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THE NON-SOCIAL PURPOSE OF PRIVATE LAW: A REPLY TO OTTO VON GIERKE

Key words: Gierke, legal history, private law theory, social law, system of law

Summary

The reasons presented by Otto von Gierke in his famous speech “The Social Purpose of Private Law” for a hybridisation of private law towards a social private law are not convincing anymore. Private law is not intrinsically social. Rather, the protection of the weaker party, for example through redistribution, is attributed to public law. Therefore, the present social private law must be broken down into its two original components: free and market-oriented private law and public social law. Only if both spheres of law are principally, conceptually and systematically separated from each other, they are capable of playing out their full capacity.

1. An often quoted but little read speech

In his famous speech on “The Social Purpose of Private Law” in Vienna in 1889, the German scholar Otto von Gierke called for a “drop of socialist oil” in private law when he criticised the first draft of the German Civil Code.¹ This drop has turned into a broad stream of norms that purport to protect the weaker contractual party against the stronger one. The whole of private law is permeated by norms which the legislature has codified to shield the weaker party in a contractual

¹ Gierke O. Die soziale Aufgabe des Privatrechts [The social task of private law]. Berlin/Heidelberg: Springer, 1889, p. 13; in detail: Repgen T. Die soziale Aufgabe des Privatrechts: Eine Grundfrage in Wissenschaft und Kodifikation am Ende des 19. Jahrhunderts [The social task of private law: A fundamental question in science and codification at the end of the 19th century]. Tuebingen: Mohr Siebeck, 2001, pp. 25–49; Schaefer F. L. Juristische Germanistik: Eine Geschichte der Wissenschaft vom einheimischen Privatrecht [Legal German Studies: A History of Domestic Private Law]. Frankfurt am Main: Vittorio Klostermann, 2008, pp. 600–602.

relationship. These norms aim to create a social private law in accordance with the principle of the welfare state. This social private law is characterised by the fact that it merges public law and private law principles and thus cannot be called a liberal, free private law, a “pure” private law, but only a hybrid law. Since the turn of the millennium, numerous crises have been shaking social private law at ever closer intervals, from the dotcom crisis in 2000 to the collapse of numerous supply chains during the Corona pandemic in 2020/21 and the following Russian-European war since 2022. The public-law welfare state with its ever greater demands for redistribution and politically motivated regulation instead of market-optimising self-organisation is putting additional pressure on social private law. These two millstones, the pro-active welfare state and the deteriorating economic conditions threaten to tear social private law apart. The call for the state as the saviour of the private business sector is the last step before the state planned economy known from the former Soviet sphere of power.

Gierke certainly could not have foreseen all this. Nevertheless, his metaphor of socialist oil still serves as a legitimisation for deep interventions in private law. Hardly anyone has really read Gierke’s speech from the beginning to the end, but everyone invokes Gierke for their desire for more social law instead of “pure” private law. In view of this wide-spread superficiality, the validity or falsity of Gierke’s arguments cannot be used to conclusively judge social private law, but the outcome of this analysis indicates, to some extent, the following considerations on the present state of social private law. A profound critique of Gierke and his successors must use multidimensionally legal theory, legal history and law and economics. In a first step, the author will divide Gierke’s arguments into two groups: firstly, into arguments that have proven to be wrong in the course of the last 135 years, and secondly, into arguments that are in principle correct, but formulated in a misleading way and need to be clarified. In a second step, the author will investigate, on the basis of Gierke’s valid arguments and current state, whether social private law is capable of reform or whether the classic division into non-social private law and social public law is preferable in order to meet the demands of the present and the future.

2. History – back to the Middle Ages?

Gierke grounds his demand for a social private law in German legal history. He wants to strengthen domestic German law in the field of private law (hereafter referred to as domestic law), which he claims that jurists have wrongly replaced with common Roman law.² Here, he follows the tradition of German legal studies (German: *Germanistik*) and the historical school of law of the early 19th century.

² Gierke O. 1889, pp. 6–8.

