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Private Laws of Western Civilization†

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PART III. THE GERMAN AND THE SWISS CIVIL CODES¹

THE GERMAN CODE²

The Bürgerliches Gesetzbuch of August 18, 1896—commonly cited as "Begebe"—came into force on January 1, 1900. Before this codification created a unified private law, the map of the country showing the laws of the several territories was like a mosaic of infinite variety transcending the distinction of states. Common law, mixed out of Roman-Byzantine, Canon, and Germanic elements often transformed, the Prussian Landrecht, and the French law were noticeable in larger parts of the Reich, but all were partially superseded by a multitude of local statutes and customs having precedence over the common law. Nevertheless, unification caused less difficulty than in other countries. The reason was evidently the scientific prevalence of the Roman-German law, which during the nineteenth century occupied the first place in the law schools and the learned literature, to the damage of what could have been learned from the Prussian code and practice. This erudite evolution, based on the Pandectist doctrines, reshaped by Savigny and his many-sided school, and continued in an intense, sometimes vehement, dispute between Romanists and

† This is the third in a series of papers by the author. The final part will be published in the May issue of the Louisiana Law Review. The Louisiana Law Review will also republish the entire series of papers on "Private Laws of Western Civilization" in booklet form.

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1. The Progress of Continental Law, *supra* p. 107, n. 1.

2. The German Civil Code, translated and annotated by Chung Hui Wang (London, 1907). Recent German editions must be consulted for the amendments.

Ernest J. Schuster, *The Principles of German Civil Law* (Oxford, 1907). Enneccerus, Kipp and Wolff, *Lehrbuch des Bürgerlichen Rechts*, in many editions; Spanish translation with comparative annotations by Gonzales and Alguer, 8 vols. (Barcelona, 1934-1946). E. M. Borchard, *Guide to the Law and Legal Literature of Germany* (The Hague, 1912). Information on German law is frequent in Italian and Spanish law reviews. Notably, reports on German decisions and theory are furnished by the important periodicals of the Instituto Italiano di Studi Legislativi, edited by S. Galgano in various languages, with English summaries; for an introduction the "Vicissitudes of the German Civil Code, 1900 to 1925," were surveyed in *Annuario del diritto comparato*, vols. 1-5, 1927-1930.

Germanists—that is, the scholars of old Germanic law—was further influenced by the rich German philosophy and finally strongly inspired by the incipient economic and sociological movements which started in the last century.

The code had to say the last word on all the problems concerning private law and express a stand on law in general. In twenty years of the most elaborate studies of drafting and debating, methodical attention was given to the enormous wealth of accumulated learned tradition and to the available German and foreign sources of law, although no one thought of English, Scandinavian or American materials. Practical experience was not missing in the serious and industrious authors of the code. The first draft was censured by Otto Gierke,³ the Germanist, as leaning too much to the Romanistic ideas, and by Anton Menger,⁴ the socialist, as too favorable to the propertied classes. But a second commission satisfied the critics as far as appeared feasible at that time. Assuredly, separate enactments on such matters as labor law and juvenile welfare had to follow in subsequent periods.

Almost every problem was minutely examined with respect to its correct statement, its solutions in the preceding codes, its relationship to other legal problems, its *just* solution, and the best formulation of the rule to be established. The ambition was to cover all worthwhile questions, or expressed in more modern jargon, all foreseeable conflicts of interests, without committing the mistake of the Prussian code which in 28,000 sections tackled every possible question separately. Abstraction, generalization, therefore, seemed required. To obtain so wide a range of accurately visualized particular situations, language and systems had to be treated in a new technique, a refined, though artificial, manner. Usual expressions were polished and converted into firmly and consistently used technical terms. Every rule became an integrated part of a closely knit system. The rules in their meaningful connections would take care of practically all major doubts that might arise so long as the essential social, economic, and moral conceptions of the time remained in existence.

In their conscientious thoroughness, these codifiers were not afraid of difficult questions. They rather took delight in such puzzling situations that turn up if several immovables belonging

3. Otto Gierke, *Der Entwurf eines Bürgerlichen Gesetzbuchs und das deutsche Recht* (1889).

4. Anton Menger, *Das bürgerliche Recht und die besitzlosen Volksklassen* (3 ed. 1904).

to different owners are found to be mortgaged for the debt of one of them; or if forced inheritance shares are to be allocated among children, some of whom have received gifts from the parent while he lived; or if a succession is overburdened by legacies and debts.

