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System and Codification – Exclusion or Inclusion of Special Law? A German Perspective

Did systems and codifications of private law in Germany push aside special laws or were these incorporated? The question as posed is obviously firmly grounded in modern theories of diversity. It revolves around equality as a political concept and it implicitly asks whether the “tendency of law towards equality”,¹ no doubt stamped on legal developments since the 18th century, was, amongst other factors, fuelled by two questions that at first sight might seem merely technical. The first, hotly debated in the course of the 19th century, asks whether, and if so how far, law is a system. Those who asked it appear more often than not to have assumed that special laws could not be fitted within this system but actually were in quite clear contradiction of it and therefore constituted a technical impediment. The second question, related to the technique of legislation, asks how special law can be incorporated into a codification without transgressing the corresponding normative context? If one views codifications as legal systems turned statute law, the second question is closely tied up with the first one. In addition, as codified systems claim to steer societies as a whole, a political dimension accrues to it: Codifications emphasise validity for and applicability to all. How do special laws fit into this context?

Part of this second question can be readily answered. Codifications assumed the primacy of statute law: all legislation in force was meant to be found here. As early as 1975, Heinz Mohnhaupt made it clear that the older world of chartered privileges had, in the course of the 19th century, been sidelined by codifications. Special laws had, therefore, changed their character from individual rights granted by a sovereign to a specific person, family, corporation or group, to statutorily defined rights for an abstractly defined part of the society. The technical meaning of ‘privilege’ now reflected this change and absorbed the differentiation between statutory and chartered

1 PUCHTA (1841) 19: “Zug des Rechts nach einer Gleichheit”.

special rights.² Nevertheless, the jurisprudential writings that we examined dealing with the demonstration and establishment of a scientific system only consider the special legal provisions as a problem. Their focus is on the many instances of a *ius singulare*, i. e. extraordinary rights or obligations not separately granted to or imposed upon specific individuals but rather addressing abstractly defined groups of persons by means of statute. Particular instances include the countless special provisions for minors, the elderly, soldiers, women, widows or merchants which from antiquity onwards have characterised Roman law, church law and then the *ius commune*. We will therefore probe the theoretical debates using what may be the most prominent of these *iura singularia*, the Senatus Consultum Velleianum which, from Justinian's time on, prohibited the intercession of wives on behalf of their husbands. Is the slow and gradual displacement of this 'benefice' an expression of systematic considerations?

1 System and *iura singularia*

Turning to the first question – whether system and *iura singularia* clashed with each other –, an observation made in 1798 by Anton Friedrich Justus Thibaut deserves attention.³ Thibaut was at the forefront of those who rose to Immanuel Kant's call to 'scientificate' jurisprudence. His "System des Pandekten-Rechts" (1803) manifestly marked the transition from *jurisprudencia* to *jurisscientia*,⁴ while his attempt to bundle all positive law under one prime principle also illustrated his view of special law. He criticised the prevalent contemporary understanding⁵ of *ius commune* – the sum of those provisions applicable "to all" ("für alle") –, whereas *ius singulare* was commonly assumed to comprise those provisions which were meant only "for a certain class of subjects".⁶ But almost always, Thibaut argued, laws would pertain only to a very limited number of persons; even particular types of contracts would be applicable only to those concluding such contracts. This criticism revealed the actual, ideological grounding of the contemporary

2 MOHNHAUPT (1975) 78.

3 THIBAUT (1817) 238.

4 SCHRÖDER (1979).

5 MOHNHAUPT (1975) 84 et seqq.

6 THIBAUT (1817) 238: "eine gewisse Classe von Unterthanen".

view of special law whereby special laws were recognised as such if the choice of the respective group of addressees answered to any politically significant or motivated differentiation. In good logic, these were rather fluent boundaries. Through this criticism, Thibaut demanded, on the one hand, a more transparent approach. Underlining the importance of political considerations, he carefully distinguished provisions “of a strict, natural or civil law” (*ius commune*) nature from those which, “for reasons of politics or equity”, formulated an exception to the rule (*ius singulare*). By doing so, Thibaut resurrected the age-old definition in D. 1,3,16: “Ius singulare est, quod contra tenorem rationis propter aliquam utilitatem auctoritate constituentium introductum est.”

