

## Review Essay – Freedom of Contract in the 19th Century: Mythology and the Silence of the Sources – Sibylle Hofer's *Freiheit ohne Grenzen? Privatrechtstheoretische Diskussionen im 19. Jahrhundert*

Sibylle Hofer, *Freiheit ohne Grenzen? privatrechtstheoretische Diskussionen im 19. Jahrhundert*, Mohr (Siebeck): Tübingen 2001, 313 pp., *Jus Publicum* Vol. 53, ISBN 3-16-147576-3

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“Qui dit contractuel, dit juste”.<sup>1</sup> This oft-cited quote by Fouillée in 1880 tempts people today to understand the early economic liberalism of the 19<sup>th</sup> Century as a system of unlimited liberal freedom, which claimed that fairness would automatically result from a formal law of obligations based especially on formal equality.<sup>2</sup> In her legal history postdoctoral Habilitation-study *Freiheit ohne Grenzen? (Unlimited Freedom?)*, Sibylle Hofer is prompted to examine the private law theory discussions of the 19<sup>th</sup> Century by the currently widely held view<sup>3</sup> that in the 19<sup>th</sup> Century a theory of private law premised on unlimited individual freedom dominated. After studying a broad range of sources she comes to the conclusion that despite a large absence of discourse on contractual freedom this perception of “unlimited freedom” cannot be confirmed, instead this is more of a myth. In the 19<sup>th</sup> Century, the concept of private law under a paradigm of unlimited contractual freedom was

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<sup>1</sup> Fouillée, *La science sociale contemporaine* (1880), p. 410.

<sup>2</sup> Cf. the particularly concise discussion in English legal development in Atiyah, *The Rise and Fall of Freedom of Contract* (1979), p. 765 ff.

<sup>3</sup> Hofer here explicitly criticises for example Kübler, Wieacker, E. Schmidt and Spellenberg, see Hofer, *Freiheit ohne Grenzen?: privatrechtstheoretische Diskussionen im 19. Jahrhundert* (2001), p. 1.

hardly ever supported. Rather, the myth of unlimited contractual freedom was constructed to be better able to attack the liberal conception in the course of the German Civil Code codification.<sup>4</sup> To confirm this basic hypothesis, in the first part of her dissertation Hofer examines the 19<sup>th</sup> Century debate on the principles of private law, while in the second part she traces private autonomy in the individual building-blocks of property and obligations law such as will, trust or reliance and autonomy.<sup>5</sup> In total she wants to uncover the discourse on the principle of “freedom” and the limits that already existed in early economic liberalism.<sup>6</sup> This would prove that “the private law conception at that time – apart from an insignificantly small number of exceptions – was in no way dominated by the idea of generally unlimited freedom.”<sup>7</sup>

During her examinations of the 19<sup>th</sup> Century discourse on principles, Hofer first comes to the conclusion that the conception of a general freedom was hardly ever the topic of a legal discourse in the 1830s and 1840s. The old German law was still firmly caught up in structures based on class status, rendering it hardly possible to characterize it as free. Even when, in rare cases like Beseler,<sup>8</sup> a notion of individual freedom could be discerned, the emphasis was placed on the limits to this freedom.<sup>9</sup>

This finding can be confirmed by Bürge. He examined in detail the developments in private law in 19<sup>th</sup> Century France with a view to the historical economic context. The paradigm of private autonomy and the individualistic conception of the economic constitution could only assert themselves relatively late in the Second Empire (1848-1870) and then only gradually; private autonomy was diametrically opposed to the previous economic constitution. The new paradigm was received from German individualism and the historical legal school first and foremost in economically interested circles, which saw their economic ideas supported by these legal theories. Economic goals as well as philosophical and legal-theoretical support

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<sup>4</sup> Hofer, *Freiheit ohne Grenzen?: privatrechtstheoretische Diskussionen im 19. Jahrhundert* (2001), p. 2 ff. and p. 275 ff.

<sup>5</sup> *Id.* at p. 155 f.

<sup>6</sup> *Id.* at p. 12 f.

<sup>7</sup> *Id.* at p. 275.

<sup>8</sup> Georg Beseler, 1809-1888, a.o. one of the fathers of the Paulskirchen-Verfassung (St. Paul's Church Constitution) of 1848: Hofer, *Freiheit ohne Grenzen?: privatrechtstheoretische Diskussionen im 19. Jahrhundert* (2001), p. 32 n.149.