Gierke argues, as follows: First, domestic law was the special property of the German people. Second, domestic law and Roman law were fundamentally different; domestic law was characterised by the common good, Roman law by boundless individualism. However, the historical literature of the earlier 19th century had already exposed such views as ahistorical and motivated purely by legal politics.³ They no longer fitted the late 19th century. When Gierke gave his speech in 1889, the legal practice of the Industrial Age had long since ceased to ask about the origin of a legal norm, but about its usefulness. Legal history therefore does not provide a suitable argument for social private law, apart from the problem of drawing any conclusions at all from the past to the present.

Gierke deduces from his domestic law that the law of obligations and property law must be merged to socialise private law.⁴ In terms of content, he refers to the domestic legal institution of the so-called *Gewere*. This hybrid legal institution united legal ownership and factual possession.⁵ Leaving aside the fact that this legal institution, as such, is an invention of the 19th century, it is already unsuitable for Gierke's argumentation on general grounds. For the *Gewere* is about the relationship between right (property) and fact (possession), not about the law of obligations and property law.

If Gierke cannot rely on legal history for the fusion of said legal areas we should further ask how his thesis relates to private law theory as another benchmark. The contract is the central part of the law of obligations, allowing a person to shape his or her life in interaction with other persons and to exercise his or her private autonomy. The contractual parties are free to configure their relationship within the limits of their autonomy because they only define rights and obligations for themselves. In contrast, they cannot agree on obligations to the legal detriment of third parties. The situation is different in property law. Proprietary rights are also protected against infringements by third parties. The scope of protection under property law is not relative but absolute. Absolute protection is not based on a contract, but on the legal recognition of certain positions as particularly worthy of protection. This boundary between the two areas cannot be torn down without levelling the scope of protection of rights under the law of obligations and property law in one direction or the other. On the one hand, the absolute protection of contractual claims would severely compromise economic competition. On the other hand, the only relative protection of property rights would severely impair confidence in the durability of investments in economic goods. In both cases, the uniform protection of rights would lead to an economically suboptimal outcome compared to a differentiating solution. For good reasons, therefore, natural

³ Overview with further references: Schaefer F. L. 2008, pp. 605–613, 617–627.

⁴ Gierke O. 1889, pp. 26 sq.

⁵ For all details: Schaefer F. L. 2008, pp. 494–496, 560–563.

law and pandectics (scholars of the so-called *Pandektenwissenschaft*) already opted for the differentiation of rights and of the according legal system.⁶

Gierke draws further conclusions from legal history that cannot withstand critical examination. He demands that the labour relation between the household staff and their manorial lord should be a part of family law.⁷ Apparently, he had in mind the household community (German: *Hausgemeinschaft*) of the Germanic or Middle Ages, which, in addition to the head of the household, the wife and children, also included the household staff. It is obvious that this demand no longer fits the social reality of the 21st century. Feudal and patriarchal domination shaped this environment, the very opposite of social security for a weaker party.

Apart from that, Gierke obscures the boundaries between family law and the law of obligations (here: labour law as a sub-area of the law of obligations). The two areas of law are based on completely different principles: Family law is characterised by the solidarity of family members due to kinship, while the labour contract is an exchange relationship of service for remuneration or further benefits such as accommodation. Solidarity under family law is only mutual over a lifetime; it can initially be one-sided, as in the relationship between parents and child. In contractual exchange relationships, the principle applies that there is no counter-performance without performance.

To detach ourselves from history and inquire into the social content of labour law, two fundamental questions arise: First, whether the protection in labour law for employees is originally social at all, and second, whether the state as legislator is the appropriate actor to intervene in labour contracts using social private law. Indisputably, an individual worker is at a severe disadvantage *vis-à-vis* the employer. He has neither the knowledge nor the leverage to negotiate a contract on an equal footing with the employer. For this reason, workers have joined together in trade unions since the 19th century. They enforce the rights of their members through strikes and other actions. Trade unions pool the bargaining power of their members and multiply their private autonomy in negotiating the conditions of employment contracts. One can call this pooling of individual interests a social act, but it is not necessary. From the point of view of private autonomy, trade union members transform their single private autonomy into group autonomy in order to negotiate contracts that are advantageous to them. The social protection of trade union members is the consequence of the exercise of this autonomy, not its legal core.

