung* and is not imposed from above, but it was perceived as right and just by the entire nation.

Gadi Algazi stressed that Brunner's idea of *Ordnung* comes through particularly clearly in one important passage of *Land and Lordship*.²⁵ In that passage, Brunner writes:²⁶

“[L]aw and justice, Right and law were in the end the same. This reflected a mentality in which all laws, orders, decrees, commands, were considered valid only in the context of ‘Right’—the sense of the community, for which ideal and positive law were inseparable because law was community law, the community’s conviction about what is right and legitimate, the conviction that dominates the heart of every individual with elemental power. ‘The convictions of the men of that time about the right and the legitimate seemed to them unchangeable and eternal, *éwa*, and they felt all ‘positive’ law to be a part of this enduring order. Hence there could be no contradiction between law and justice. That is why Heinrich Mitteis has called medieval legality a ‘conviction of Right.’” [footnotes omitted]

A quick analysis of the sources of this passage reveals that the medieval society described by Brunner was largely seen through the studies of the old Germanistic legal historiography: the assumption that “law was community law” (*Recht war Volksrecht*) harkens back to Beseler (1843) and more recently to the work of the historian Fritz Kern, whose article *Recht und Verfassung im Mittelalter* came out in 1919,²⁷ to be translated into English in 1939,²⁸ reprinted in German as a book in 1952 and in subsequent editions up through the twenty-first century. The reference to “the community’s con-

25 See G. ALGAZI, *Otto Brunner „Konkrete Ordnung“ und Sprache der Zeit*, in: P. SCHÖTTLER (eds.), *Geschichte als Legitimationswissenschaft*, 1918-1949, 2nd ed., Frankfurt am Main 1998, pp. 166-203.

26 O. BRUNNER, *Land and Lordship*, p. 119; O. BRUNNER, *Land und Herrschaft* (51965), s. pp. 139-140; *Land und Herrschaft* (1939), pp. 165-166, and K. G. HUGELMANN, „Das Deutsche Recht,“ in: O. BRUNNER u. a. (ed.), *Das Mittelalter*, Leipzig 1930, p. 217. The passage is also quoted *in extenso* in J. RÜCKERT, *Der Rechtsbegriff der Deutschen Rechtsgeschichte in der NS-Zeit: der Sieg des „Lebens“ und des konkreten Ordnungsdenkens, seine Vorgeschichte und seine Nachwirkungen, Die deutsche Rechtsgeschichte in der NS Zeit* (note. 20), p. 207.

27 F. KERN, HZ 120 (1919), pp. 1-79.

28 F. KERN, *Kingship and Law in the Middle Ages*, transl. with an introduction by S. B. Chimes, Oxford 1939. Especially useful for the understanding of the intellectual world of Kern is J. LIEBRECHT, *Fritz Kern und das gute alte Recht. Geistesgeschichte als neuer Zugang für die Mediävistik*, Frankfurt am Main 2016 (*St. zur eur. Rechtsgeschichte*, p. 302). For the connections with 19th Century legal history and the Germanists, see pp. 85-92.

viction about what is right and legitimate, the conviction that dominates the heart of every individual with elemental power,” is taken from Claudius von Schwerin, the author of the then most widely read handbook on German legal history; similar remarks can be found in many German legal history handbooks from the nineteenth and early twentieth centuries. Brunner also refers explicitly to Heinrich Mitteis, who in 1926 was still applying Puchta’s theory of custom to the study of German law.²⁹ The reference to the German word *êwa* also has a long history. The word is attested solely in a few Carolingian manuscripts that use the term as a definition of popular law.³⁰ Noticed by German legal historians in the nineteenth century, the word became more important in the twentieth, because its linguistic root³¹ seemed appropriate to underline the eternal and unchangeable feature of the German concept of popular law.³²

The perfect coherence between Brunner’s *Land and Lordship* and the theories of the historical school of law, both of which shared the same strong rejection of positive law, was emphasized in an enthusiastic 1941 review of Brunner’s book by the great legal historian Heinrich Mitteis. The conception as a “sacral order” (*sakrale Ordnung*) that the *Urgermanen* had of law, wrote Mitteis, has always been the dominant concept of law among the Germanist legal historians, for whom law cannot be altered by state power because it springs directly from the consciousness of the *Volk*.³³ To impose this

29 H. MITTEIS, „*Rechtsgeschichte und Machtgeschichte*,“ in: G. P. BOGNETTI *et al* (eds.), *Wirtschaft und Kultur. Festschrift zum 70. Geburtstag von Alfons Dopsch*, Baden bei Wien/Leipzig 1938, pp. 547-580: pp. 565-566.