On the other hand, he not only stressed *utilitas* as the reason behind legal exceptions, but also raised the question of how system and special law could be combined. *Ius singulare* constituted an exception to the rule, which explained the position of special laws in the system: They were amendments to the rules of the respective areas of law. At the same time, it was pointed out how these norms “to that extent deviated from the general strict rules of law”, as Thibaut phrased it in those passages from his textbook that deal with the SC Velleianum.⁷ For the rest, Thibaut remained silent: no other conclusions were drawn from his positionings of *ius commune* and *ius singulare*. In particular, there is no evidence that his systematic conceptions put the SC Velleianum under any strain or that the need was felt to rid the system of discordant exceptions. In any case, Thibaut did not believe in an inherent systematic structure of law. Rather, all he asked of jurists was that they structure legal provisions in a pragmatic as well as systematic manner, always with the proviso that a “perfected system [...] was] impossible”. That is why he should not be criticised, if “every now and then the logical decorum were not observed”.⁸ Carving up legal material in order to achieve an especially conclusive system was therefore not a viable path for him.

Most 19th-century Pandectists will have thought along these lines. Of a pedagogical vocation, Pandectist systems aimed to render the corpus of legal material easily accessible to students. Thus, special laws were simply added as

7 THIBAUT (1834) § 603, 131: “und insofern es von allgemeinen strengen Rechtsregeln abweicht, zu den Arten des iuris singularis gehört”.

8 THIBAUT (1803) 3: “vollendetes System [...] für unmöglich”; 2: “hin und wieder das logische Decorum nicht geachtet seyn sollte”.

an exception. To omit them or to limit their academic treatment for systematic reasons was deemed nonsensical because students were taught the law then current, and that law still retained a host of special laws. If one looks for jurists pondering not merely didactic but more explicitly scientific systems – a group which could have dedicated more effort to our topic –, one finds a surprisingly small number of academics. From the end of the 1820s onwards, the discussion about such systems reacted to criticism from the Hegelian camp. This criticism was directed at the disciples and followers of Friedrich Carl von Savigny, who were charged with being unable to present a scientific system. At the centre of this debate stood Friedrich Julius Stahl, Georg Friedrich Puchta, Moritz August von Bethmann-Hollweg, Friedrich Bluhme and Savigny.

In 1840, Savigny followed Thibaut's lead⁹ and stressed that *iura singularia* could not be characterised as being of application only to "a certain class of persons", "as the definition of such classes can be formulated at discretion, like for example the whole law of sales only applies to the class of seller and buyer".¹⁰ He, too, foregrounded the relationship between rule and exception, deploying it as a logical connection between *ius commune* and *ius singulare* and speaking of "anomalous" principles which had not sprung from the "pure area of law itself", but from "an alien place".¹¹ Savigny argued that rules in which he saw the "common element"¹² of law at work were rooted in the "moral nature of law in general [...], i. e. the acceptance of a universal dignity and liberty of man".¹³ According to Savigny, *ius strictum*

9 SAVIGNY (1840) 61.

10 SAVIGNY (1840) 63: "gewisse Klasse von Personen"; "da man den Begriff solcher Klassen nach Belieben bilden kann, wie denn z. B. das ganze Recht des Kaufs nur für die Klasse der Käufer und Verkäufer gilt".

11 SAVIGNY (1840) 61: "Ein zweyter Gegensatz bezieht sich auf die verschiedene Herkunft der Rechtsregeln, je nachdem dieselben entsprungen sind auf dem reinen Rechtsgebiet (sey dieses jus oder aequitas), oder aber auf einem fremdartigen Gebiet [...]. Indem diese letzten als fremde Elemente in das Recht eingreifen, werden dessen reine Grundsätze durch sie modificirt, und insofern gehen sie contra rationem juris [...]. Ich nenne sie daher anomalische, die Römer nennen sie Jus singulare, und setzen ihren Entstehungsgrund in die von dem Recht verschiedene utilitas oder necessitas."

