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# Positivism as a Concept of Legal Historians

## Introduction

There is a tale about an emperor who, once upon a time, demanded of his most able cartographers to make him a precise map of his empire. But when they presented the fruits of their strivings to their master, he was not satisfied: “This map is not precise enough,” he responded. Eventually, the royal cartographers drew a map as big as the empire itself. Still, His Majesty was not pleased: “Where are the flowers; where are the animals?” After that, cartography in his kingdom died out.

It is a simple truth: You just cannot map reality. Any researcher therefore will have to focus his spotlight, his mental search lamp, on things he deems important, leaving other things in the dark. As must everybody else, a legal historian must make a choice and decide upon the question he would like to ask.

It also is a simple truth, however, that these questions ultimately decide the so-called facts. And even if you disagree and accordingly believe in the existence of ‘mere facts’, you still would have to concede that, since the historian cannot ask everything, he will have to select certain facts he considers to be important for a valid response to the question asked. The facts become part of a story, and that story tells us what this fact is about. Question and fact cannot be separated. Now, if you believe in this standard of rationality, it follows that the results of any study are useless without access to its initial questions and the methods applied.

And, although it is such a simple truth, experience shows that, over time, research results will grow into truths so solid that they will eventually resemble facts. Usually, this happens because people forget to critically examine the original conditions, the questions that formed the basis of the research. What we see then is the formation of some so-called basic insights that dictate general knowledge about a subject; I believe recent American language coined the term ‘factoid’ for this.

In the discussion that follows, I would like to critically examine one of these so-called facts that is central for many German legal historians. It is the ‘fact’ that the history of private law is a story of the rise and fall of positivism. Its most influential narrator still is Franz Wieacker, whose learned book *Legal History of Private Law in Europe* was published first in 1952, then saw translation of its revised 1967 edition to many languages.<sup>1</sup> Wieacker’s book may still be the most influential book in contemporary Europe about the history of private law.

I will try to approach the topic in three steps. First, I would like to introduce the subject of positivism in brief by way of mentioning of a few seminal texts and a short philosophical analysis. Second, I will try to identify the historical eras built by the history of positivism. Third, I would like to use all of this to put a spotlight on a selected number of ‘great legal minds’ of the past and try to show that the way we understand their ideas today bears the heavy imprints of their late historiographers.

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<sup>1</sup> See T. Weir (Transl.), F. Wieacker. *A History of Private Law in Europe—with particular reference to Germany*. 1995.

## Positivism as a concept of legal historians and philosophers

About half a century ago, positivism was quite big as a topic. In 1944, Georg Dahm decided to present his version of the history of private law as divided into chapters as follows: ‘natural law—historical school—positivism—positivism overcome’. In 1951, Gustav Boehmer chose ‘natural law—historical school—jurisprudence of concepts—positivism—renewal of a meta-positivist jurisprudence of values’.<sup>2</sup> In 1952, F. Wieacker selected ‘law of reason—historical school—reign of scientific positivism—passage from scientific positivism to statutory positivism—degeneration of statutory positivism—juridical naturalism’.<sup>3</sup> Karl Larenz went for a rather small-footed ‘historical school—jurisprudence of concepts—positivism—leaving positivism behind—present jurisprudence of values’.<sup>4</sup>

For these writers, the idea of periodisation was particularly important—that is, a succession of distinct epochs, each dominated by a different Great Idea. For them, history came in the form of a huge struggle, a fight positivism at first fought successfully but ultimately lost. How was it that these histories of private law were all so similar, given that they all set out to scrutinise legal history for traces of ‘positivism’?

The obvious answer is that the concept of positivism might be simply one of the best yardsticks available. If you take a closer look, however, it turns out that there is not one but rather are many yardsticks called positivism. Franz Wieacker discerned three different variants in 1967<sup>5</sup>; H. L. A. Hart, in his famous 1961 book, distinguished five different forms<sup>6</sup>; and in 1966, Robert S. Summers spoke of 10 variations,<sup>7</sup> while Stig Strömholm spoke of six variants in 1985.<sup>8</sup> If we focus our attention on the works of legal historians, the picture does not become any sharper. In the writings of nine authors only, I found a confusing number of different positivisms<sup>9</sup>: speculative positivism; naïve positivism; factual positivism; prescriptive or normative positivism; formal, as opposed to material, positivism; genuine and erroneous positivism; ethical, historical, juridical, logical, and materialist positivism; statutory positivism; a naturalist-materialist approach as set against positivism of legal science; pragmatic positivism; scientific and sociological positivism; enlightened, empirical, objective or subjective deontological positivism, and finally psychological positivism.