This leads to the second question. Trade unions are able to regulate employment relationships with employers comprehensively, starting from salary as the price of labour, to safety at work and to protection against unfair contractual termination of employment. There is no need for an individual labour law made by the state. The state should not become a subsidiary contracting partner in place of

⁶ See Schaefer F. L. 2008, pp. 400–402.

⁷ Gierke O. 1889, pp. 32, 40.

the unions because this discourages potential members from joining a union and because it undermines the unions' position *vis-à-vis* employers.

The statutory minimum wage is the most striking example of what happens when the legislator acts instead of trade unions in individual labour law. When the legislator raises the minimum wage for political reasons to improve electoral chances, for example to deal with high monetary inflation, he invokes two economic risks: first, even higher inflation because of higher labour costs, and second, a loss of competition if the wage increase is higher than productivity growth. Similarly, the specific risks for trade unions and employees should not be underestimated. The higher the minimum wage, the less trade unions and employers are able to differentiate wages according to the specific occupation. If the minimum wage is raised sharply over a very long period of time, there is a danger of a uniform wage for large sections of the workforce. With such standard wage, it is no longer reasonable for employees to undergo further training and to pursue higher-value work.

3. Theory – social law through conceptual confusion?

Let us now leave Gierke's ground of legal history and turn to his theoretical arguments. His thesis "no right without duty"⁸ is equally inaccurate. With this thesis, Gierke does not repeat the truism that the right of one person corresponds with the duty of another. A right without the duty of one or more persons to respect that right would indeed be meaningless. Rather, Gierke means something else. He merges right and duty and wants to limit the right of one person by a corresponding duty in the *same* person. Private rights are therefore, according to Gierke, always immanently limited. Therefore, if we follow him, there is no absolute ownership; the owner is not allowed to do with his or her property as he pleases. Rather, his concept of ownership is intrinsically and socially bound, so that he must show consideration for the collective. According to Gierke's conception, this collective does not necessarily consist of the sum of other individuals and their rights. Rather, he has in mind constraining individual rights by the common good and other supra-individual values, all of which derive from the world of public law. In this way, he hybridises ownership into a right with private and public-law elements. Gierke's approach enables the conceptual formulation of limited ownership and thus a silent expropriation even without a formal legislative or administrative act. Gierke not only strips away ownership, but also the rule of law.

Leaving aside these fundamental concerns, Gierke's allegation that ownership under private law was some kind of selfish right that legalises behaviour to the detriment of other persons is unfounded.⁹ The starting point is that society

⁸ Gierke O. 1889, pp. 17 sq.

⁹ Gierke O. 1889, p. 18.

should tolerate the unreasonable exercise of ownership. There is no universal standard for determining when someone is behaving reasonably and when they are behaving unreasonably because interests differ from person to person. It is equally questionable to limit ownership by the concept of abuse of rights. For this creates a gateway for public-law norms into the concept of property. Ownership finds its limits solely in the rights of other persons. This barrier is not conceptually immanent to ownership. Rather, it follows from the collision of rights of different persons. Since ownership, like all other private rights, is an outflow of private autonomy, ownership has no priority whatsoever. This feature in itself prevents an owner from causing damage to other persons with his or her property.

Gierke's further support for a strong personality right¹⁰ is certainly welcome, but a close look reveals that this is not social private law. When Gierke calls for the protection of the personality, he is not only referring to socially weaker persons, but in general to the right of personality as an outflow of private autonomy. This mixing of completely different principles continues to have a damaging effect in Germany to this day: As is well known, Gierke was one of the first advocates of the right of personality in the late 19th century. Nevertheless, the German legislature still shies away from codifying the right of personality. In contrast, the Swiss legislature already and universally protected the right of personality in Art. 28 Civil Code of 1911/1912.¹¹

Similarly, Gierke's last demand for the incorporation of company law into the Civil Code¹² has nothing to do with a social private law. Here, Gierke merely addresses the fundamental systemic question of the unitary model and the separation model. Gierke obviously had the Swiss Code of Obligations of 1881/83 in mind, which codified commercial law together with the law of obligations. The merger of commercial law, which also includes the law of commercial companies, with the law of obligations is indeed a matter of debate. However, this is not a social question in the meaning of the traditional term. Instead, Gierke uses the attribute "social" because he sees all companies as a kind of social law.