The legislative decisions are intended to achieve justice and fairness in the midst of the conflicting interests of the parties and the clashing conceptions of right and wrong. The old institutions of family, property, and inheritance are maintained with modifications intended to delimit their social functions. Protections for the weaker members of family and society are considered at length; for the first time a code provided that an employer has to maintain sanitary, decent rooms and safe tools (Section 618) and has to pay six weeks' wages to a sick employee living in his home (Section 617). Pro and contra are studied and impartially weighed. This code is neutral, objective, tolerant, and imbued with the desire for justice. It is the product, not of one genius, but of impersonal, though inventive, committee work. With this end and this temperament, it is the most authoritative and most effective creation of the European legal mind that had been achieved at the turn of the century.

This learned and sober character aroused curious reproaches. Some romantic critics complained about the prosaic impersonality pervading the rules. Often has it been criticized that individual freedom and property rights still prevailed. Some were disgusted by the logical structure. We have evidently to conclude that the ideal law of the future must be subjective, impulsively capricious and totalitarian. In fact, the National Socialists directed their hostility against the very name of the *Bürgerliches Gesetzbuch*, the code of citizens, and prepared a code for "the people," a "*Volksgesetzbuch*."

More consequentially, the method of "abstract casuistry," intended to guarantee exactness and completeness by systematic generalizations of fact situations, has been attacked. One of the code's characteristic methods to achieve this end consists in the gradual descent of the rules from a general part, the first book, containing the rules common to all private law questions, to more specific topics, such as to obligations in general (Book 2, Part 1), then to the individual sources of obligations, and finally when sales are treated, to special kinds of sales. For the individual topic, moreover, the code first establishes a normal pattern of operative facts, for instance, the case where a lunatic or

small child incapable of discernment causes damage to another (for example, throws stones into a car). Section 827, with the usual generalization speaking of a person unconscious or in mental disturbance, et cetera, says: the damaging person is not responsible for the damage. But immediately the section turns to the case where this person has brought himself into a temporary disabled condition by intoxicating liquor or similar means (thinking of drugs): he is responsible. That this forms a separate sentence hints to the courts that the plaintiff should prove this predicament is self-inflicted. Yet, there is a third consideration; the liability does not arise if he has come into this condition through no fault of his own. Thus, he may prove that someone has poured more rum into his glass. And to crown the sequence, another section, under cautious conditions, allows a damaged party nevertheless an equitable indemnization for the act of an incompetent person, for instance if the drunkard is rich and the injured is poor. Other codes have one or the other of these rules; no other has all these distinctions, which lead to fair decisions.

As an example of the artful terminology, the auxiliary words, *darf*, *darf nicht*, *muss*, *kann*, *kann nicht*, are used with the specific meaning of distinguishing mandatory and directory requirements.

§ 1303: A man *cannot* (*darf nicht*) marry before full age.

§ 1316: A marriage celebration *should* (*soll*) be preceded by bans.

§ 2234: The spouse of the testator *cannot* (*kann nicht*) be a witness even though the marriage is dissolved.

§ 2237: A minor *should* (*soll*) not be a witness.

§ 2239: The persons assisting in the making of a will *must* (*müssen*) be present during the entire act.

If "elastic" words are chosen, the terms intentionally indicate that the court should use discretion, as when a penalty in a contract should be examined as to whether it is "adequate"; when damage should be "equitable," instead of covering all damage; or when "disruption" of the marriage is a requisite of divorce.

The language of the code is its strangest aspect for foreign readers and has immeasurably contributed to widespread ignorance of its merits. The German lawyers had to work very hard for some years to accustom themselves to this apparatus. And any freshman again will still be puzzled in reading Section 164, Paragraph 2, the requirement for representation of a principal by an agent:

If the intention to act in the name of another does not appear in a perceptible manner, the absence of the agent's intention to act in his own name is not to be considered.

More simply: an agent must make it clear to the other party that he acts as an agent; otherwise he himself is the party.

However, it must also be borne in mind what intensive and extensive elaboration is contained in the terse formulations of the code. Compare, for instance, the following paragraphs of the Swiss code with its German predecessors and study the scope of the problems covered as well as the exactitude of the language.

Swiss C. C., Article 801, Paragraph 1: An immovable mortgage is extinguished by *the cancellation* of its entry. . . .