<sup>9</sup> *Id.* p. 15 ff., especially p. 47 f.

were indistinguishable in this radically changing society.<sup>10</sup> Bürge proves, in relation to France, that not until the 1830s and 1840s were changes to the Code Civil demanded to realize a liberal economic model where it had previously been completely enveloped in the *étatistic* concept of economic constitution.<sup>11</sup>

In the 1850s jurists like Lenz,<sup>12</sup> Jhering,<sup>13</sup> C.A. Schmidt,<sup>14</sup> and Röder,<sup>15</sup> discussed the principles of Roman law and those of German law, and according to Hofer, in doing so they implicitly followed on from the work of Hegel, in so far as the Roman principles were confronted with the Christian principles. However, because these legal commentators considered themselves to be experiencing a phase of radical political change, Hegel's negative notations on the Roman principles accordingly received little consideration.<sup>16</sup> In the models which Hofer discerns in the legal discourse of the 1850s she sees freedom – even if not expressly dealt with – as implicitly recognized as a principle by these legal commentators. Different views among the authors examined existed only in so far as whether, and above all on what grounds limits should be placed on this basic freedom.<sup>17</sup> For example, C.A. Schmidt provided for the limitation of freedom by moral precepts, which were based on

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<sup>10</sup> A similar development can for example be shown for England: The eighteenth century could also be entitled "The Triumph of the Whiggery". This century saw a debate of principles between the Whiggery on the one side, represented by such thinkers as Locke, who advocated the preservation of property as the reason for the existence of government and the consent of a majority, rather than "the people" as such. On the other side, enlightenment was sought by Voltaire and Montesquieu, who advocated constitutionalism, liberty and prosperity and spoke out against taxation exemptions by virtue of wealth: Arblaster, *The rise and decline of western liberalism* (1986), p. 160.

<sup>11</sup> Bürge, *Das französische Privatrecht im 19. Jahrhundert zwischen Tradition und Pandektenwissenschaft, Liberalismus und Etatismus* (1991), p. 89 ff., p. 131 und p. 494 f. with further references.

<sup>12</sup> Gustav Lenz, 1818-1888, a.o. scholar of Gans and later an "enthusiastic admirer of Bismarck", see Hofer, *Freiheit ohne Grenzen?: privatrechtstheoretische Diskussionen im 19. Jahrhundert* (2001), p. 58 n.78.

<sup>13</sup> Rudolf von Jhering, 1818-1892. After 1872 in Göttingen, where in the same year he held his presentation to the Wiener Juristischen Gesellschaft (Viennese Jurist's Society) 'Der Kampf ums Recht'. In detail on Jhering: Wieacker, *Rudolf von Jhering: eine Erinnerung zu seinem 50. Todestage* (1942).

<sup>14</sup> Carl Adolf Schmidt, author of *Der prinzipielle Unterschied zwischen römischem und germanischem Recht* (1964/1853).

<sup>15</sup> K.A. Röder, 1806-1879, focus in the area of criminal law theory, had to leave Giessen because of his "Grundzüge der Politik des Rechts" (1837), see Hofer, *Freiheit ohne Grenzen?: privatrechtstheoretische Diskussionen im 19. Jahrhundert* (2001), p. 66 f. n.153.

<sup>16</sup> Id. at p. 49 ff.

<sup>17</sup> Id. at p. 72 f.

Germanic principles like the *Fraternitätsverhältnis* (fraternal relationship); so for this reason the employer was obliged to take care of the “moral and physical well-being of the employee.”<sup>18</sup> In contrast, in Jhering the limits to the principle of freedom can be found in the principle itself, in the freedom content of legal institutions.<sup>19</sup> How far Jhering is allowing himself to be led by Kant’s moral freedom here and where he differs from it, remain unclear in Hofer.<sup>20</sup>

For the 1860s and 1870s too, although large “*Pandekten*” (pandect text books)<sup>21</sup> appeared, Hofer has to admit that no debate on the principles of private autonomy took place among jurists. However, in this time period Hofer finds this debate on principles between economists, who also comment on contractual freedom. Strengthening socialism is fixed as the central point of reference in the debate, which according to Wagner<sup>22</sup> was causing the question of freedom and its rules to enter a new phase.<sup>23</sup> Accordingly Hofer categorizes the economists who commented on the structuring of the economic and legal order of the time as the “free trade school” on the one side and “*Kathedersozialismus*” (lectern socialism) on the other. The economic theories had positioned themselves in their distance to the idea of freedom in accordance with these poles. Based on this point of reference, for the first time in this debate on economic freedom the discursive use of the term “contractual freedom” can be found.<sup>24</sup> The important idea that individual freedom had to be determined according to the common interests at the time, held by national economists like Schmoller,<sup>25</sup> had been adopted by jurists like Jhering and Gierke,<sup>26</sup>

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<sup>18</sup> Id. at p. 50 ff.

<sup>19</sup> Id. at p. 61 ff. and p. 72 f.

<sup>20</sup> Compare Kant, *Kritik der praktischen Vernunft* (1993/1788), p. 60 ff., especially p. 60 f. and p. 64: The arbitrariness of one person is thereby limited solely by the arbitrariness of the other person and this as general law ‘thought of as objectively necessary because it is supposed to apply to everyone who has reason and will’.