Translating these positivisms already presents a problem. When I speak of ‘scientific positivism’, others say ‘scholarly positivism’; likewise, ‘statutory positivism’ is the same as ‘textual positivism’.

This variety of labels shows considerable confusion about the meaning of positivism. Already in 1943, Walter Schönfeld displayed his unnervedness in the face of the variety of mutually contradicting definitions.<sup>10</sup> As the ‘positive’ in positivism he found norms; the material justice; the political, social, or economic reality behind the norms or a way of formal, logical, or psychological thinking. Neither was there any more agreement on what should be seen as non-positive. In 1944, Dahm stated that positivism would be unable to adequately take into consideration such things as ‘material justice, practical reason, the intended purpose of a legal norm, real life, politics and economics, morals, and ethics’.<sup>11</sup> What was ‘positive’ to one author was non-positive to others.

Even two pre-eminent luminaries of legal history, Ernst Landsberg and Franz Wieacker, each defined ‘scientific legal positivism’ in a way that ruled out the validity of the other’s definition. To Landsberg, ‘scientific legal positivism makes use of any scientific means available, be they statutory construction, historical analysis of a statute’s origin, or systematic context, but also reasonings based on rationality, practicability, or ethics, adorned by comparisons to other legal systems past and present’.<sup>12</sup> Much to the contrary, Wieacker defined the very same ‘scientific legal positivism’ as a ‘concept of law that deduces all rules of law and the decisions based upon them out of the sum of legal notions and principles, without juridifying and therefore accepting into the discourse of law any kind of non-legal argument, be they religious, socio-ethical, or political’.<sup>13</sup>

<sup>2</sup> G. Boehmer. *Grundlagen der Bürgerlichen Rechtsordnung*. Zweites Buch. Erste Abteilung: Dogmengeschichtliche Grundlagen des bürgerlichen Rechts 1951.

<sup>3</sup> F. Wieacker. *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*. 1. Ed. 1952.

<sup>4</sup> K. Larenz. *Methodenlehre der Rechtswissenschaft*. 1960.

<sup>5</sup> F. Wieacker. *Privatrechtsgeschichte der Neuzeit*. 2. Ed. 1967, pp. 431 *ff.*

<sup>6</sup> H. L. A. Hart. *Der Positivismus und die Trennung von Recht und Moral*. Translated and ed. by N. Hoerster. 1971, p. 23.

<sup>7</sup> R. S. Summers. *The New Analytical Jurists*. – *New York University Law Journal* 1966 (41), pp. 889 *ff.*

<sup>8</sup> S. Strömholm. *Kurze Geschichte der abendländischen Rechtsphilosophie*, 1991, pp. 226–227.

<sup>9</sup> See H.-P. Haferkamp. *Positivismen als Ordnungsbegriffe einer Privatrechtsgeschichte des 19. Jahrhunderts*. – O. Behrends, E. Schumann (ed.). *Franz Wieacker – Historiker des modernen Privatrechts*. Symposium zu Ehren des 100. Geburtstags von Franz Wieacker, forthcoming.

<sup>10</sup> W. Schönfeld. *Die Geschichte der Rechtswissenschaften im Spiegel der Metaphysik*, p. 52.

<sup>11</sup> G. Dahm. *Deutsches Recht*. 1944, p. 73.

<sup>12</sup> E. Landsberg. *Geschichte der Deutschen Rechtswissenschaft*. Volume 3.2., 1910, p. 75.

<sup>13</sup> F. Wieacker (Note 3), p. 253.

Given all this, it is difficult to explain why so many writers still told their histories of law as the histories of their positivisms. Any use of the notion inexorably led to difficult discussions about its precise meaning<sup>\*14</sup>, and to this day, any reader is compelled to follow an author's individual understanding closely.<sup>\*15</sup> For example, while some saw so-called conceptual jurisprudence as a variation of positivism<sup>\*16</sup>, other writers wanted to count as positivism only movements that tried to mimic the concept of cognition adopted by natural science<sup>\*17</sup>, which others separated from positivism as 'naturalism'.<sup>\*18</sup>

## Anti-positivist positivism

If you attempt to draw a provisional line here, you could say that, for historians, positivism is a rather troublesome concept. Its erstwhile and still continuing success may become a little clearer if we shift our attention toward the emotional images positivism usually brings to mind. For the most part, these images are not favourable; there is something inherently bad about them. In any case, the emotions evoked are strong. A positivist, it is alleged, somehow only thinks in ways of logic and form; as lawyers, such persons would erect a barrier between law and ethics that is too strict, and, equally, they are fixated on the distinction between the prescriptive and the descriptive, norms and facts, in a tradition following the German philosopher Kant.