German C. C., Section 875, Paragraph 1: For the release of a right in land, unless the law provides otherwise, it is required that the person entitled *declare that he surrenders the right and that the right be cancelled* in the land register. The declaration shall be communicated to the land registry office or to the person in whose favor it is made.

Swiss C. C., Article 827 (mortgage): The land owner who is not personally liable on the debt secured by the mortgage, may redeem the mortgage under the same conditions as those required of the debtor to discharge the debt. If he satisfies the creditor, *the claim is transferred upon him*.

German C. C., Section 1143, Paragraph 1 (among the cases where the owner may be mortgagee): If the owner is not the personal debtor, the claim passes upon him to the extent that he satisfies the creditor. The provisions of Section 774, Paragraph 1, concerning a surety are applicable by analogy.

Section 1163, Paragraph 1, Sentence 2: If the personal debt is extinguished, *the owner acquires the mortgage*.

Swiss C. C., Article 973: A person *who has relied* in good faith on an entry in the land register and *thereupon has acquired* property or other real rights, is protected in this acquisition.

German C. C., Section 892, Paragraph 1, Sentence 1: In favor of a person who acquires a right in land or a right in such a right by legal transaction, the entries of the land register are deemed to be correct, unless an opposition to their correctness has been registered or their incorrectness is known to the acquirer. . . .

Paragraph 2: If registration is necessary for the acquisition of the right, the decisive time for the knowledge of the acquirer is that when the application for registration is filed, or if . . .

Finally, general rules were introduced to secure equity and morality. The courts have subsequently generalized and very

largely employed the fundamental maxims that contracts are to be construed and performed according to good faith with regard to common usage (Sections 157, 242) and that contracts violating good morals are void (Section 138).

Can a code satisfy everybody? The law of immovables has been developed in Austria and Germany on the ground of more and more perfect land register books (that is, public title registers, not to be confused with geodetic and tax surveys). This division in the code is a marvelous system of principles defining the exact effect of registration and nonregistration of real rights. Inscription in the book is neither merely evidentiary nor, as in Louisiana, a self-sufficient act. As a result, transfers of land and mortgaging have become smooth and secure operations, without benefitting bad faith. Certificates of mortgage may circulate as negotiable instruments. Because, however, credit was so much facilitated, agrarian reformers soon complained that pledging land was made too easy and owners overburdened their property with charges. There is something to this reproach. In homestead legislation, mortgaging is generally prohibited. Nevertheless, I had to ask: Must we blame a cook for giving us food so good as to cause us to overeat?

The ponderous code found a congenial legal profession for enfolding its capacity. In the short space of time from 1897 to the outbreak of the First World War in 1914, the German writers and law schools devoted themselves almost exclusively to exploring and learning to operate this huge apparatus. They experienced the biggest event in centuries, exchanging their fragmentary and turbid legal tradition for one solid, bright manifestation of law; turning, from painful attempts to make ancient sources decide modern problems, to separate scholarly inquiries in the actual law and in the history of law; and immediately proceeding towards a reborn audaciously progressive theory. By its over-accurate pedantry, the code educated the lawyers to maximum efforts. Its innumerable wheels and gadgets invited expert handling and produced a formerly unknown resourcefulness.

The courts participated. They approached their task with intelligence and ability, and, to their own surprise, with a creative spirit of which no one had suspected the German tribunals. Sometimes, they went much further than the envied French judges in free constructions and judge-made law. In those very years the spirit of the time changed. Public law increased its

inroads into private relations. Freedom of contracting encountered the objection that it was one-sided. Everyone now knows the mass of standard forms and general conditions issued by carriers, banks, insurers, manufacturers, landlords, which the single other party to the contract has simply to sign; the German courts reacted against it at an early time.

They have filled many gaps left by the code. To name at random a few examples of the various progresses, judicial authority has improved the protection of personality; established a sound criterion for the question whether machines are a part of a factory (immovable fixtures); recognized conditional sales and fiduciary assignments; invented actions for injunction; and created a new class of quasi corporations allowing adequate functions without undesired registration to political, religious, benevolent, scientific, sport, and labor associations.

All this was substantially achieved in those short years—a memorable refutation of the fears that a new codification necessarily leads to half a century wasted with sterile exegesis, as happened in France and in Austria.