30 Cfr. G. SCHMITZ (ed.), *Die Kapitulariensammlung des Ansegis, Monumenta Germaniae Historica*, Hannover 1996, pp. 35-36, pp. 49-50.

31 See R. SCHMIDT-WIEGAND, „*Ewa*“ in: H. JANKUHN-H. BECK (eds.) *Reallexikon der Germanischen Altertumskunde*, 2.Aufl., Berlin 1994, pp. 35-37.

32 The meaning of the term *êwa* had been described in different ways in the different editions of the same book, R. SCHRÖDER, *Lehrbuch der deutschen Rechtsgeschichte*, Leipzig 1894. I have seen the second edition, where it is defined on page 13 as *ewige Ordnung* (“eternal order”), whereas in the sixth edition, produced with co-author E. FREIHERR VON KÜNSSBERG (Berlin 1922), it is presented on page 19 as a variant of the word *Ehe*, meaning in German *Billigkeit* or in Latin *aequum* (English “equity”).

33 H. BRUNNER, *Land und Herrschaft. Bemerkungen zu dem gleichnamigen Buch Otto Brunners*, *Historische Zeitschrift*, 163 (1941), pp. 255-281, pp. 270-271: “*Das Recht ist in Gott gegründet und mit Gerechtigkeit und Billigkeit identisch Diese Auffassung ist aber nicht etwa erst durch das Christentum vermittelt worden, sie ist schon dem Urgermanentum eigen, für die das Recht eine sakrale Ordnung war Damit ist die germanische Konzeption des unwandelbaren und unverbrüchlichen, aus der Volksüberzeugung unmittelbar fließenden guten alten Rechts aufgehoben.*”

Germanic variety of the rule of law, Germany did not need a state, at least not in the abstract sense defined by the learned lawyers, because the legal order was engraved in the hearts of all Germans. At the same time, the pluralism of political entities in Germany could not endanger the essential unity of the German nation because the common legal order could not be altered by any person or power. As we have already seen, this is the image of the German state that Gierke presented in 1919: a peculiarly German state does not impose its laws, but rules a pluralist community that acknowledges the existence of a common *order* arising from the spirit of the people.

5. Some examples of the enduring persistence of the idea of a medieval ordo in European historiography

Now it might seem odd that these old, nationalist, even racist ideas, rooted in the nineteenth century and proudly exalted in the Nazi period, still have some currency among historians and lawyers in the twenty-first century. But to our surprise, we can easily recognise in more than one national scholarly tradition this vision of the old school of the Germanist legal historians, mediated by the work of the *Verfassungsgeschichte* historians.

I offer below a few signs of the persistence of this historiographical construct even in current scholarship.

(a) Germany. After the war, Germany took seriously enough the task of getting its universities rid of fascist doctrines. But the German professors who had been loyal to the Nazi government were so numerous that it was not possible to stop every former Nazi from teaching. After being expelled from the Vienna University, Otto Brunner found a chair in Hamburg, and continued to work and publish. His *Land and Lordship* reappeared in multiple editions (reprints in 1939, 1942, and 1943; then new editions in 1959 and 1965, and further reprints in 1973, 1981, 1984, 1990; an Italian translation in 1983; and an English translation in 1992), and he also published some short syntheses such as his *Sozialgeschichte Europas im Mittelalter* (in 1978 and 1984, an Italian translation in 1980, Spanish in 1991, Finnish in 1992) where the concepts he had expressed in his main books were summarized for a broader readership.

It is worth noting that a large part of the tradition of German legal history fed

into what we now think of as “social history.”³⁴ This happened because historians of medieval German law refused to study the abstract constructions of the learned scholastic law, considering them to be mere superstructures imposed by state powers in opposition to the spirit of the people. Instead, they devoted themselves to describing a truly popular law, imposed by custom and formed basically by social behavior, attitudes, and practices. They used the same kind of material on which the German *Verfassungsgeschichte* constructed their vision of a popular law as opposed to a learned and artificial law imposed on the people by judges, professors, and finally also kings and emperors, with their officials trained in the study of Justinian’s laws.