You could say that it was this emotional potential of positivism that motivated legal historians throughout the 20th century. From around 1920 onwards and still of considerable influence today, there has been a broad alliance engaged in a polemical fight against positivism. In 1935, Hans Welzel wrote that the most distinct feature of positivism would be its inherent negativity: a strict denial of anything even remotely resembling metaphysics.<sup>\*19</sup> In 1943, Schönfeld sharpened this to a short 'negativism'<sup>\*20</sup>, and a year later, Wieacker saw a 'common tendency to negate'.<sup>\*21</sup>

As a result, positivism was habitually used to describe positions perceived as odd or even morally deviant. As Schönfeld put it, already the idea of justice was foreign to positivism.<sup>\*22</sup> And, even more drastically, Coing wrote in his treatise on legal philosophy—and kept it there in every edition—that, to a positivist, the statement: "The killing of the Jews at Auschwitz was unjust" simply is irrational and unscientific.<sup>\*23</sup> The complete bewilderment these words evoked in the reader was intended.

But, if legal positivism is really so profoundly evil, why not tell legal history as a warning of its wicked dangers? Indeed, this was the mission these tales of positivism had in mind. During the Third Reich, German universities started to offer a course on the 'newer legal history of private law'. According to Hans Thieme in 1935, its purpose was to make students 'discerning'<sup>\*24</sup> by marrying practical usefulness with moral judgement; 'discerning' was defined as 'independent towards statutory norms'<sup>\*25</sup>. Schönfeld gave lectures 'on the self-disintegration of positivism' in 1943<sup>\*26</sup>, something Georg Dahm called 'the overcoming of positivism' a year later.<sup>\*27</sup> As it was with so many other things, 1945 was no turning point here either.<sup>\*28</sup> In 1949, Erich Molitor

<sup>14</sup> F. Wieacker (Note 5), p. 432.

<sup>15</sup> For the "weitgehend fruchtlosen Begriffsstreitigkeiten", see M. Auer. *Normativer Positivismus – Positivistisches Naturrecht – Zur Bedeutung von Rechtspositivismus und Naturrecht jenseits von Rechtsbegriff und Rechtsethik.* – A. Heldrich/u.a. (Hrsg.). *Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag.* 2007, p. 933 ff., 2007, p. 935 ff.

<sup>16</sup> See, e.g., G. Dahm (Note 11), p. 73; F. Wieacker (Note 5), pp. 431–432.

<sup>17</sup> See, e.g., Schönfeld (Note 10), p. 17; E. Wolf. *Große Rechtsdenker der deutschen Geistesgeschichte.* Ed. 4. 1963, p. 623; H. Welzel. *Naturrecht und materielle Gerechtigkeit.* Ed. 4. 1962, pp. 183 ff. For further information on Welzel see J. Rückert. 'Große' Erzählungen. *Theorien und Fesseln in der Rechtsgeschichte.* – T. J. Chiusi, T. Gergen, H. Jung (ed.). *Das Recht und seine historischen Grundlagen.* *Festschrift für Elmar Wadle zum 70. Geburtstag.* 2008, pp. 973–974. For this view on natural science see H.-P. Haferkamp. *Neukantianismus und Rechtsnaturalismus.* – M. Senn, D. Puskás (eds.). *Rechtswissenschaft als Kulturwissenschaft?* (ARSP Beiheft B 115). 2007, pp. 105 ff.

<sup>18</sup> F. Wieacker (Note 5), p. 536.

<sup>19</sup> H. Welzel. *Naturalismus und Wertphilosophie*, first published in 1935, reprinted in 1975 in H. Welzel. *Abhandlungen zum Strafrecht und zur Rechtsphilosophie.* 1975, p. 30.

<sup>20</sup> W. Schönfeld (Note 10), p. 535.

<sup>21</sup> F. Wieacker. *Ratio scripta. Das römische Recht und die abendländische Rechtswissenschaft.* – ders. (Hrsg.), *Vom Römischen Recht. Wirklichkeit und Überlieferung.* 1944, p. 278.

<sup>22</sup> W. Schönfeld (Note 10), p. 534.

<sup>23</sup> H. Coing. *Grundzüge der Rechtsphilosophie.* Ed. 5. 1993, p. 62.

<sup>24</sup> H. Thieme. *Neuere deutsche Privatrechtsgeschichte.* – DJZ 1935, p. 341.