12 SAVIGNY (1840) 55–56: "das allgemeine Element".

13 SAVIGNY (1840) 55: "Das allgemeine Element dagegen erscheint wiederum in verschiedenen Gestalten. Am reinsten und unmittelbarsten, insofern darin die sittliche Natur des Rechts im Allgemeinen wirksam ist: also die Anerkennung der überall gleichen sittlichen Würde und Freyheit des Menschen."

and *aequitas* formed the sources from which the “common element” originated. They had to be kept quite distinct from norms of *ius singulare*, which were emanations of “paternal care for the welfare of individuals (*ratio utilitatis*), for example the advancement of trade, the protection of some classes, like women and minors, against specific dangers”.¹⁴ The starting point was to be found in “every kind of *utilitas*”.¹⁵ Savigny’s views evidently owed much to a strong commitment to systems: “As the latter, as foreign elements, interfere with the law, its pure principles will be modified by them.”¹⁶

2 The technique of change: merging or coexistence of rules and exceptions?

It would be Savigny’s disciples who looked more closely at possible answers to the question of whether modifications to extant law through *ius singulare* should be incorporated by means of a change to the existing rules themselves or whether they should be allowed to exist alongside them as exceptions. Was the aim of jurisprudence to weave a *ius singulare* into the fabric of the *ius commune* by changing legal rules and principles to such an extent that any exception could be dispensed with?

For Puchta, it was the basic principle of law to govern the inequality of people and of things on the principle of equality. Thence, the task of integrating individual demands into an increasingly differentiated legal system.

“The more a law develops, the more open it will become to demands resulting from the differing nature of men and of things; the less brusque and hard, the more elastic its forms will become, in which it will envelop them without letting go of its basic principle. [...] But this pure development has often been interrupted. The demands resulting from the individual nature of men and of things have often asserted themselves in a way that lead to them being placed above the principles of law, instead of them being inserted into those principles. This gave rise to exceptions to the pure law. [...] It is not the influence of these individual considerations that characterizes the *ius singulare*, as the pure law, too, cannot and should not seal itself against this influence, but rather the manner of the same [*sc.* the influence], namely, that it exerts itself by the external way of an exception breaking through the

14 SAVIGNY (1840) 56.

15 SAVIGNY (1840) 56: “jede Art von *utilitas*”.

16 SAVIGNY (1840) 61: “Indem diese letzten als fremde Elemente in das Recht eingreifen, werden dessen reine Grundsätze durch sie modificirt”.

principles, thus transcending them, instead of satisfying all demands by a corresponding shaping of the legal institutes themselves.”¹⁷

This naturally raised the question of why a legal order sometimes held particular positions of individuals apart by means of contrasting special laws and sometimes integrated them into the *ius commune*. To Puchta, three explanations seemed possible:

“The reason for choosing, instead of the latter way, the former, the erection of a *ius singulare*, will not seldom be found in a lack of sensible insight and of the command of the material on the part of the legislator; often also in the particular character of a certain right, that is, in the legal opinions of the people itself; and finally, in the imperfection of all things human generally, which precludes the absolute achievement of that idea of a pure law, which is the inner perfection of law.”¹⁸

Puchta illustrated his points by taking the SC Velleianum as an example. Donations between spouses, he explained, had been prohibited in Roman law because “it is irreconcilable” with the Roman conviction “that the spouses were held to consider all that they owned as common goods, if one may enrich himself to the detriment of the other.”¹⁹ The prohibition