The very idea of a popular law, which could resist the imposed Roman-law superstructures over a period of centuries, led historians to disconnect the idea of law from the power of the state. Instead of being the source of law, the state becomes its enemy, committed to choke off the rules naturally produced by the *Volksgeist* with the ruthless abstractions of Roman law.

After the tragic failure of the Third Reich, the German historians were particularly keen on painting a portrait of the German Middle Ages that stressed social structures much more than any construction of a central authority. The *Verfassungsgeschichte* that had been the premise of a peculiar German *Ordnung* became the description of a popular order based on anthropological features and on ancient traditions. Brunner’s and Fritz Kern’s books had second lives, and the old image of a stateless order was happily revived.

(b) France. The influence of Germanist scholarship arrived relatively early in France, beginning with the work of the early nineteenth-century historian Henri Klimrath, and it became dominant in French legal history with the extraordinary success of François Olivier-Martin, whose *Histoire du droit français*, first published in 1948, had an extremely large use in French universities, being reprinted until 2010. Born in 1879, Olivier-Martin was a legal historian educated in the spirit of German legal history: in 1938 he published a book on the corporatist structure of the Kingdom of France during the Middle Ages, following Gierke’s interpretation. In his book of 1947, *Les lois du roi*,

34 See LEHMANN-VAN HORN MELTON, *Paths of Continuity* (note 16).

he proposed a distinction between the *lois du royaume* and the *lois du roi*, meaning that there are two kinds of legislation in the French tradition: the king made the law, yet he lacked the power to alter the old preexisting legal traditions of the kingdom. According to Olivier-Martin a core set of fundamental rules, which the monarchy was bound to respect, existed. This is merely a French version of the German idea of a popular *Verfassung* that lies beyond the power of the central authorities to change.

French legal historians tended to reproduce the German division between “Romanists” and “Germanists” by emphasizing the traditional distinction between the *pays de droit écrit* and the *pays de droit coutumier*. Olivier-Martin insisted on his interpretive key, namely that the king had no power to change the private law and that his *ordonnances* would have been effective only in the areas of public administration, the law of privileges, civil and criminal procedure, and substantive criminal law.

The distinction is a French transfiguration of the German distinction between the concepts of *Verfassung* and *Konstitution*. As the core set of rules of social intercourse, deep-rooted in the self-consciousness of the people, the *Verfassung* represented the identity of a nation, whereas the *Konstitution* was an act empowering the king and government. Given this distinction, even the king could not change the identitarian rules. It is the same position that we have seen in Brunner and his predecessors. Law is an *Ordnung*, an “order,” which escapes the power of the state and therefore exists without the state.

During the late 1980s and the 1990s, an influential historian of political thought gave yet again a new impulse to these old nineteenth – and early twentieth – century ideas in France. In 1988 Blandine Kriegel wrote the second book of her tetralogy on the relationship between the French state and historiography, under the title *La défaite de l'érudition*.³⁵ Recruited to the *Collège de France* by Michel Foucault, Blandine Kriegel was fascinated by the constructs of the legal historians in general and of Olivier-Martin in particular. She insisted on the despotic character of Roman law, connecting the development of modern civil liberties to the process of “relegation” of Roman law. Instrument of every despotic power, Roman law was the main

35 B. KRIEDEL, *L'histoire à l'âge classique*, 1, *Jean Mabillon*; 2, *La défaite de l'érudition*; 3, *Les académies de l'histoire*; 4, *La république incertaine*, Paris 1988. Reprint Paris 1996.

obstacle to remove so as to attain a degree of real liberty and predominance of the law over state power.