4. Counter-theory – private law as a complement to public law

If one turns away from Gierke and looks at the question of whether private law should be social from today's perspective, one must first differentiate. The social content of a legal provision must be separated from its social effect. In principle, a social effect is immanent in every legal provision. However, it would be an overextension of

¹⁰ Gierke O. 1889, pp. 34 sq.

¹¹ Details on Gierke and Switzerland: Schaefer F. L. Eugen Huber und das schweizerische ZGB: Vorbild fuer Deutschland [Eugen Huber and the Swiss Civil Code: A role model for Germany]? *Zeitschrift des Bernischen Juristenvereins* 159 (2023), p. 468 (480).

¹² Gierke O. 1889, pp. 41–44.

the social concept to classify all private law as social law *per se*. The advocates of social private law want something quite different. They want to merge private and public law norms to the detriment of private law. Private law is supposed to be less free and more state-bound.¹³

This approach should be rejected for several reasons. First, there is simply no practical need for such a hybrid law. Unlike in Gierke's age, the modern welfare state encompasses all areas of life and offers far more than subsidiary emergency assistance in challenging situations. It ranges from free attendance of schools and universities to subsidies for cultural institutions and a network of social insurances. Some European states are even discussing the introduction of an unconditional basic income as a money transfer without social need. Under these circumstances, it should be left to the welfare state to promote the material equality of its citizens. Private law, on the other hand, may limit itself to the complementary task of preserving the formal equality of citizens. The task of private law is therefore not substantive contractual justice, for example, through a "fair" price, but formal contractual justice at the time of entering into a contract and by safeguarding the principle of *pacta sunt servanda*.

Housing rents in particular show that this complementary division between private law and the welfare state governed by public law is the right way to go. Due to the housing shortage of the First World War, the German legislator created a complex set of rules to protect tenants. The following decades have seen many ups and downs of regulation and deregulation. Currently, the lawmaker restricts the landlord's freedom especially by limiting his right to terminate the lease (sections 573 sqq. German Civil Code) and setting price limits for new and current rental agreements (sections 555d, 557 sqq. German Civil Code).

State intervention in a system as dynamic and complex as millions of tenancy agreements with a very heterogeneous housing stock tends to misregulate such agreements. The rules protecting tenants are so complex that tenants regularly have to consult a tenants' association or a lawyer in order to exercise their rights adequately. The rules are not only difficult to understand, but also reduce the stock of available housing. In conjunction with high energy prices and with state regulations on thermal insulation, the market for new housing has collapsed.¹⁴ It is simply no longer feasible for investors to build rental houses. Insofar as tenants are fortunate enough to rent

¹³ See for example: Dauner-Lieb B. Verbraucherschutz durch Ausbildung eines Sonderprivatrechts fuer Verbraucher: Systemkonforme Weiterentwicklung oder Schrittmacher der Systemveraenderung [Consumer protection through the development of a special private law for consumers: System-compliant further development or pacemaker of system change]? Berlin: Duncker & Humblot, 1983, pp. 108–150; Reichold H. Betriebsverfassung als Sozialprivatrecht: Historisch-dogmatische Grundlagen von 1848 bis zur Gegenwart [Working constitution as private social law: Historical-dogmatic foundations from 1848 to the present]. Munich: Beck, 1995, pp. 399–550.

¹⁴ Hoefer C. & Ruehrmair C. Hohe Zinsen, Kosten und Auflagen: Dem Wohnungsbau droht der Kollaps – mit Folgen fuer alle, die eine Wohnung suchen [High interest rates, costs and requirements: Housing construction is threatened with collapse – with consequences for everyone who is looking for an apartment]. Business Insider, 13.09.2023. Available: <https://www.businessinsider.de/> [viewed 20.11.2023].

a home, they are also affected by the negative effects of this over-regulation. When the rent is no longer covering the expenses, some landlords might only carry out the most necessary repairs in the hope that tenants will move out again as quickly as possible due to the poor condition of their living space. Other landlords might try to circumvent tenant protection, for example by renting out a furnished flat to which some tenant protection regulations do not apply. In all cases, there is a long-term prospect that rental housing will be converted into ownership housing. Actually, at first glance, this is a desirable outcome from an economic point of view. However, in view of the current high interest rates for real estate loans, the majority of the population simply cannot afford such an expensive investment. In other words, social private law here worsens the social situation of the population instead of reducing the cost of living and easing the housing shortage.