<sup>21</sup> With the pandects the separation of civic society and the state was meant to be encouraged by the reception of Roman law, which was transferred into national law in a systematised way and was thereby at the same time meant to realise the values of the Enlightenment and overcome the old order, see Hatzenhauer, *Einführung zu: Thibaut und Savigny: ihre programmatischen Schriften* (1973), p. 33 ff.

<sup>22</sup> Adolph Wagner, 1835-1917, initially professor for political economics and finance in Vienna, after 1870 Professor for political science in Berlin, see Hofer, *Freiheit ohne Grenzen?: privatrechtstheoretische Diskussionen im 19. Jahrhundert* (2001), p. 90 n.135.

<sup>23</sup> Id. at p. 74 ff., especially p. 98 f.

<sup>24</sup> Id. at p. 98.

<sup>25</sup> Gustav Schmoller, 1838-1917, professor of political economy and science, see Id. at p. 87 n.112.

although according to Hofer, central points of these models remain unclear.<sup>27</sup> Hofer finds the reason for this is to be that jurists like Gierke and Jhering, though they adopt common interests in their conception of private law, nonetheless refuse to give up the basic idea of individual freedom, so that the priority of both principles will have to be determined in a case-by-case weighing-up process.<sup>28</sup>

Finally, prompted by the draft of the German Civil Code 1896, Hofer finds a few authors taking part in a principles debate worthy of the name. Authors like Gierke, Menger and Baron (according to Hofer) followed on the economic principle debate of the 1860s and 1870s.<sup>29</sup> While Menger in his critique of the German Civil Code conceded that there existed a principle of freedom, which was limited by common interests, specifically the interests of the propertyless classes, Gierke assumed an inherently limited freedom, meaning that the limits to freedom required no special justification. The common interest set the scope of freedom in the first place.<sup>30</sup>

Because in the first part of her work Hofer comes to the conclusion that an explicit principle debate on private autonomy and its limits was absent until the time of polarization prompted by the draft German Civil Code, in the second part of her dissertation she traces private autonomy in the individual building blocks of the law of obligations and property law.<sup>31</sup> She examines individual principles of the law of obligations and property law like intention, trust or reliance, and autonomy and comes to the same conclusion that she reached in the first part dealing with the principles discourse: although the legal commentators assume a, usually in principle and also limited, freedom, the underlying positions are not expressly stated.<sup>32</sup>

Hofer seeks at first to illustrate this hypothesis using the 19<sup>th</sup> Century concept of “unintended declaration.” A pure conception of individual autonomy would have

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<sup>26</sup> Otto von Gierke, 1841–1921, eminent German jurist and legal historian in Breslau, Heidelberg und Berlin. On Gierke see also Haack, *Otto von Gierkes Kritik am ersten Entwurf des Bürgerlichen Gesetzbuches* (Diss.) (1996) and Pfennig, *Die Kritik Otto von Gierkes am ersten Entwurf eines bürgerlichen Gesetzbuches* (1997).

<sup>27</sup> Hofer, *Freiheit ohne Grenzen?: privatrechtstheoretische Diskussionen im 19. Jahrhundert* (2001), p. 107 ff., especially p. 130 f.

<sup>28</sup> *Id.* at p. 130 f.

<sup>29</sup> *Id.* at p. 132 ff.

<sup>30</sup> *Id.* at p. 132 ff., especially p. 153 f.

<sup>31</sup> *Id.* at p. 155 f.

<sup>32</sup> *Id.* at p. 155 ff.

to deny validity to every declaration of intention that was made without the appropriate intention.<sup>33</sup> However, the legal discourse around 1879-90 was dominated by conceptions, which although they were based on a principle of private autonomy, nevertheless assigned validity to an unintended declaration in case of fault,<sup>34</sup> or where it was in the interests of intercourse.<sup>35</sup>

In a similar way Hofer finds the (implicit) rejection of unlimited private autonomy in the discussion on the definition of subjective law and obligation. Again, jurists like Savigny and Jhering emphasize that the force of will is limited by the interests of intercourse, although Hofer does not examine in depth which legal and societal context these interests of intercourse are connected to exactly.<sup>36</sup>

Just as in Hofer's exposition of the economic discussion of the 1860s, the chapter on the form of the limited property rights also touches on the societal context.<sup>37</sup> Hence Hofer fixes the question of whether freedom exists in the establishment of limited property rights in the context of emigration to the cities and the landowners' credit crisis, in other words the context of the contemporary political and economic interests and events. The rejection of freedom in establishing property rights in the 1850s was mostly closely linked to legal-political demands for personal freedom (above all the liberation of the individual) and land freedom (above all the liberation of land) from enduring burdens.<sup>38</sup> For the 1870s, however, Hofer observes a change in opinion. In the context of increasing emigration to the cities, various politically

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<sup>33</sup> Ernst Zitelmann, 1852-1923, see *Id.* p. 169 n.97.