The vision of Kriegel had been sharply criticized by some great French legal historians: Yan Thomas³⁶ and Jacques Krynen have taken quite a clear stance against this simplistic identification of Roman law with an oppressive system. A vision resulting from a mixture between the old fashioned vision of a French Germanist like Olivier-Martin and a simplified idea of law in history that Barret-Kriegel had taken from some old classics like Jules Michelet's *Histoire de France*.³⁷

Yet again, now only a few years ago, a new controversy arose in the pages of the French journal *Droits*: André Castaldo published two articles³⁸ in 2008 criticizing Jacques Krynen and Gérard Giordanengo for having stressed the importance of late medieval jurists' abstract legal constructs for the early modern construction of a national system of private law.³⁹ The nineteenth-century idea that Roman law was an imposition of the central power over the "spirit" of a national rule of law could not accept this new way of describing the history of French law as a mixture of local practices and a legal culture that, over time, diffused abstract legal rules that the doctrine had built on the authoritative base of the Roman law sources.

Castaldo's articles have received two detailed responses, one from Yves Mausen, the other from Gérard Giordanengo. Yves Mausen's 2009 article⁴⁰ showed the "practical value" of the Roman-law doctrines that the Parlement of Paris used to settle the everyday disputes it had to deal with. Mausen agrees with Yan Thomas, Jacques Krynen, and Gérard Giordanengo that the old interpretive model based on the opposition between people and lawyers, or Roman law against German law, or concreteness against abstrac-

36 Y. THOMAS, *L'institution civile de la cité*, *Le Débat* 74 (1993), pp. 21-40, note 8.

37 J. KRYNEN, *L'encombrante figure du légiste: Remarques sur la fonction du droit romain dans la genèse de l'État*, *Le Débat* 74 (1993), p. 44.

38 A. CASTALDO, *Pouvoir royal, droit savant et droit commun coutumier dans la France du Moyen Age: À propos de vues nouvelles*, *Droits* 46 (2007), pp. 117-158; and 47 (2008), pp. 173-247.

39 J. KRYNEN, *Jus commune et 'droit commun' en France, du XIIIe au XVIe siècle*, *Études d'histoire du droit et des idées politiques* 3 (1999), pp. 219-247; G. GIORDANENGO, *Le droit romain, droit commun de la France*, *Droits* 38 (2003), pp. 21-35.

40 Y. MAUSEN, *A demonio merediano? Le droit savant au parlement de Paris*, *Droits* 48 (2009), pp. 159-177.

tion, must be abandoned. Law is a very complex phenomenon, whose high degree of abstraction is impossible to eliminate. This does not mean that law has nothing to do with reality: on the contrary, legal abstractions are a powerful tool for settling disputes to change the balance of power in real life.

Gérard Giordanengo's response, published in a 2010 article,⁴¹ is extremely informative. After a long and detailed demonstration of the persistence of learned law in the theory and practice of French law from the twelfth century onward, Giordanengo concludes that "the nationalism of the legal historians of the nineteenth century, which let them see in the customs the real law of France, can no longer be accepted."⁴²

(c) Italy. The lively discussions in French scholarship have no parallel in Italy. More than fifteen years ago I tried to offer a critical point of view⁴³ about a very successful Italian monograph on medieval legal ordering,⁴⁴ but neither the author of the monograph nor anyone else took up the opportunity to enter into a scholarly debate.

My critical position is shared and backed up with further analysis by Peter von Moos. In his 2008 work on the concepts of "public" and "private" in medieval history and historiography,⁴⁵ von Moos remarks that a number of *braune Relikte* of nineteenth- and twentieth-century historiography continue to structure our understanding of medieval society. In particular, von Moos remarks that the exercise of translating some Ita-

41 G. GIORDANENGO, *Roma nobilis, orbis et domina: Réponse à un contradicteur*, *Revue Historique de Droit Français et étranger*, 88 (2010), pp. 91-150.

42 G. GIORDANENGO (note 41), p. 150.

43 E. CONTE, *Droit Médiéval. Un débat historiographique italien*, in *Annales. Economie, Sciences Sociales*, 57 (2002), pp. 1593-1613 (tr. it. *Storicità del diritto. Nuovo e vecchio nella storiografia giuridica attuale*, in *Storica* 22, 2002, pp. 135-162). More on the topics in: E. CONTE, *L'état au Moyen Âge*, in: P. BONIN - P. BRUNET - S. KERNEIS (eds.), *Formes et doctrines de l'État. Dialogue entre histoire du droit et théorie du droit*, Paris 2018, pp. 123-136.