Public-law measures, such as state subsidies for housing rents (or better: for home ownership), and public housing associations that build and rent out social housing, are preferable. The tenancy agreements should remain private contracts in the latter case. This enables a need-based adjustment of tenancy agreements, which can react much faster to the dynamics of the housing market than slow statutory regulation. Moreover, public housing competes with private investors, which in turn stimulates competition to the benefit of tenants.

Furthermore, social private law is incompatible with the foundations of private law theory because it is a hybrid matter. Legal rules concretise vague legal principles. The principles belonging to private law limit private law immanently, whereas those belonging to public law have a transcendent effect. The difference is enormous: transcendent limitations must be interpreted narrowly because they form an exception to the rule, whereas immanent ones do not. In a lawsuit, the defendant against a claim bears the burden of proof for transcendent limitations, the plaintiff for immanent ones (provided that a statute does not regulate this differently in individual cases). If private law and public law principles are mixed in social private law, it remains an open question which normative elements are to be interpreted narrowly or broadly and how the burden of proof relates. Since social private law precisely wants to mix private law and public law, it must also abandon the substantive difference between the two areas of law. Any continuation of a differentiation would be inconsistent with the premises of hybrid law.

After all, what remains as a sustainable solution is a private law that can do without social elements.¹⁵ The individual person is the core of private law; the sum of

¹⁵ In full detail: Schaefer F. L. *Privatrechtstheorie des Libertarismus* [Private law theory of libertarianism]. In: *Rechtshistorische und andere Rundgaenge: Festschrift fuer Detlev Fischer* [Legal history and other detours: Festschrift for Detlev Fischer]. Karlsruhe: Gesellschaft fuer Kulturhistorische Dokumentation, 2018, pp. 427–441.

the individuals constitutes the private-law society.¹⁶ Private companies like joint-stock companies do not have a life of their own. They only exist because individuals want them to. The purpose of private autonomy – as the supreme principle of private law and equivalent of public-law human dignity – is not the unconditional responsibility for other individuals, but the self-responsibility of individuals. On the theoretical level, a person is responsible for every action attributable to him or her. Responsibility for others follows from self-responsibility alone. It is not socially third party-related, but non-socially related to the individual. In a specific legal environment, a person is only responsible for another person on the basis of a specific cause, that is contract, customary or statutory law, for example, on the basis of a tort.

In contrast, the common good, taxation, redistribution and regulation of private business are matters of public law. The attribute “social” is only appropriate for such a public law, which is focussed on the community. In view of this clear division of the legal system, the principle of the welfare state and the fundamental rights of a constitution do not command the legislator to create a social private law. Similarly, the primacy of the constitution does not dictate an interpretation of private law in the sense of social private law.

5. Sidestep – consumer protection as social private law?

In conclusion, one could come up with the idea of interpreting every consumer-protective norm as a social norm and therefore claim that consumer protection is proof of the need for social private law. However, such an equation would misjudge the meaning and purpose of consumer protection. It is only true that social protection and consumer law can coincide, but they do not have to. A consumer is not merely a person without sufficient bargaining power, financial resources and legal knowledge, but any person who is not an entrepreneur. Consumer protection therefore abstracts from the need for protection. A social private law, on the other hand, should consequently only protect socially vulnerable persons.

Correctly understood, consumer protection aims at something different in terms of content than social protection. Provisions for consumer protection seek to distribute information, not wealth, equitably. They do not change the material resources of consumers and typically do not regulate prices. In all cases, consumer protection law defines itself as a continuation of the law of persons and contract law, which already protects minors and other groups of persons whose private autonomy is endangered. By providing consumers with better information, consumer protection aims to strengthen their negotiating power and thus their freedom of contract as a facet

¹⁶ Schaefer F. L. Die Privatrechtsgesellschaft des Libertarismus [The private law society of libertarianism]. In: Prozess als Wirklichkeit des Rechts: Festschrift fuer Stefan Smid zum 65. Geburtstag [Process as a reality of law: Festschrift for Stefan Smid on his 65th birthday]. Munich: Beck, 2022, pp. 755–766.

of private autonomy. The right to withdraw from a contract also serves the consumer's private autonomy. Consumers should be free to decide whether they want to stick to the contract they have concluded or not.