<sup>34</sup> Bernhard Windscheid, 1817-1892, a.o. Member of the Commission for Preparation of the German Civil Code and an instrumental participant in these preparations. His major work is the *Lehrbuch des Pandektenrechts* (3 vol., 1862-1870), which had a great influence on the preparation of the German Civil Code. See in detail Falk, *Ein Gelehrter wie Windscheid: Erkundungen auf den Feldern der sogenannten Begriffsjurisprudenz* (1989). See also, Jhering, on autonomy and responsibility, Hofer, *Freiheit ohne Grenzen?: privatrechtstheoretische Diskussionen im 19. Jahrhundert* (2001), p. 163 ff. and p. 184.

<sup>35</sup> Ferdinand Regelsberger, 1831-1911, the pandects can be characterised as his major work: *Pandekten* (1997/1893); Savigny, 1779-1861, founder of the "historischen Rechtsschule" and Prussian Minister; Rudolf Leonhard, 1851-1921, concerned himself mainly with the newly emerged BGB, and with reference to *bona fide*, Gustav Hartmann, 1835-1894, dealt with among other things the purpose idea in obligations law, see Hofer, *Freiheit ohne Grenzen?: privatrechtstheoretische Diskussionen im 19. Jahrhundert* (2001), p. 180 n.177, p. 181 n.193, p. 184 f., and p. 204.

<sup>36</sup> Hofer, *Freiheit ohne Grenzen?: privatrechtstheoretische Diskussionen im 19. Jahrhundert* (2001), p. 205 ff.

<sup>37</sup> *Id.* at p. 74 ff. and p. 250 ff.

<sup>38</sup> *Id.* at p. 260 and p. 274.

interested jurists argued for a broadened contractual freedom in the sense that a wide-ranging contractual limitation on the disposal of land should be possible.<sup>39</sup>

With this Hofer ascertains the non-existence of a legal, basic principles discourse on (contractual) freedom for the individual principles of property law and obligations law, just as observed before in the discourse on principles. The silence of the sources applies with few exceptions as far as Menger's and Gierke's basic remarks/attacks in the setting of the draft German Civil Code.<sup>40</sup> Only under the precondition of this absent explicit discourse, however, which is Hofer's central recognition, could an opposing position be created in the schematic categorization of freedom which, particularly in the course of drafting the German Civil Code, could be fought against with serious consequences. The missing freedom discourse made attacks by Gierke and Menger on private autonomy within the German Civil Code debate possible in the first place. Hence Gierke compared the free Romanistic model to his social Germanic model, and in the same manner Menger built his criticism of the exploitation of the working classes on this radicalized picture.<sup>41</sup>

It is Hofer's particular achievement to categorize various small and large principles of private law in the respective conceptions of the 19<sup>th</sup> Century jurists with reference to the emerging private autonomy. Hofer's postdoctoral lecture qualification by means of her typification of private law conceptions forms a contribution to finding a way out of the often all-too schematic comparison of freedom and compulsion in private law. Her work takes its place in an important finding by a number of authors, who describe the mechanical opposition of freedom and social as a myth and obsolete, whereby as far as "social" private law is concerned the question of either/or shifts to a question of quality.<sup>42</sup> This is demonstrated with particular clarity where the societal context of the time examined is illuminated, as in the examinations of the form of property rights. In around 1850, for the purpose of free enterprise mobilization of land and labor, freedom was withdrawn so that land and labor could not be permanently withdrawn from the free market. Under the pressure of the societal crisis of emigration to the cities this mobilization was slowed

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<sup>39</sup> Id. at p. 259 ff.

<sup>40</sup> Id. at p. 275.

<sup>41</sup> Id. at p. 2 and p. 275, additionally p. 50 ff. on C.A. Schmidt; cf. also Gierke, *Die soziale Aufgabe des Privatrechts* (1948/1889); Menger, *Das Bürgerliche Recht und die besitzlosen Volksklassen* (1997/1904).

<sup>42</sup> Rückert, *Zur Legitimation der Vertragsfreiheit im 19. Jahrhundert*, in: Klippel (Eds.), *Naturrecht im 19. Jahrhundert* p. 135-183 (1997), p. 144; Amstutz, *Evolutorisches Wirtschaftsrecht: Vorstudien zum Recht und seiner Methode in den Diskurskollisionen der Marktgesellschaft* (2001), p. 14 ff.; cf., p. 178 ff. and p. 323 ff.

down from the 1870s onwards in that under the name of contractual freedom stronger contractual commitments of property were again permitted.<sup>43</sup> Here, however, it is also demonstrated that the discourse on private autonomy with respect to its absence, cannot be understood without having regard to the social and above all the economic context. This context, which Hofer expressly closes off in her research starting point,<sup>44</sup> is worth thinking about further. However, it is necessary to focus on relating legal principles and legal dogma in the larger context of societal development<sup>45</sup> as well as tracing them back to their philosophical and general historical idea foundations<sup>46</sup>. The following hints should show the examination process which would be followed to gain a more extensive understanding of the private law conceptions examined by Hofer and to understand the absence of discourse on contractual freedom.