44 P. GROSSI, *L'ordine giuridico medievale*, Roma-Bari 1995, many reimpresions. In 2006 Grossi signed two pages of introduction to the new issue of his book, reprinted without any change after 10 years from its first issue. Just to say that the discussions that followed the first edition had not changed his ideas, and particularly that (1) the Medieval law, better defined as an "order" to stress its immanence in the European people and the small impact of legislation on it, is basically different from the modern idea of law; and (2) this basic character of Medieval law does not change for eight centuries, from the 6th to the 14th century. In particular, the birth of legal science within the scholasticism does not change the features of the medieval legal order.

45 P. VON MOOS, *Öffentlich und Privat, Gemeinsames und Eigenes*, in: G. MELVILLE (ed.), *Gesammelte Studien zum Mittelalter*, vol. 3, 3. ed., Berlin 2007, pp. 131-132.

lian historiographical constructs into German evokes frightening slogans of the 1930s.⁴⁶

The lack of discussion among the specialized legal-historians has allowed, in Italy, a rather simplistic use of historical arguments in some pretty lively legal debates.⁴⁷

6. Conclusions

We could easily go on with other examples of the enduring fortune of a historiographical model that arose in a particular historical situation as a reaction to the liberal state, to the triumph of rational legislation, and to the distinctions between private rights and public legislation and between private and public law. The exponents of the conservative wing of the German historical school have lined up against the exaggerated individualism of capitalist society, clamoring for more social sensitivity in the legal system. Their target was the dichotomy between the state and the individual; their desired reform was a more scattered distribution of public power among many corporate bodies, whose autonomy could provide a legal order that would answer the real needs of the society instead of affirming an abstract project of private, individualist rights. It is the conservative answer to the same tensions that gave birth to socialism and communism. But whereas Marxist social doctrines proposed an evolution through capitalism toward the rising sun of a socialist state and a socialist international network, the conservative social doctrines of Gierke were strongly tied to a nationalist feeling. It was an essential precedent for the Nazi theories,⁴⁸ as it was certainly for the historiographical stream of *Verfassungsgeschichte*.

The model of the popular origin of medieval law erases much of the complexity of medieval law. The model's defenders treat the doctrinal literature of medieval Roman

46 P. VON MOOS (note 45) 198 and note 194, quotes the expression "*sangue, terra, durata*" used by Grossi, whose German translation evokes the expression *Blut und Boden*.

47 Some remarks on the discussion on the commons in: E. CONTE, *L'État au Moyen Âge* (note 43).

48 See M. STOLLEIS, *Die Rechtsgeschichte im Nationalsozialismus: Umriss eines wissenschaftsgeschichtlichen Themas, in Recht im Unrecht: Studien zur Rechtsgeschichte des Nationalsozialismus*, Frankfurt am Main 1994, p. 64, note 28. Gierke was very much appreciated by Nazi legal theorists after 1933. See, e.g., R. HÖHN, *Otto von Gierkes Staatslehre und unsere Zeit: Zugleich eine Auseinandersetzung mit dem Rechtssystem des 19. Jahrhunderts*, Hamburg: Hanseatische Verlagsanstalt 1936, which evokes a byword current among scholars immediately after the Nazi rise to power: "*Zurück an Gierke!*".

and Canon law as a mere superstructure, useful only for validating legal forms already created by the people. On the contrary, doctrinal abstractions created from the twelfth century onwards have been extremely creative, effective, and in some cases revolutionary. Academic lawyers forced customs to change,⁴⁹ seriously endangered the feudal system, and substantially contributed to the creation of a new model of sovereignty. They made possible a public, rational legal procedure, introduced a right of resistance, constructed a new system of jurisdiction, and defined the powers of public officials. We now understand that considering all this as a mere superstructure served the political views of German academia in the nineteenth and twentieth centuries. We should be careful, however, not to adhere to the old historiographical interpretations just for the sake of keeping alive the feelings of the last century.

49 E. CONTE, *Roman law vs. customs in a changing society* (Italy, 12th-13th centuries), in: P. ANDERSEN - MIA MÜNSTER-SWENDSEN (eds.), *Custom. The Development and Use of a Legal Concept in the High Middle Ages*, Copenhagen 2009, pp. 33-49.