<sup>25</sup> *Ibid.*, p. 339 ff.

<sup>26</sup> W. Schönfeld (Note 10), pp. 72 ff.

<sup>27</sup> *Ibid.*, pp. 76 ff.

<sup>28</sup> On these aspects, see R. Schröder (ed.). *8. Mai 1945 – Befreiung oder Kapitulation?* 1997.

wished to ‘liberate our students from positivism’.<sup>29</sup> Gustav Boehmer warned in 1951 of the dangers incurred by a positivism that was ‘blind to values’.<sup>30</sup> The following year, Wieacker hoped that positivism could be left behind by way of some new paradigm in philosophy<sup>31</sup>; in the meantime, his own account of the history of private law should prevent aspiring lawyers and legal academics from surrendering the ‘living spirit of the law’ to either a totalitarian state or the ‘dead formulas of academic dogmatism’.<sup>32</sup>

Just as his fellow narrators of positivism did, Wieacker wanted to learn from history. He accordingly structured his account of legal history in a teleological way, wherein every epoch would shape its successor. He described the history of positivism as a sequence of levels, one in which scientific legal positivism must pass each stage until it reaches a state where it rules the world as ‘unchallenged and unsparing’ statutory positivism.<sup>33</sup> The goal-oriented nexus we can identify here shows that the fight was not only against legal positivism but against positivism as a historian’s method as well. Wieacker demanded to ‘overcome positivism, which suppresses the true idea, or nature, of historical events’.<sup>34</sup>

In summary, the people who told the tale of the rise and fall of positivism were anti-positivists. The writings I am referring to date from between 1925 and 1989, a rather long period. Again, we must be careful and notice that, although the authors of these works stood united in their anti-positivism, their ideas as to what should replace positivism were quite different. In the Weimar Republic, the ill-fated German state between World War I and the Third Reich, many had become anti-positivists because, as conservatives, they did not feel represented well by a leftist parliament. During the era of national socialism, a racist law reform was pitched against the ‘old law from before 1933’ and therefore positivism was abandoned. After 1945, many former nationalist lawyers stated that positivism would have made them defenceless against national-socialist law and they now hoped for salvation by re-emphasising Christian values against positivism. United only in their anti-positivist stance, they found no agreement on what should be adhered to instead.

## Outline of the anti-positivist legal history of private law

The focus on positivism yielded an entirely new understanding of history:

- a) Its foundation was a reinterpretation of the reception of Roman law.<sup>35</sup> From the 1930s onward, there was intensive research on this, but under a different presumption than in the 19th century. Back then, lawyers in the pro-Germanic-law camp (‘Germanists’) had been up in arms against what they called a national disaster. Roman law had rendered the substance of German law alien, they argued; it was unfitting because its content was foreign. Quite in contrast to this, in 1942, Dahm<sup>36</sup> saw the main problem as lying not in the substance of Roman law but in the methodical approach that had come along with its reception.<sup>37</sup> Wieacker explained the phenomenon as a process of rationalising and scientifying legal thinking.<sup>38</sup> This was to become the starting point of a new history of private law: It no longer would be an account of the development of doctrine and institutions but would be one chronicling the methods of legal thinking. The story of a private law that becomes a science, degenerates, and ultimately collapses.
- b) One of the winners with this new mode of analysis was the epoch of legal humanism in early modern times. As recently as 1936, Kunkel had deprecated humanism as a side track of little impact, a ‘missed chance for a better unification of German and foreign statutes’.<sup>39</sup> Applying the new, methods-oriented understanding of reception, Wieacker arrived at a different conclusion and saw humanism as an

<sup>29</sup> E. Molitor. *Grundzüge der Neueren Privatrechtsgeschichte*. 1949, p. 5.

<sup>30</sup> G. Boehmer (Note 2), 1951, p. 131.

<sup>31</sup> F. Wieacker (Note 3), p. 354.

<sup>32</sup> *Ibid.*, p. 3.

<sup>33</sup> *Ibid.*, p. 327.

<sup>34</sup> F. Wieacker (Note 21), p. 280.

<sup>35</sup> M. Stolleis. „Fortschritte der Rechtsgeschichte“ in der Zeit des Nationalsozialismus? – M. Stolleis, D. Simon (eds.). *Rechtsgeschichte im Nationalsozialismus. Beiträge zur Geschichte einer Disziplin* 1989, p. 190; the interpretation of the Reception of Roman law always had political connotations, see H.-P. Haferkamp. *Die Bedeutung von Rezeptionsdeutungen für die Rechtsquellenlehre zwischen 1800 und 1850*. – H.-P. Haferkamp, T. Repgen (ed.). *Usus modernus pandectarum. Römisches Recht. Deutsches Recht und Naturrecht in der Frühen Neuzeit*. 2007, p. 25.