The central, defining characteristic of the economic system that was installed in the course of the 19<sup>th</sup> Century, was, in a nutshell, the self-steering of the market through the mechanism of price. It was a significant innovation that the whole economy, including labor (and in part, land), was left to its own control and that the economy could thereby free itself from politics to this extent. Also, economics and the market were no longer "embedded" in society, but rather social relationships were decisively influenced by the market.<sup>47</sup> The primacy of politics, according to Luhmann, was changed to the economy,<sup>48</sup> already described by Weber as "uni-

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<sup>43</sup> On emigration to the cities in Switzerland see Bergier, *Wirtschaftsgeschichte der Schweiz von den Anfängen bis zur Gegenwart* (1990), p. 258 f.; and Balthasar/Gruner, *Soziale Spannungen - wirtschaftlicher Wandel: Dokumente zur Schweiz zwischen 1880 und 1914* (1989), p. 27 ff. On the importance of the great economic crisis, initiated by the Viennese stock market crash of 1873, for the private law conception see, e.g. Polanyi, *The Great Transformation* (1957), p. 267 ff.; Brüggemeier, *Entwicklung des Rechts im organisierten Kapitalismus* (2 vol.) (1977-79), vol. I, p. 56 ff.; Hart, *Zur konzeptionellen Entwicklung des Vertragsrechts, Die Aktiengesellschaft (AG)* p. 66-80 (1984), p. 71; cf. on all also Atiyah, *The Rise and Fall of Freedom of Contract* (1979), p. 571 ff. under the title "The Decline and Fall of Freedom of Contract: 1870-1970".

<sup>44</sup> Hofer, *Freiheit ohne Grenzen?: privatrechtstheoretische Diskussionen im 19. Jahrhundert* (2001), p. 9 ff.

<sup>45</sup> Fundamentally Weber, *Wirtschaft und Gesellschaft* (1980/1921-25), p. 382 ff. (on good faith in business dealings) or p. 398 ff. (on subjective rights).

<sup>46</sup> So, for example, Rückert, *Zur Legitimation der Vertragsfreiheit im 19. Jahrhundert*, in: Klippel (Eds.), *Naturrecht im 19. Jahrhundert* p. 135-183 (1997), p. 135 ff.

<sup>47</sup> Polanyi, *The Great Transformation* (1957), p. 77 ff.; similar already Weber, *Wirtschaft und Gesellschaft* (1980/1921-25), p. 398.

<sup>48</sup> Brüggemeier, *Probleme einer Theorie des Wirtschaftsrechts*, in: Assmann/Brüggemeier/Hart/Joerges (Eds.), *Wirtschaftsrecht als Kritik des Privatrechts* p. 9-81 (1980), p. 14 and p. 17 ff.; Luhmann, *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie* (1999), p. 374 ff.



versal free-marketization.”<sup>49</sup> In particular, out of the need to prospectively secure the means of production, including labor, arose the demand for the economic system according to the credo of the classical liberal model<sup>50</sup> that the economic system be left to its own devices; the prices of all goods would have to “find themselves” and imbalanced situations would repair themselves.<sup>51</sup> From this arose the demand for the state not to influence market direction, above all not through price-fixing, and also to protect market direction from other influences, namely especially not to permit any income which did not come through income generated in market transactions.<sup>52</sup> In this sense the co-operation of the state was constitutive for the emergence of free enterprise. This was a state organization of private law rules in an economic and private-law centralized state, admittedly with the (in this sense paradoxical) aim of the free market as a distribution mechanism independent of the state.<sup>53</sup> Through the self-steering mechanism inserted by free enterprise the economy became an independent social field of modern society. Economic dealings were freed from moral, religious or familial references.<sup>54</sup> As soon as the economy, through distinguishing itself from the communication means of money especially and through a functioning labor market, was no longer inherently linked to and determined by events in society, contractual content could be released from law

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<sup>49</sup> Weber, *Wirtschaft und Gesellschaft* (1980/1921-25), p. 198. Corresponding to this in the second half of the 19th century the subsystem understood today as “economy” was called “society”, which resulted in the misunderstood elements of the premise of “self-regulation of society” as a basic principle of private law, see Luhmann, *Einführung in die Systemtheorie* (2002), p. 35.

<sup>50</sup> The term “classical liberal” is used for the dominant liberal-economic school of thought during the short phase of a free market economy which found its end in the consequences of the great economic crisis from 1873 onwards. See on this in particular Brüggemeier, *Probleme einer Theorie des Wirtschaftsrechts*, in: Assmann/Brüggemeier/Hart/Joerges (Eds.), *Wirtschaftsrecht als Kritik des Privatrechts* p. 9-81 (1980), p. 9 ff.