- 17 PUCHTA (1841) 92–93: “Je mehr ein Recht sich ausbildet, desto vollständiger wird es sich den Ansprüchen der verschiedenen Natur der Menschen und der Dinge öffnen, desto weniger schroff und hart, desto elastischer werden die Formen werden, in die es sie einschließt, ohne sein Grundprinzip aufzugeben. [...] Aber diese reine Entwicklung ist oft durchbrochen worden. Es haben sich die Ansprüche der individuellen Natur der Menschen und der Dinge häufig in der Art geltend gemacht, daß sie über die Principien des Rechts hinweggesetzt wurden, statt in sie eingefügt zu werden. Dadurch sind Ausnahmen von dem reinen Recht entstanden. [...] Nicht der Einfluss jener individuellen Rücksichten ist es, worin der Charakter des *ius singulare* liegt, denn diesem Einfluss kann und soll sich auch das reine Recht nicht verschließen, sondern die Art und Weise desselben, nämlich daß er auf die äußerliche Weise einer die Rechtsprincipien durchbrechenden, also sie überwindenden Ausnahme geübt wird, statt daß jenen Ansprüchen durch eine entsprechende Gestaltung der Rechtsinstitute selbst genügt würde.”
- 18 PUCHTA (1841) 93: “Daß statt des letzteren Wegs jener erste, die Aufstellung eines *ius singulare*, eingeschlagen wird, hat seinen Grund nicht selten in einem Mangel an rechter Einsicht und Beherrschung des Stoffs von Seiten des Gesetzgebers, häufig auch in dem besonderen Charakter eines gewissen Rechts, also in den Rechtsansichten des Volks selbst, endlich aber in der Unvollkommenheit menschlicher Dinge überhaupt, welche die vollständige Erreichung jener Idee des reinen Rechts, also die innere Vollendung des Rechts ausschließt.”
- 19 PUCHTA (1841) 93: “Im römischen Recht sind die Schenkungen unter Ehegatten verboten [...] Der Grund liegt darin, daß es mit dem sittlichen Wesen der Ehe, mit der wahrhaften ehelichen Gesinnung, wonach die Ehegatten alles was sie haben, als gemein betrachten sollen, unverträglich ist, wenn sich einer auf Kosten des andern bereichern will.”

itself had resulted from developments in Roman family law. Whereas in the traditional form of marriage, the *manus*-marriage, the husband received complete legal control over all of his wife's assets, that was not the case with free marriages, which thus legally allowed for a donation. There would have been two ways of reacting to this problem. The first would have been root and branch modification to the matrimonial property regime and the implantation of "free common ownership of goods between the spouses, which could have solved this problem". But by destroying the proprietary aspects of (*manus*-)free marriage, such an approach "was alien to the legal sense of the Roman people". A solution involving changes of the *ius commune* was therefore ruled out.

"The only way was to break through this pure law with a singular exception, the prohibition of donations, to let it [i.e. the pure law] be defeated by individual considerations, instead of giving a form to that pure law in which it would have accommodated this requirement and would thereby have remained in command of the same."²⁰

Thus, the legal conscience had to decide whether an exceptional provision could be integrated by modifying the principle or whether it had to be included as an exception. What underlay this was the conviction that the legal conscience did not simply function like an organism, but sometimes eluded the rules of the system. Puchta thought of the law as being of a reasonable nature, "even though, of course, necessity may from time to time lead to a deviation from these consequences".²¹ Bethmann-Hollweg clarified the point in 1840:

- 20 PUCHTA (1841) 94–95: "Es ließe sich denken, daß der Rechtssinn des Volks, indem er über jene älteste Form des ehelichen Verhältnisses hinausgieng, eine neue rechtliche Gestalt desselben gefunden hätte, die, obwohl weniger schroff, jene sittliche Anforderung in sich aufnahm, und ihr somit auf dem Standpunkt des reinen Rechts genügte, eine rechtliche Gestalt, wodurch die Schenkung ebenfalls nach reinem Recht unmöglich geworden wäre. Unsere rechtlichen Anschauungen führen uns auf eine freie Gemeinschaft der Güter unter den Ehegatten, wodurch dieses Problem hätte gelöst, und die an die Stelle jener alleinigen Berechtigung des Mannes hätte gesetzt werden können. Aber dieser Begriff war dem Rechtssinn des römischen Volks fremd [...] So blieb nichts übrig, als dieses reine Recht durch eine singuläre Ausnahme, jenes Verbot der Schenkungen, zu durchbrechen, es durch die individuellen Rücksichten besiegen zu lassen, statt dem reinen Recht eine Form zu geben, worin es dieses Bedürfnis aufgenommen hätte und dadurch desselben mächtig geblieben wäre."
- 21 PUCHTA (1847) 25: "wiewohl freilich unter Umständen das Bedürfnis zu einer Abweichung von diesen Konsequenzen führen kann".