<sup>36</sup> G. Dahm. *Zur Rezeption des römisch-italienischen Rechts*. – *Historische Zeitschrift* 167, 1943, p. 35.

<sup>37</sup> *Ibid.*, p. 39.

<sup>38</sup> F. Wieacker (Note 21), p. 222.

<sup>39</sup> W. Kunkel. *Vorwort*, in id., Thieme u. Beyerle, *Quellen zur Neueren Privatrechtsgeschichte Deutschlands*. 1936, XI.

important forerunner to modern legal science; in their striving to reach the idea of legal rule, the gist of the source, the humanists had been able to overcome the old fixation on authorities, but in this, as well as in the importance they laid on a coherent system, they also prepared for the later evils that positivism would bring, in the form of the neo-humanism advocated by the 19th-century historical school.<sup>\*40</sup> In the course of 16 years of research (1936–1952), humanism had risen from ashes to ruins of mighty importance.

- c) Another winner was natural law. In 1936, Hans Thieme published his ‘Habilitation’<sup>\*41</sup> on ‘the late period of natural law’<sup>\*42</sup>, a book that was intended to revive interest in the concept of natural law itself.<sup>\*43</sup> There, the culprit was the historical school of law, which had unfairly deprecated natural law. What followed was a revisiting of natural law. It now appeared to have been a trade-off between a socio-ethical and a so-called mathematical perspective. Here, the good and the bad side of the whole process of scientification came up. A fight between ethics and logic started. The history of private law was characterised as the gradual removal of ethical aspects. This was also Wieacker’s leitmotif. For him, the law of reason was a transformation process spanning the ample period between around 1600 and 1800, going from theological natural law to secular natural law.<sup>\*44</sup> ‘Mathematical’ was another word for science and positivism.<sup>\*45</sup> The socio-ethical component raised the question of justice. Natural law therefore came in two flavours, one seeking to establish material justice, the other aspiring to positive formal justice.
- d) Thus, the foundations had been laid for a re-examination of the 19th century as the main culprit in the eventual loss of everything ethical. In 1943, Georg Dahm emphasised that the rightful exculpation of reception with respect to the alienation of true German law necessarily meant indicting the 19th century for the destruction of nativist law that had taken place during the 19th and early 20th century.<sup>\*46</sup> Franz Beyerle lamented in 1939 that the previous century had shown a disquieting lack of legal culture: although thought out well, immensely sophisticated, and refined, the law of the time had been void of any ethical values.<sup>\*47</sup> Put succinctly, 19th-century law was deemed bad because it was non-worldly and non-ethical.

This line of thought had been prepared earlier by Julius Binder, who published a book on legal philosophy in 1925.<sup>\*48</sup> He argued that 19th-century private law had removed the connection between personal subjective rights and corresponding social obligations. Later on, Larenz expanded upon this idea in a journal article on law and ethics in 1943<sup>\*49</sup>, which prefigured his discussion of many of the central topics of his highly influential treatise on legal methods published in 1960, which is still the most influential book on legal methods in Germany.<sup>\*50</sup>

The fulcrum of this argument was a revision of the role attributed to the historical school of law, whose proponents had claimed to have discarded natural law. Now, they were accused of having covertly picked up natural law instead and, of the two variants, having chosen the ‘wrong’ one—that is, the ‘mathematical’ kind. Consequently, what had been offered as modernised Roman law by von Savigny and his followers really was ‘scientific positivism’. This claim was bolstered by a reference to humanism itself: Since the historical school had decried ‘ad fontes’, a call to go back to the pure and untarnished source of antique law, their intentions were branded as neo-humanist, because doing so was incompatible with respecting the moral standards that had been central to natural law.

As Franz Beyerle explained his view in 1939, it was an illusion that pandectist doctrines had replaced the forgotten doctrines of natural law. Instead of creating a legal order based on social values and human needs, the pandectists adhered to a cult of irrefutable, naked logic, thereby undoing the intellectual liberation that had been accomplished by natural law.<sup>\*51</sup>

<sup>40</sup> F. Wieacker (Note 3), p. 44.

<sup>41</sup> A. Laufs. Nachruf auf Hans Thieme. – ZRG GA 119, 2002, p. 16.