<sup>51</sup> On all of this: Weber, *Wirtschaft und Gesellschaft* (1980/1921-25), p. 398 ff.; Polanyi, *The Great Transformation* (1957), p. 62 ff. and 97 ff.; Atiyah, *The Rise and Fall of Freedom of Contract* (1979), p. 226 ff.; Brüggemeier, *Probleme einer Theorie des Wirtschaftsrechts*, in: Assmann/Brüggemeier/Hart/Joerges (Eds.), *Wirtschaftsrecht als Kritik des Privatrechts* p. 9-81 (1980), p. 14 ff.

<sup>52</sup> Polanyi, *The Great Transformation* (1957), p. 94 ff.; cf. the liberal demand to eradicate all old privileges, i.e. all income not resulting from market transactions.

<sup>53</sup> Weber, *Wirtschaft und Gesellschaft* (1980/1921-25), p. 383 ff. and 499 ff.; Polanyi, *The Great Transformation* (1957), p. 94 ff.; Brüggemeier, *Probleme einer Theorie des Wirtschaftsrechts*, in: Assmann/Brüggemeier/Hart/Joerges (Eds.), *Wirtschaftsrecht als Kritik des Privatrechts* p. 9-81 (1980), p. 14 f.

<sup>54</sup> Amstutz, *Evolutorisches Wirtschaftsrecht: Vorstudien zum Recht und seiner Methode in den Diskurskollisionen der Marktgesellschaft* (2001), p. 16 ff.; Rückert, *Das BGB und seine Prinzipien*, in: Rückert/Schmoeckel/Zimmermann (Eds.), *Historisch-kritischer Kommentar zum BGB* (2003), N 14, 23, 29.

into the hands of the economy, since now there was another means of discipline that could take over the function of controlling content – the market.<sup>55</sup>

This overview of major directions in development can be confirmed with a glance at Switzerland's economic history data. Through the new Swiss federal state of 1848 the preconditions for a market economy for all of Switzerland were created, in particular the single domestic market and freedom of movement, i.e. the mobilization of labor, were politically disposed. The first federal constitution of 1848 created the single customs union and laid down a corresponding freedom of goods and of establishment. Due to new foreign competition after 1848 the economy was under heavy pressure to mechanize, and the lack of raw materials meant that Switzerland was dependent on good international relationships, accordingly it integrated itself early into free trade. Only in the second federal constitution of 1874, coinciding with the codification efforts for a Swiss law of obligations (in operation since 1883), was the uniform trade and commercial freedom fixed.<sup>56</sup> This emergence of the economy and the erection of the free market was comprehended in law by the emergence of private law and its extensive closing off from influences other than economic ones. Through this exclusive structural coupling<sup>57</sup> of law and economics by contract<sup>58</sup>, an express principle of private autonomy, in particular the freedom of obligations contracts, became superfluous.<sup>59</sup>

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<sup>55</sup> Luhmann, *Das Recht der Gesellschaft* (1993), p. 449 ff.; compare also Amstutz, *Evolutorisches Wirtschaftsrecht: Vorstudien zum Recht und seiner Methode in den Diskurskollisionen der Marktgesellschaft* (2001), p. 92 f.

<sup>56</sup> Balthasar/Gruner, *Soziale Spannungen - wirtschaftlicher Wandel: Dokumente zur Schweiz zwischen 1880 und 1914* (1989), p. 27 f.; Winzeler, *Die Wirtschaftsfreiheit in der schweizerischen Verfassungsgeschichte des 19. und 20. Jahrhunderts*, 113 I *Zeitschrift für Schweizerisches Recht (ZSR)*, p. 409-432 (1994), p. 416 ff.; cf. Huf, *Die sozialstaatliche Einbettung der Marktökonomie*, Nr. 45 *Zeitschrift für Soziologie (ZfS)* p. 221-241 (1999), p. 223 f.

<sup>57</sup> A structural coupling exists when a system permanently assumes characteristics in its environment and relies on their stability in such a way that its own structures are connected to them. Structural couplings simultaneously limit and facilitate the influence of the environment on the system, see Luhmann, *Das Recht der Gesellschaft* (1993), p. 443 ff.

<sup>58</sup> According to Atiyah, *An Introduction to the Law of Contract* (1995), p. 3 ff., from 1770-1870 the common law courts enforced the intention of the parties strictly and were there to enforce the contractual provisions agreed upon by the parties, in the firm belief that enforcing private contracts was in the public interest.

<sup>59</sup> Luhmann, *Das Recht der Gesellschaft* (1993), p. 458 ff.; Perels, *Privatrechtssystem und Verfassungsstruktur in der Weimarer Republik (Diss.)* (1973), p. 10.