“As in the whole history of the peoples, in the development of their law, too, there is an unknown factor at work, an *x*. No people is completely aware of the unity of its law, to a greater or lesser extent it merely carries it in its emotions. It is precisely for that reason that it does not produce its law in absolute unity but instead, prompted by the diversity of life and by a practical need, it will leap-frog links and develop details which are now characterized as anomalies, as exceptions.”²²

No victory of the system, therefore. Jurisprudence followed the existing sources of the law, and it was not always possible to integrate legal rules into the organism. But of course, the challenge remained to achieve the best possible integration by changing the guiding principles. Keller went so far as to hold that, despite their opposition, “consequence and utility [...] have their place within the legal system and that is where they demand their equalisation.”²³ Kuntze was far more sceptical:

“*Aequitas (bonum et aequum)* is different from the logical elements of law which can be deduced rationally and demonstrated exactly, and which are therefore pure products of thinking; the *aequum* is a product of creation, a free unfolding of the substance, a creative expansion of the legal lineaments, but borne by the basic ideas of the law und thereby distinguished from the mere laws of utility which only form mechanical additions and – to a greater or lesser extent – always bear the sign of arbitrariness.”²⁴

Another, more careful way was suggested by Bluhme. He pointed to the fact that special law could crystallise into whole, irregular complexes of law. His examples were “the laws of soldiers, Jews, feudal law, commercial law, shipping law, mining law, forest law etc.” He argued that such complexes of

22 BETHMANN-HOLLWEG (1840) 1573 et seqq., 1580: “Wie in der ganzen Geschichte der Völker, so auch in der Entwicklung ihres Rechts wirkt eine unbekannte Größe, ein *x* mit. Kein Volk ist der Einheit seines Rechts sich vollständig bewußt, es trägt sie mehr oder weniger nur im Gefühle. Eben deshalb producirt es auch sein Recht nicht in absoluter Einheit oder Consequenz, sondern durch die Manigfaltigkeit des Lebens und das practische Bedürfniß gedrängt bildet es mit Ueberspringung der Mittelglieder Einzelheiten, die nun den Character der Anomalie, der Ausnahme haben.”

23 KELLER (1866) 17: “Consequenz und Utilität [...] gehört aber in das Innere des Rechtssystems und fordert in demselben seine Ausgleichung.”

24 KUNTZE (1869) 17: “Die *Aequitas (bonum et aequum)* unterscheidet sich von den logischen Elementen des Rechts, welche rationell deducirt, exact demonstrirt werden können und also reine Producte des Denkens sind; das *aequum* ist ein Product des Schaffens, freie Entfaltung des Stoffes, schöpferische Erweiterung der juristischen Lineamente, aber getragen von den Grundideen des Rechts, und dadurch unterschieden von den bloßen Utilitätsgesetzen, welche nur mechanische Zusätze bilden und immer mehr oder minder das Gepräge der Willkür tragen.”

special law “can only be raised to the status of an organic entity, to an intelligible representation of real life, through multifarious amalgamation with related and more general principles”.²⁵ In any event, the system was not allowed to brush away any provision of the special law. According to Puchta, nothing was gained “by not dealing with a real anomaly, i. e. one not rooted in other provisions of the system, right where one encounters it, but instead pushing it deeper into the system”.²⁶ These discussions, revolving as they did around the theory of a legal system, did not contemplate special law as a systematic tool. No one was fond of it, and there were marked attempts to integrate the contents of the respective provisions of special law by adjusting the principle. But where that failed, the provisions remained in force, as exceptions in flat contradiction of the rule. Puchta, for instance, treated the SC Velleianum as a general prohibition of intercession by women and thus as an exception to the rule.²⁷ Other Pandectist systems also added the SC Velleianum as an exceptional law to their respective systems and merely documented the deviations from Roman law in contemporary *ius commune*. There is nothing to indicate that in order to uphold systematic consistency any thought was given to sacrificing these deviations and the SC Velleianum in favour of the general rule of freedom to intercede.²⁸

3 Codification and *iura singularia*

But what about the codifications? At first glance it seems even more unlikely that *iura singularia* which still fitted the political bill would be pushed aside due to technical legislative concerns. The science of legislative theory unan-