<sup>42</sup> H. Thieme. Die Zeit des späten Naturrechts. Eine privatrechtshistorische Studie. – ZRG GA 56 (1936), S. 202 ff.; quoted according to the reprint in id., Ideengeschichte und Rechtsgeschichte. Gesammelte Schriften. Bd. II, 1986, pp. 633 ff.

<sup>43</sup> H. Thieme (Note 42), p. 635.

<sup>44</sup> V. Winkler. Moderne als Krise, Krise als Modernisierung: Franz Wieacker und die großen Besinnungs-Bücher nach 1945. Available at: <http://www.forhistiur.de/zitat/0507winkler.htm>, 2005: Notes 33 ff.

<sup>45</sup> F. Wieacker (Note 3), p. 151.

<sup>46</sup> G. Dahm (Note 36), p. 47.

<sup>47</sup> F. Beyerle. Der andere Zugang zum Naturrecht. – Deutsche Rechtswissenschaft IV (1939), p. 13.

<sup>48</sup> J. Binder. Philosophie des Rechts. Berlin 1925; see H.-P. Haferkamp. Georg Friedrich Puchta und die „Begriffsjurisprudenz“. 2004, pp. 96 ff.

<sup>49</sup> K. Larenz. Sittlichkeit und Recht. Untersuchungen zur Geschichte des Deutschen Rechtsdenkens und zur Sittenlehre. – id. (ed.). Reich und Recht in der Deutschen Philosophie, volume 1, 1943, pp. 169 ff., especially pp. 202 ff. (Thomasius) and 250 ff. (Wolff).

<sup>50</sup> K. Larenz (Note 4); on these contexts, see M. Frommel. Die Rezeption der Hermeneutik bei Karl Larenz und Josef Esser. 1981.

<sup>51</sup> F. Beyerle (Note 47), p. 13.

There was more to this argument than just mourning the abolishment of material justice. The stress was placed on the ‘social ethics’ of natural law. The accusation was not restricted to that of being a stringently systematic legal order, with criticism of the unworldliness resulting from its strictly logical application. This also was an attack on the main doctrinal concept of the historical school, which stated that all binding law emanated from the free will formed by the individual. What was hidden between the lines here was the question of whether private law as such, on its basic level, should give preference to egotistical interests as opposed to a preponderance of community interests. The question really asked here was one of individualist vs. social private law. From Julius Binder’s 1925 proposition onwards, the discussion focused on the question of whether the autonomy of the individual in private law is bound by socio-ethical rules or not. The general perspective of this discussion therefore was not only anti-positivist but anti-liberal as well. This was a fight not about justice as such but about a very particular kind of justice. Scientific positivism had created a positivist-liberal private law, brought to full reality by the ‘late-born’<sup>52</sup> German Civil Code of 1900, and therefore also had prepared the ensuing ‘intellectual and moral breakdown’<sup>53</sup>.

## ‘Great legal thinkers’ and their role in anti-positivist legal history of private law

Wieacker and his contemporaries preferred to write history by illustrating it with the ideas of ‘great men’. The central treatise at their disposal was a book by Erik Wolf, *Great Legal Thinkers in German Cultural History*, published in 1939<sup>54</sup>. Wolf defined great legal thinkers as ‘not ordinary people. [...] They are witnesses to the acts of God on earth. This means: by studying their character and works we learn something about the meaning of history and therefore about the meaning of our own lives [...] Insofar, great minds provide us with a measure.’<sup>55</sup>

Accordingly, they were persons who both explicated epochs and also initiated them at the same time. Great minds were divided into categories such as founders, forerunners, finishing masters, or even vanquishers of epochs. Naturally, it was very important who was chosen. Erik Wolf chose Ulrich Zasius, Hugo Grotius, Samuel Pufendorf, Christian Thomasius, Friedrich Carl von Savigny, Bernhard Windscheid, Rudolf von Jhering, and Otto von Gierke. If you add Christian Wolff and Georg Friedrich Puchta, it is possible to tell the whole history of private law just by referring to this very select number of scholars.