Savigny's much-cited statement, to which Hofer also makes reference, can now be classified in this context:<sup>60</sup>

“... in financial circumstances the power of the law is asserted without regard to the moral or immoral exercise of a right. That is why the rich can let the poor perish by refusing support or exercising contract law harshly, and the assistance against this springs not from the soil of private law, but from that of public law; it lies in a poorhouse, which, however, the rich man can be compelled to contribute to, even if his contribution is perhaps not directly noticeable. It therefore remains nevertheless true, that no moral component can be attributed to “Vermögensrecht” (property law) as an institute of private law, and by this claim neither the absolute rule of moral laws is denied, nor the nature of private law placed in an ambiguous light ...”<sup>61</sup>

In Savigny extensive economic self-regulation is initially, in exceptional cases, corrected by public law institutions. Within private law limits to self-regulation arise essentially only if participation in the free market is permanently denied; private law when adapting its structures in limiting contractual freedom also primarily almost exclusively takes into consideration the economy, in the form of “limits to freedom by freedom” or “limits to freedom by the requirements of commerce,” with reference to the newly-realized free domestic market in particular.<sup>62</sup> Through the exclusive referral of contract law to the economy, the law, according to Luhmann, achieves the modern form of structural coupling to the economy.<sup>63</sup>

Though only sketched in an overview the following context led to changes in the private law system. In the wake of the great economic crisis from 1873 onwards the liberal-economic presumption that the free market would balance out and keep the promises made, above all growth, full employment and stability, was increasingly called into question.<sup>64</sup> Following the economic crisis an increasing *Vermachtung* (emphasis on power relationships) of the economy was discerned, that called into

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<sup>60</sup> Hofer, *Freiheit ohne Grenzen?: privatrechtstheoretische Diskussionen im 19. Jahrhundert* (2001), p. 206 ff.

<sup>61</sup> Savigny, *System des heutigen Römischen Rechts*, vol. 1-4 (1840), vol. I, p. 371.

<sup>62</sup> cf. Hofer, *Freiheit ohne Grenzen?: privatrechtstheoretische Diskussionen im 19. Jahrhundert* (2001), p. 206 ff.

<sup>63</sup> Luhmann, *Das Recht der Gesellschaft* (1993), p. 458 ff.

<sup>64</sup> Brüggemeier, *Entwicklung des Rechts im organisierten Kapitalismus* (2 vol.) (1977-79), vol. I, p. 56 ff.; Hart, *Zur konzeptionellen Entwicklung des Vertragsrechts, Die Aktiengesellschaft (AG)* p. 66-80 (1984), p. 71.

question the liberal-economic premise of self-regulation and self-repair of the free market and simultaneously attracted attention to the factual inequalities of market participants (mainly between companies and non-organized persons) as already raised for example by Lotmar and Gierke.<sup>65</sup> After all, through the constitution of the free domestic market new population groups were being integrated into the formally egalitarian free market, whereby the “practical universalization of market commerce” had received a difficult extension. Through the increasing existential emergencies and fears of laboring people during the economic crisis as well as the simultaneous development of a “class consciousness” the legal protection of the existential and at the same time economic independence of these population groups became the centre of political attention.<sup>66</sup>

Not until the influence of politics under the motif “social” entered alongside and in opposition to the almost exclusive ties of private law to the economy did (as Luhmann had already argued) contractual freedom find a continual entrance to private legal discourse. Only from this time on, in contrast to Savigny’s concept, was the question of the structural coupling of private law to the economy raised with force. This was done concretely, for example, in the question of which legal rules within contract law were dispositive and which compulsory. This explains after all the extensive silence of the sources in the 19<sup>th</sup> Century found by Hofer.<sup>67</sup> The unique adoption in the German-speaking codification process of an express freedom of contract in Art. 19 Abs. 1 of the Swiss contract law occurred only its revision in 1905-11 and not at the emergence of contract law in 1881. The adoption of contractual freedom in the codification is to be seen in this context of the new political intervention in contractual content and the new alternative coupling of

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<sup>65</sup> Weber, *Wirtschaft und Gesellschaft* (1980/1921-25), p. 503 f.; Brüggemeier, *Probleme einer Theorie des Wirtschaftsrechts*, in: Assmann/Brüggemeier/Hart/Joerges (Eds.), *Wirtschaftsrecht als Kritik des Privatrechts* p. 9-81 (1980), p. 38 f. and p. 46. On situations of structural inequality see Lotmar, *Der Dienstvertrag im Entwurf des Zivilgesetzbuches*, in: Rehinder (Eds.), *Philipp Lotmar: Schweizerisches Arbeitsvertragsrecht, Forderungen an den Gesetzgeber*, p. 119-147 (1991/1905), p. 43 f.; On ‘Vermachtung’ of the economy see Gierke, *Die soziale Aufgabe des Privatrechts* (1948/1889), p. 18 ff. and 41 ff.