6. Examples – the merits of non-social private law

The thesis that private law does not have to be socialised in order to protect private autonomy, but on the contrary produces fairer and more efficient results than social private law, will be demonstrated using three selected areas of German law.

Let us start with tenancy law on housing. Gierke is famous for his call to reverse the rule in tenancy law that “purchase trumps rent” to “rent trumps purchase”.¹⁷ His paradigm shift followed from his basic strategy to merge the law of obligations (here: tenancy agreement) and property law (here: landlord's ownership). He wanted to ensure that tenancy agreements for housing endure when the owner changes. Gierke impressed the second commission on the German Civil Code so much that it adopted his demand into the final civil code (section 571 German Civil Code original version, section 566 German Civil Code reformed version). This rule orders the transfer of the tenancy agreement from the old landlord/owner to the new owner.

Gierke's proposal for statutory tenant protection is not only superfluous, it also harms tenants because they have no choices between different solutions with different risks and gains. Without a statutory provision, the new owner might sue the tenant out of his home because the tenant has no contract with the new owner and is in unlawful possession of the property. The tenant is limited to claiming damages from the landlord and former owner. Therefore, it is up to the parties of the original tenancy agreement to deal with this case. The parties are faced with the following choice: First, they could agree a discount on the rent for the risk of an action for eviction. This would be advantageous for the tenant in a housing market with sufficient housing, because the tenant pays a lower rent without running the risk of not being able to find a new home when the property changes hands. For the landlord, the value of his property would increase because a buyer would not be burdened by the existing tenancy. Second, the parties could agree a right of first refusal (pre-emption, German: *Vorkaufsrecht*) for the tenant in respect of the property and record this in the land registry (right of first refusal *in rem*). This solution would benefit the tenant; he could upgrade his rental possession to ownership. The tenant could finance the purchase price with a mortgage on his new property, provided, he has a certain amount of fiscal space. Third, the parties could agree that the landlord must negotiate a right of possession in favour of the tenant in a purchase agreement with the buyer. Unlike the right of first refusal *in rem*, this agreement would not have a direct effect on the buyer. However, the tenant could secure this right with a guarantee from a third party.

¹⁷ Gierke O. 1889, pp. 26 sq.; in detail: Schaefer F. L. 2008, pp. 559 sq.

The second example is related to the first. According to the almost general doctrine in present day German private law, possession should enjoy protection in tort under certain conditions.¹⁸ If one follows this view, at least rightful possession, for example possession under a tenancy agreement, is a protected right within the meaning of section 823(1) German Civil Code. This means that the tenant's protection extends beyond the tenancy agreement to infringements of his tenancy by third parties. The German Federal Constitutional Court confirms this broad interpretation of tort law; the court recognises the rightful possession of a dwelling as a property right protected by Art. 14 German Constitutional Law.¹⁹ The purpose of this is to improve the protection of tenants under private law. Here, too, the law of obligations and property law are merged.

The protection of the tenant in tort must be rejected for every reason.²⁰ The inclusion of authorised possession under tort law combines possession with the tenancy agreement. However, possession on its own, as actual control of an object, is only a fact and not a juridical right worthy of protection. The tenancy agreement is no different. Although the tenant's claim to possession of the rented property is a right, it is only of a relative nature and is only effective against the landlord. According to the prevailing doctrine such a claim is not worthy of protection because, unlike life, health and property, it is not universal and therefore has no effect *vis-à-vis* third parties outside the rental agreement. If neither possession itself nor the right to possession are covered by tort law, this must apply *a fortiori* to the addition of the two positions. Logically, the addition of two negative values does not result in a positive value.