The German legal system, of which the private law is the centerpiece, is not as well known in the world as it should be. With its historical background reaching into primordial wisdom, with its refined erudition, its enlightened approach and its unique technique, it is the most important single piece of legal achievement in the world. Much of its particulars may be disapproved after half a century of radical changes; it has never inspired any great love. However, I dare say, after life-long observation, that the methods used in the legal science of the United States would gain by a thorough appraisal of German private law. Appropriate books to introduce American lawyers to the civil law are urgently needed; a special role is due to a comparative exposition of the German system.

THE SWISS CODE⁵

The Swiss Civil Code—"Zivilgesetzbuch"—of 1907, in force from January 1, 1912, and the re-enactment of the largely mod-

5. Robert P. Schick, *The Swiss Civil Code of December 10, 1907*, annotated by Charles Wetherill (Boston, 1915); Joy Williams, *The Swiss Civil Code, English Version* (Oxford, 1925). Georg Wettstein, *The Swiss Federal Code of Obligations* (English, Spanish, and French), 2 vols. (Zürich, 1928 and 1930). (Zürcher) *Kommentar zum Schweizerischen Zivilgesetzbuch*, von Egger, Escher, u. a. [see esp. Vol. 1 (2 ed. Zürich, 1930) with bibliography, p. 35 ff.]; (Gmür's) *Kommentar zum Schweizerischen Zivilgesetzbuch*, see Vol. 1 (2 ed., Bern, 1919) bibliography 27 ff.

ernized Code of Obligations, originally of 1881, present another masterpiece. The law of Switzerland was enormously divided. Although it is a small country, its segments of three nations, all equal in law and social standing, were reared in considerably different legal conceptions. The arch-conservative inner cantons, the agricultural and Protestant regions, and the industrial and trade centers of Zürich, Basle and Geneva represented contrasts as much to be respected as any conflicts of interests which legislators have to consider.

For a long time, all these diversities seemed to frustrate any plans for unifying the private law; there was no Napoleon to enforce it. However, Eugen Huber, in an excellent historical and critical survey of the territorial laws, prepared the legislative work, which then was entrusted to him. This great scholar in fact included a number of the surprisingly well-preserved old Swiss institutions in the code. The French and Swiss codes show essentially more medieval Germanic influences than the German Code! Also for legislative technique Zürich and Basle had set remarkable examples.

Huber's ability has finally overcome the disparate elements but for a few exceptions. Thus, the code declared that brothers and sisters of a deceased, in the absence of heirs of the first class, have legitime portions in the succession and that the children of brothers and sisters have no forced shares. But the federal legislation had to leave the cantons the faculty of legislating inversely in both respects.

The codification was greeted with enthusiasm not only in its own country but by many people outside. In Germany those who felt oppressed by the weight of their code were in raptures over the two principal features of Huber's technique: simple language and loose structure—an antithesis to the northern neighbor.

The language is, indeed, natural and attractive, something between solemnity and colloquialism. Proverbs and slogans are interspersed, and you may find a saying such as: Marriage gives full age.

The light tone of the law was possible because the legislator strongly reduced his task. Huber was satisfied with broad outlines of the legal institutions, with principles to guide the courts rather than detailed regulations to bind them. Hence, an elegant arrangement of the topics was preferred to a tightly woven system.

Radicals in Germany hailed just this aspect. Self-restriction of the law, a half-way compromise with case law, seemed to them the answer to the lawyer's prayer. And we all felt relief in stating that, after all, it was possible to codify without the most ambitious precision and cleverness, in simple language not requiring years of initiation. And it was not necessary to press the judge into a machinery dictating his every move.

Indeed, considering after four decades the results reached by the highly competent legal profession under the guidance of the admirable Swiss Federal Tribunal, we understand fully the satisfaction and pride with which Switzerland views her code.

Another point of view, of course, is needed for a just estimation of such a code in comparison with its more particularized brothers, either German or American, or the recent codifications which we cannot discuss here.⁶

In the first place, the Swiss conditions have determined the character of the code, although a last technical revision of the text for assuring more precision, much desired by the best jurists, would not have harmed the work. The task was fixed from the beginning as the unification and redrafting and development of the traditional law by the accustomed methods. Switzerland had many courts with a large participation of laymen on the bench. The referendum threatened a crucial test. The language had to appear understandable to the common man, even though it may sometimes puzzle the lawyer by its emptiness. Popular votes on any new law were known to be risky. Finally, the country was always accustomed to a large discretion by the judges. It seemed natural to leave them a conspicuous part in forming the new law.