- 25 BLUHME (1854) 16: “nur durch vielfaches Einweben verwandter allgemeinerer Grundsätze [sic] zu einem organischen Ganzen, zu einem verständlichen Bilde wirklicher Lebensverhältnisse erheben lassen”.
- 26 PUCHTA (1826) 40 et seqq., 41: “dass man, statt eine wirkliche (d. h. nicht auf andere Sätze des Systems zurückzuführende) Anomalie gleich wo sie sich zeigt, einfach als solche abzufertigen, sie weiter ins System hineinschiebt”.
- 27 PUCHTA (1844) §§ 407–410 (541–544), mentioning that court practice had recently supplied another exception from the general prohibition of intercession by women, namely in cases in which the intercession pertains to the woman’s own commercial activity (§ 408 [543]).
- 28 Cf. for instance GÖSCHEN (1839) 527 et seqq., including 536 et seqq. (“Heutiger Gebrauch”); VANGEROW (1852) 149 et seqq. (including note 1), collecting the many exceptions the *ius commune* allowed, compared to Roman law.

imously declared that the legislator “was expected to base his laws on a systematic foundation [...] but should refrain from encroaching on the field of science by directing this system at the outside.”²⁹ It was deemed sufficient to first formulate the rule and then the exception.³⁰ *Iura singularia* therefore posed no technical legislative problem. This was stressed by Gottlieb Planck – member of the first and chairman of the second BGB commissions – in his remarks regarding the issue of whether women’s capacity to contract was to be restricted under certain circumstances. Openly weighing up the systematic benefits of a general solution with the legal-political implications, he pointed to the ultimately secondary importance of issues of system:³¹

“Seen from the point of view of juristic technique, there would indeed be certain benefits, and the simplicity of the system would be furthered if, regarding the matrimonial property regimes of community of property and of matrimonial usufruct and administration [i.e. the so-called “Verwaltungsgemeinschaft”], a limitation of the legal capacity of the wife were introduced [...]. But such a step would threaten the interests of the wives to such an extent, would fail to comply with the economic needs as well as with the general social opinions, that this seems too high a price for the gain of a simpler system.”

Planck emphasised this view: “Alas, the position within the system is of merely secondary importance.”³²

Does this mean that the integration of *iura singularia* into the codification did not play any role as a legislative technique? Planck, in particular, had a very keen eye for the legislative-technical challenge posed by special laws. 1889 saw his debate with Otto von Gierke, whose continuous criticism that

29 MERTENS (2004) 423: Legislative theory was in agreement that the legislator “zwar seinen Gesetzen ein System zugrunde legen [...] aber nicht in das Gebiet der Wissenschaft übergreifen [solle] indem er dieses System nach außen kehrt.”

30 MERTENS (2004) 427.

31 PLANCK (1889) 352: “Vom Standpunkte der juristischen Technik aus würde es allerdings gewisse Vortheile gewähren und die Einfachheit des Systemes gewinnen, wenn man bei den Güterständen der Gütergemeinschaft und der ehelichen Nutznießung und Verwaltung eine Beschränkung der Geschäftsfähigkeit der Ehefrau eintreten ließe [...] Eine solche Gestaltung würde aber das Interesse der Ehefrauen in solchem Maaße gefährden und den wirthschaftlichen Bedürfnissen, wie den Anschauungen des Lebens so wenig genügen, daß der Gewinn eines einfacheren Systemes um diesen Preis als zu theuer bezahlt erscheint.”

32 PLANCK (1889) 338: “Die Stellung im Systeme ist aber doch nur von untergeordneter Bedeutung.”

the First Draft of the BGB's insistence on equality would favour the strong over the weak was its salient feature. Against a backdrop of heated political debate in the wake of the economic crisis of the 1870s ("Gründerkrise"), von Gierke's criticism was tantamount to accusing Planck of overlooking, or even disregarding, the present social demands in the most naïve manner possible. Planck's reply was fuelled by his conviction that the first task of a codification was to set up "general rules"³³ and to codify only that which was "open to a general regulation".³⁴ Should this be impossible, Planck said, he tended towards either "leaving the decision to the legislation of the federal states"³⁵ or calling for "special legislation".³⁶ The task of the codification was, then, to regulate what was applicable to all. Normative deviations favouring or burdening particular groups were better contained in and restricted to special statutes.