Constitutional law does not dictate otherwise. Even if one recognises in principle the dubious interpretation of the Federal Constitutional Court, this does not result in tortious protection for the tenant. In relation to the landlord, the tenant is not dependent on such protection. He can sue against the landlord for breach of contract under the tenancy agreement. There is also no need for protection against third parties. For the tenant, as the possessor of the rented property, has already extensive rights arising from the specific protection of possession in property law (sections 858 ff. German Civil Code) to self-help, restitution of the rented property and injunctive relief. That the legislator has not codified a claim for damages here is compliant with Article 14 German Constitution since the legislature has a degree of discretion when implementing constitutional law.

The third example stems from private insurance law. As is well known, German health insurance law is divided into statutory (social) and private health insurance. Section 193(6) of the private Insurance Contract Act (German:

¹⁸ German Federal Court of Justice (BGH) *Neue Juristische Wochenschrift*, Rechtsprechungs-Report Zivilrecht (NJW-RR) 37, 2022, p. 1386 margin 7.

¹⁹ German Federal Constitutional Court (BVerfG) *Neue Juristische Wochenschrift* (NJW) 46, 1993, p. 2035.

²⁰ Schaefer F. L. *Schuldrecht Besonderer Teil* [Law of Obligations, Special Part]. Baden-Baden: Nomos, 2021, § 35 margin 46.

Versicherungsvertragsgesetz) orders that an insured person who does not pay premiums can still claim basic cover from the insurer in case of illness or accident. It is all too obvious that this regulation eliminates the justice of exchange in the contractual relationship because the insured person is entitled to a benefit without any counter-performance of his or her own. This *prima facie* creates the illusion that the legislator is aiming the social protection of a person in need at the expense of the insurer.

However, this is not the case for several reasons.²¹ The legislator itself differentiates between persons in need of social assistance and persons not in need of social assistance. Anyone who needs social assistance has a social claim against the agency for social services for payment of the premiums. Section 193(6) Insurance Contract Act therefore only concerns persons who are not in need of social assistance, in other words those insured persons who could pay but do not want to. The legislator is not implementing social protection here, but debtor protection at the expense of the insurer and thus at the expense of the entire group of insured persons. The solution of non-social private law in complementary association with public social law would choose a different path: Those in need of social assistance would still be allowed to claim social assistance for the premium. Those not in need of social assistance do not deserve any insurance cover because they are responsible for not paying the premium themselves. This solution alone preserves the fairness of exchange in contract law, and it takes into account the self-responsibility of individuals.

Conclusions – the struggle against illiberalism

To sum up, the historical and theoretical reasons presented by Gierke for a social private law are not convincing. This is by no means a triumph over Gierke. Like many other jurists in the age of nationalism, Gierke believed in the power of German legal history. He wanted to reform the legal regime of his time and, in doing so, strengthen the rights of the economically weaker party to the contract. Since the impoverishment of the working class was the political, social and economic problem par excellence of his time, Gierke classified far too many problems and their solutions under the keyword “social”, for example the whole realm of company law. From today’s perspective, the part of Gierke’s theses worthy of approval should be classified as personality right and equal bargaining power in contractual relationships. These concepts are far away from a social private law as it is understood today.

Therefore, the hybrid social private law should be broken down into its two original components: free and market-oriented private law and public social law.

²¹ In Detail: Schaefer F. L. Notlage und Aequivalenz in der PKV [Emergency situation and equivalence in private health insurance]. *Medizinrecht*, 33, 2015, pp. 793–799.

Private law is not intrinsically social. Rather, the protection of the weaker party, for example through redistribution, is attributed to public law. Only if both spheres of law are principally, conceptually and systematically separated from each other, they are capable of playing out their full capacity. The paper therefore argues for the dismantling of so-called social elements in private law and for their transfer to public law. This demand may sound revolutionary. Nevertheless, it is no more revolutionary than Gierke's reverse plea for less liberty in private law. A non-social private law, purified of public law elements, could react extremely quickly to new challenges. For the supreme source of private norms is the contract, which the parties can flexibly adapt to changing environmental conditions at any time. In contrast, the hybrid social private law is no longer able to adapt quickly enough to the dynamic challenges of 21st century society and economy. Free private law strengthens the welfare state of public law through higher economic growth, new jobs and higher tax revenue. This, in turn, strengthens democracy and builds resilience against external threats. If Germany and the European Union want to survive in an environment hostile to democratic and liberal values, we should not put chains on freedom, but unleash it.

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