Consequently, in the choice between completeness or smoothness, exactitude or elegance, advice to the lawyer in difficult problems or information to the intelligent common man,—where the Germans selected the first, the Swiss decided for the second method. And no hard and fast conclusion is valid for the rest of the world.

In the second place, the code would not have succeeded so well in any country not so highly cultured and not so greatly favored by its continuous contacts with German, French, and Italian legal sciences.

6. Particulars were mentioned in my articles, *Streifgänge im Schweizerischen Zivilgesetzbuch*, *Rheinische Zeitschrift für Zivilrecht und Prozess*, Vol. II (1910) 308; Vol. IV (1912) 135.

A characteristic example is the question whether there should be a general part of the code. The German code has 240 sections of general rules; among them 82 sections deal with juristic acts, including contracts and unilateral declarations not only creating, modifying or terminating obligations, but also involving property, succession and family law transactions such as legitimation and adoption. This was a novel work of abstraction, difficult to establish, but subsequent criticism has demonstrated that the generalizations should rather be complemented than abolished. The French Reform Commission, as mentioned earlier, has decided on an analogous undertaking. The Swiss legislator has contented himself with an emergency solution. The Code of Obligations contained certain rules on offer and acceptance, error and fraud, limitation of action and some others. The new code in one article provides that the general provisions of the law of obligations involving the conclusion, fulfilment and rescission of contracts apply also to other civil relations. This leaves a great deal of problems to judicial decision.

The substantial differences between the two codes have been unreasonably exaggerated. In particular, it is simply not true that the Swiss code is infinitely more advanced in social progress, as we hear so often. This assertion with its ambiguous wording would certainly not have pleased all the authors of the code. Despite important changes in the political climate between the dates of the codes, problems and solutions are closely related. Both codes allow a wife to take a separate domicile but under restrictive conditions unknown to American law, relying again on the judge (Article 170). In the absence of a marriage settlement, the administration of the matrimonial property (except that reserved to the wife) is left to the husband in both codes; the Swiss admirably improves this system by dividing the holdings at the end of the marriage (Article 214). On the other hand, after varying proposals a wife needs consent of her husband for carrying on a profession or a trade (Article 167); her position in this regard is slightly worse, at least in theory. But the Swiss wanted sound marriages rather than unlimited women's emancipation. Switzerland improved the position of certain classes of illegitimate children (Article 323). But if the German code deprives a natural child of alimony from a defendant when there was another concumbent, the Swiss code recognizes a similar defense (Article 315). Moreover, it follows the French rather than the German lead in excluding adulterous and incestuous children from recog-

dition (Article 304). There is no ground for different conclusions in other matters.

The Swiss code and the Revised Code of Obligations, of course, have contributed a great number of valuable additions to our supply of solutions. For instance, the rights of individuals, including the privileges concerning one's own picture, unpublished letters, and reputation, have obtained a clearer and firmer endorsement than in any previous enactment and rival the French *jurisprudence*. But that a husband may claim damages from a defendant for having alienated the wife's affections, as in the United States, is a peculiar feature of the Swiss Code. Civil law has disapproved a husband to whom his wife becomes precious on the occasion of such a suit. Associations without economic purpose receive personality as soon as their intention to become a corporation is declared in written articles of association—a full return to an old principle and a highly modern step.

Conclusion

The German Civil Code has exercised considerable influence on every one of the more recent enactments of private law in Europe and has been adopted in Japan except for the ancient institutes of family and succession (connected with the "house"). The Swiss code has been adopted in Turkey—because a new generation of lawyers had to grow up until a code of their own was possible—and has been a popular model for many legislators. Legal science has received a tremendous lift from the literature occasioned by both codes.

For legislative purposes and technique the lesson is clear. That very heavy, very potent locomotive of the Germans is ugly and efficient; it takes us to any place where tracks go. That other graceful automobile is useful so long as a driver such as the Federal Tribunal sits at the wheel; it may easily be overloaded. Can their virtues be combined? This has not yet been demonstrated. Certainty of what written law can work in society and state and what it should not try, is by no means definitively acquired. It may be an insoluble question in our disturbed century. The art of preparing and formulating laws can be learned and ought to be cultivated. The contents of these two codes has largely enriched the substance of the private law. Sound social progress is slow. Private law develops even more slowly. It does not carry a blazing torch into darkness. But it follows and assures the forward movement of civilization.