The old distinction between general principles on the one hand and exceptions springing from political considerations on the other thus resurfaced in Planck's writings as a principle of legislative technique. Planck clearly distinguished between the question of *how* a particular legal relationship was to be regulated and *what* the appropriate *place* for it was – within or outside the codification. Particularly in cases where this would have meant taking sides in the socio-political struggles of his day, Planck was averse to integrating special law into the codification.

"Therefore, far-reaching social innovations are – as far as is reasonably possible – to be left to the legislation in the form of specialized acts [Spezialgesetzgebung], be it the legislation of the Reich or, as appropriate, of the federal states. Intervention in such circumstances as are still developing, in particular, is to be ruled out."

This position reveals an attempt – as a reaction to severe criticism of the First Draft of the BGB (1889) – to depoliticise the codification and to remove controversial political issues. Thus, Planck lauded the legislator for prohibiting usury again, employing a special law and thereby avoiding the need to integrate the prohibition into the BGB – to Planck's mind it was an instance of "the correct distribution of the material"³⁷ between codification and special law.

33 PLANCK (1889) 335: "allgemeine Grundsätze".

34 PLANCK (1889) 336: "einer allgemeinen Regelung fähig".

35 PLANCK (1889) 336: "die Entscheidung den Landesgesetzen überlassen".

36 PLANCK (1889) 343: "Specialgesetzgebung".

37 PLANCK (1889) 410: "princiipiell richtige Vertheilung des Stoffes".

Behind this rather technical argument stood Planck's decidedly liberal stance towards private law as well as his rather sceptical view of special law. By relegating special law to special statutes, Planck's conception of the BGB embodied a liberal space for individuals as well as for the market and thus made plain his socio-political standpoint. From this perspective, the "security of commerce" superseded the protection of the weak through codified special law. Planck refused outright to heed von Gierke's call for the protection of the weaker to be enshrined within the BGB and taken as axiomatic:

"The BGB, however, must never give preferential consideration to the interest of one class but should – by weighing all interests concerned – enact whichever provision serves the common weal best. [...] The most important factors of economic power and weakness, wealth and poverty, cannot be used at all in private law as preconditions of legal rules. Neither can it be claimed as a general rule that the debtor is the weaker party vis-à-vis the creditor. Thus, any decision will depend on the close analysis of the individual legal relationships, but particularly on whether the preconditions, demanded as given by a provision protecting the weak, as well as the very contents of that provision, can be defined in such a manner that – at least usually – application of this provision will indeed only result in the protection of the weak and not act to the detriment of the security of commerce as well."

For that reason, the draft of the BGB had eliminated a number of provisions which were deemed not to "have achieved their aim at all, or only very incompletely, but which have instead proven to be a troublesome nuisance for healthy and honest commercial relationships." As examples, Planck mentioned "the restriction of suretyships of women, rescission for reasons of *laesio enormis*, the Lex Anastasiana etc."³⁸

38 PLANCK (1889) 409: "Das bürgerliche Gesetzbuch aber darf niemals das Interesse einer Klasse vorzugsweise berücksichtigen, sondern muß unter Abwägung aller in Frage kommende Interessen die dem Wohle des Ganzen am besten entsprechende Bestimmung treffen. [...] Die wichtigsten Factoren wirtschaftlicher Macht und Schwäche, Reichthum und Armuth, lassen sich im Privatrechte überhaupt nicht als Voraussetzungen von Rechtsätzen verwenden. Ebenso wenig läßt sich allgemein behaupten, daß der Schuldner gegenüber dem Gläubiger der Schwächere sei. Es wird daher immer auf eine genaue Prüfung der einzelnen Rechtsverhältnisse ankommen, besonders aber darauf, ob sich die Voraussetzungen, unter welchen ein zum Schutze des Schwachen bestimmter Rechtssatz Anwendung finden soll, sowie der Inhalt dieses Rechtssatzes selbst so bestimmen lassen, daß dadurch wenigstens regelmäßig wirklich nur der Schwache geschützt wird und nicht daneben andere schwerwiegende Nachtheile für die Sicherheit des Verkehrs eintreten. Von diesen Gesichtspunkten hat sich der Entwurf leiten lassen und wenn über einzelne

Yet again, the SC Velleianum served as an example which Planck used to rank the protection of wives below the requirements of the market. This chimed nicely with demands from the political mainstream which had been calling for the abolishment of restrictions on interceding for quite some time.³⁹ But the reason why the BGB now opted against the limitation of intercession was of a different nature. Among other things, the Commission wanted to set up the codification as a symbol of private law itself. It was here that society's general liberties were enacted, a default model applicable as long as the state did not opt to intervene. This was nothing short of a defence of private law against von Gierke's call to amalgamate private law and public law. Viewed as the codification of private law, the BGB therefore necessarily threatened special law in all those cases in which the Reich refrained from intervening through counter-legislation, that is, through specialised statutory law. To that extent, and only to that extent, there was a connection between codification and special laws.