Ulrich Zasius, to start with, was one of the humanists and thus exemplifies the benefits as well as the risks of a scientific approach in law, since, although he had advanced the serious examination of ancient law, he at the same time had lost track of contemporary problems. Hugo Grotius and Samuel Pufendorf, on the other hand, stood for an ideal wherein scientific and ethical concerns were treated in equal harmony, under the presumption that natural law had evolved from the standards of a secular social community. The dangers of rigorous scientific legal thinking then again were brought to the fore by Christian Thomasius and Christian Wolff. Thomasius was identified as a major malefactor, since he had drawn a sharp distinction between law and ethics and therefore destroyed the foundation for the kind of autonomous social ethics the older law of reason had created.<sup>56</sup> Christian Wolff then brought this ‘logical rationalism’, as Wieacker called it in 1952, to unprecedented heights: Wolff had deduced all rules of natural law from a system of gapless axioms, down to the smallest details, leaving out both inductive reasoning and empirical arguments. In Wolff, Wieacker saw the founding father of 19th-century ‘scientific positivism’. It was him who broke the ground for the coming generations of legal thinkers, who were overly fixated on formal, positivist methods, with little more than a faint remembering of ethical values. Wolff’s gapless system of axioms and deduced rules was able to live because it secretly sapped the essence of the material ethics developed by Grotius and Pufendorf, Wieacker continued in his analysis.<sup>57</sup> Immanuel Kant was named as another hidden source of ethical obligations. In 1951, Hans Welzel stated that Kant’s ethics had required the premise of an objectively existing ethical order, and that his philosophy had been a far cry from purely subjective ethics.<sup>58</sup> The latter were a misconception brought about by Neo-Kantianism and ‘certain existentialist teachings’, Welzel said. Von Savigny was read as a Kantian and therefore remained also between these two epochs, of good and bad positivism. In von Savigny, Wieacker saw ‘ethical responsibility committed to the free autonomous will of the individual’ that

<sup>52</sup> F. Wieacker (Note 5), p. 15.

<sup>53</sup> F. Wieacker (Note 3), p. 14.

<sup>54</sup> 4th ed. 1963.

<sup>55</sup> E. Wolf (Note 17), pp. III ff.

<sup>56</sup> F. Wieacker (Note 3), p. 190.

<sup>57</sup> *Ibid.*, p. 193.

<sup>58</sup> H. Welzel. *Naturrecht und materiale Gerechtigkeit*. 1962, p. 169.

still steered clear of undermining the ethical doctrines of older natural law.<sup>\*59</sup> The final demise, however, had begun with the rise of Georg Friedrich Puchta, classified as the main culprit ushering in a new level of ‘conceptual formalism in legal science’.<sup>\*60</sup> While Puchta was the founder of the classical jurisprudence of concepts, Bernhard Windscheid represented scientific positivism at its prime, in which purportedly all rules of law were deduced from a rigorous pyramid of concepts, with complete indifference to society, politics, economics, and ultimately justice. Now the rise of Rudolph von Jhering began. He saw his chance here and cunningly declared a fundamental change of his mind; from now on, he would fight against what he himself had adhered to before—against ‘formalism of the will’ and ‘jurisprudence of concepts’, following a realist, purpose-oriented approach instead. Wieacker elevated von Jhering’s publicity stunt even further, to biblical dimensions, and explicitly referred to the conversion of Paul. The last great jurist in the developments of this long 19th century was found in Otto von Gierke, who famously had demanded that ‘a drop of socialistic oil’ be added to the *Bürgerliches Gesetzbuch*. He stood for the ideal of a non-positivist, social private law.

With Gierke, the history of the scientification of private law had found its end. From this point onward, the political and social dimensions of private law were moved to the foreground, while technicalities such as methods or logical reasoning were removed to a lower rung of the ladder, where they were deemed to really belong. Again, everything was connected teleologically and pivoted around the ominous great minds: The gaze would wander from Grotius on to Thomasius, Wolff, Kant, von Savigny, Puchta, Windscheid, von Jhering, and von Gierke.

Stringing persons together in a long line, however, does not work in the same way as a child’s stringing of beads together on a cord to make a necklace. The legal order of the day to a great extent is reflected back onto the perceived character of the persons and changes them. I would like to illustrate this with the example of Bernhard Windscheid. In order to do so, I will establish a counter-image first. In 1910, Ernst Landsberg published his history of German legal science. As I have already pointed out, Landsberg not only had a completely different understanding of positivism but also was free of the anti-positivist bias that only started to emerge later, in the 1920s. His image of Windscheid therefore should show some interesting differences.

To be sure, Landsberg as well saw formalistic tendencies with Windscheid. His formalism, Landsberg wrote<sup>\*61</sup>, had originated from an ever stricter approach in the validation of contemporary legal doctrines against the sources of ancient law. Differently put, Windscheid had lost practical solutions to real-life problems in the inductive reasoning necessary when one works with ancient sources. Landsberg put the emphasis on concepts that were of practical help; sticking to the letters was dangerous.