4 A glance over the Alps

Comparison of these German debates with the late 19th-century Italian discussion, as analysed in Massimo Meccarelli's contribution,⁴⁰ shows how both discourses share a common premise: codifications are to be stable while areas of law which are still in flux, prone to constant changes or politically charged should be kept at bay and legislatively outsourced. Behind this lies a shared reluctance to open up a codification for re-negotiation. Whether that reluctance was due to already sufficiently complicated and unpredictable legislative discussions about the respective bill (cf. the history of the BGB)

Fragen die Meinungen auch geteilt sein mögen, im Großen und Ganzen, wie ich glaube, den richtigen Mittelweg festgehalten. Er hat eine Reihe von Vorschriften beseitigt, welche zum Schutze des Schwachen bestimmt waren, so z. B. die Vorschriften über die Beschränkung von Bürgschaften der Frauen, über die Anfechtung wegen *laesio enormis*, die *lex Anastasiana* u. a. m. Es handelte sich hierbei durchweg um Bestimmungen, von denen sich herausgestellt hatte, daß sie ihren Zweck überhaupt nicht oder nur höchst unvollkommen erreichten, dagegen andererseits den gesunden und ehrlichen Geschäftsverkehr in hohem Grade belästigten und vielfach zu chikanösen Streitigkeiten gemäßbraucht wurden."

39 For an overview over the discussion see HAFERKAMP (2013) §§ 765 et seqq., margin notes 99 et seqq.

40 See the contribution by Meccarelli in this volume.

or to genuine optimism regarding the role of codification is a question that might merit further comparative analysis.

But if Biagio Brugis's view is to be taken as representative of at least a strong current of Italian scholarship at the turn of the century, one has also to acknowledge marked differences in the appraisals of the extent to which a codification is open. Italian scholars seem to have been convinced that – as far as the social question is concerned – special law is the potential raw material of ordinary, regular codified law and that it serves as a temporary repository of a normative avant-garde which, once dogmatically refined and generally accepted in terms of its contents, will at some point or other make the passage to codification. The 'Italian' view is perhaps mirrored in Brugis's view that as a response to current social needs, special law need not comply with an existing private law codification in any systematic sense; in other words, it is the task of jurists to "understand old and new law as a System".⁴¹ In the last analysis, this is a hands-on approach which favours attention to current, pressing problems over technical questions of systematic purity. This approach seems to be less pronounced in the German context. In fact, von Gierke would have chosen to sidestep the legislative laboratory of socially imperative special laws and opted instead for codifying (some of) their values and regulations from the very start. At the other extreme, Planck would of course have flinched at the thought of legal material contained in special laws trickling into the BGB.

This leads – inevitably, given the scale of the task – to a blind spot in this panel: the role of jurisdiction and legal science in applying statute law, be it a code or a special law. Our paper has focused on *academic* debates over the relationship of *ius commune* and *ius singulare*, mainly in the course of the 19th century and with an especial eye to a future codification of private law. But Massimo Meccarelli has gone beyond that and, by referring to contemporary Italian writings, hinted at possible roles and tasks legal academics and the judiciary⁴² might take up when dealing with both codes and special law. By moving into the contemporary forensic arena, it might turn out that the difference between code and special law, between *ius commune* and *ius singulare*, is viewed as less pronounced, perhaps, even, of no importance at all,

41 See the contribution by Meccarelli in this volume.

42 Halpérin (see his contribution in this volume), too, points to the important role the process of *cassation* played in reinforcing the French (civil) legal system's claim to generality.

in day-to-day legal affairs. Such an observation might shift the focus of debate from the question “code or special law?” to “statute law or legal practice?”

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