Wieacker drew quite a different picture in 1942<sup>\*62</sup>. For him, Windscheid had followed a purely deductive method, logically deducing all rules of law from accepted axioms down to the last detail and generating a seamless system of rules and institutions. Wieacker arrived at this conclusion because his own thinking proceeded from the idea of subjective rights, and from this vantage point he looked ‘downward’ onto Windscheid’s system, arguing deductively. For Wieacker, Windscheid had applied his definition of law and from this had then deduced all of the other rules. Landsberg, on the other hand, had styled Windscheid as purely inductive, arriving at unworldly conclusions, while Wieacker’s new Windscheid deduced unethical rules of law from higher principles.<sup>\*63</sup>

Wieacker arrived at this conclusion because he believed Christian Wolff’s ‘demonstrative method’, a system of natural law, to be the precursor. According to Wieacker, the historical school had simply transferred the system and method of the later law of reason to the content of the *ius commune*. Thereby, an inductive Windscheid became deductive. All of this essentially was argued in a deductive way, too: It was based on the premise that pandectism was the secret heir of natural law. Tellingly, those adopting this position never provided precise citations from the works of Windscheid. In any case, the first study of Windscheid that lived up to modern standards was published only in 1989 and promptly invalidated these claims.<sup>\*64</sup>

## Conclusions

Legal history and the history of private law, in particular, have been told as the history of positivism, and they continue to be told in this way. The impact of this narrative can hardly be exaggerated. It had far-reaching consequences, in that it was decisively at play in the structuring of time into supposed epochs, and also in its

<sup>59</sup> F. Wieacker (Note 3), pp. 229 ff.

<sup>60</sup> R. Schröder. *Abschaffung oder Reform des Erbrechts*. 1981, pp. 417 ff.

<sup>61</sup> E. Landsberg (Note 12), p. 861.

<sup>62</sup> F. Wieacker. *Bernhard Windscheid*. Zum 50. Todestag am 26. Oktober 1942. – *Deutsches Recht* 1942 (12), pp. 1140 ff.

<sup>63</sup> For more details on this aspect, see H.-P. Haferkamp (Note 9).

<sup>64</sup> U. Falk. *Ein Gelehrter wie Windscheid*. *Erkundungen auf den Feldern der Begriffsjurisprudenz*. 2. Aufl. 1999.

influence on the assessment of individual historical actors, down to the tiniest details. Anybody who likes to draw big lines in legal history needs to be aware of this.

One last question remains to be answered: Should one still make use of the positivist narrative?

Over the last couple of years, it has become increasingly clear that the list of casualties in the wake of anti-positivist legal history is not a short one. The positivism narrative not only left to the side the economic and political contexts. The substance of the law itself, concrete rules, judgements, and doctrine found little interest as well. What was told was a history of law without law. This, however, was not seen as a problem, because most people agreed on at least two central matters: First, positivism is unjust. Secondly, the autonomy of the subject in private law endangers public co-operation and community.

In Germany, the (hi)story of the fall and rise of positivism after 1918 catered to anti-democratic, from 1933 onward to nationalist-racist, and after 1945 to remorsefully Christian narratives, but in every instance, people had agreed on the same two basic assumptions. Whoever continues to tell history through the looking glass of positivism today, however, needs to be aware that such a consensus no longer exists. Equating positivism with peril and anti-positivism with salvation no longer stirs up emotions. Today, we know very well that it was not positivism that had left the lawyers of the Third Reich defenceless and, put more precisely, that the terror unleashed during the time of national socialism also resulted from the fact that lawyers did much more than just passively apply 'naked' statutes. Today, we both do of instances of inhuman natural law and have learned to appreciate what it means to be bound by even-handed legislation. In other words, the concepts of natural law and positivism are no longer of help when we argue about justness and equity. Equally, the earlier understanding of the 19th century as a hotbed of unrestricted hardcore liberalism, an age in which the law did not impede the strong or protect the weak, has been shown to be wrong. Morals surely do fluctuate over time, but nobody took to such an immoral stance back then, and the law had provided judges with ample possibilities to ameliorate inequity in a given case. Here as well, equating 'social' with 'good' and 'liberal' with 'egotistical' and 'dangerous' does not satisfy anymore. The history of national socialism and then socialism shows clearly that such an equation would be too simple.

What is the result? What we need today is a new story of the history of private law. At the moment, there is no authoritative book on this topic on the European market. What we need for such a book are new questions. Therefore, the first step is to reflect on the fact that our own thoughts as historians are attached to puppet-strings, played by historians such as Franz Wieacker. We have to become aware of this if we are to be free to find these new questions.