<sup>66</sup> Weber, *Wirtschaft und Gesellschaft* (1980/1921-25), p. 503; Wiethölter, *Rechtswissenschaft* (1986/1968), p. 180 ff.; Hart, *Zur konzeptionellen Entwicklung des Vertragsrechts, Die Aktiengesellschaft (AG)* p. 66-80 (1984), p. 70 f.; just as Rückert, *Das BGB und seine Prinzipien*, in: Rückert/Schmoeckel/Zimmermann (Eds.), *Historisch-kritischer Kommentar zum BGB* (2003), N 105; see also Tanner, *Industrialisierung, Familienökonomie und Hungererfahrung: Sozialkonflikte, Arbeitskämpfe und Konsumboykott in der Schweiz 1880-1914*, in: Gailus/Volkman (Eds.), *Der Kampf um das tägliche Brot: Nahrungsmangel, Versorgungspolitik und Protest 1770-1990* p. 233-257 (1994), p. 255 ff., who refers to the societal focus on the wages of factory workers during industrialisation.

<sup>67</sup> cf. Hofer, *Freiheit ohne Grenzen?: privatrechtstheoretische Diskussionen im 19. Jahrhundert* (2001), p. 275 f.

private law to politics, not, however, as an early culmination of contractual freedom as the dominant principle of contract law.

With this social-societal background Luhmann is to be referenced, particularly with respect to his legal-historical explanations of "law as a social system," which comes to a similar and yet at the same time contradictory conclusion as Hofer.<sup>68</sup> Luhmann points out that the concept of contractual freedom does not appear until politics tries in a higher degree to control the reciprocal irritation of legal and economic systems. Luhmann, however, in contrast to Hofer suspects that the concept of contractual freedom was invented "as for defense against state intervention, especially in labor law and cartel (anti-trust) law."<sup>69</sup> Until then, a structural coupling of law and economics had existed, in that "the contract, expressed extremely formally, is nothing else than the agreement of the declarations of intention of the parties concluding the contract,"<sup>70</sup> whereas the subsystem of politics has temporarily withdrawn to an observation position.<sup>71</sup> However, from the point of view of the law the primary structural link to economics has been replaced by a simultaneous coupling to economics and, through compulsory contract law, to politics, which is mainly responsible for enacting compulsory norms:

"The structural coupling of the legal and economic systems [mainly through contract] becomes a medium for the medium political power, that means a loose coupling of possibilities which can be brought into politically acceptable forms by collectively binding decisions [for example by compulsory norms in contract law]. For the sake of the hoped-for economic effects the use of property and contractual freedom are continually subjected to stronger legal limits."<sup>72</sup>

What can we gain from such recognitions? Alongside many other things, the following. Today, in the age of reformulation of political tasks and privatization,<sup>73</sup> especially under the pressure of globalization<sup>74</sup> and technologization,<sup>75</sup> because

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<sup>68</sup> Luhmann, *Das Recht der Gesellschaft* (1993).

<sup>69</sup> *Id.* at p. 465 ff., mainly p. 468.

<sup>70</sup> *Id.* at p. 461.

<sup>71</sup> *Id.* at p. 467.

<sup>72</sup> *Id.* at p. 468.

<sup>73</sup> Compare Uebersax, *Privatisierung der Verwaltung*, *Zentralblatt für Staats- und Gemeindeverwaltung*, p. 393-422 (2001), p. 394 with further references.

<sup>74</sup> Compare Hofstetter, *Globalisierung und Wirtschaftsrecht*, 119 II *Zeitschrift für Schweizerisches Recht (ZSR)*, p. 361-396 (2000), p. 361 ff, especially 366 ff.; Koller, *Globalisierung und Internationalisierung des*

tasks are increasingly being performed by private actors it is urgently necessary to show that unlimited private autonomy is only a myth. At the same time, however, it must be emphasized that the original conception of economic law was almost exclusively directed at the constitution of a free domestic market, in which initially only a small fraction of the population participated.<sup>76</sup> However, after the integration of further population groups and trade areas of society into the free market this "pure" economic system could no longer be maintained. Rather, from then on it was a matter of the precarious balance between autonomy and intervention, that private law saw itself as maintaining in regard to self-regulating markets. This remarkable responsiveness, that private law had already developed by around 1900 pertaining to the autonomy of the economic system and its associated social issues, can serve today as the great historical role-model for the relationship of law to other (new) autonomous areas of civil society. In the words of Teubner: Today, especially, it is a matter of institutionalizing the precarious balance between autonomy and intervention that private law saw itself as maintaining in respect of self-regulating markets in other autonomous fields of civil society as well. Neither an overly strong coupling to the economy nor political intervention is the agenda of the future, but rather a variety of structural couplings to the different sectors of civil society.<sup>77</sup>

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Wirtschaftsrechts - Auswirkungen auf die nationale Gesetzgebung, 119 II Zeitschrift für Schweizerisches Recht (ZSR), p. 313-360 (2000), p. 313 ff, especially p. 324 ff.; Imhof, Marktgleichgewicht, Vertragsgerechtigkeit und Globalisierung; letzteres insbesondere hinsichtlich des Arbeitsvertrages, in: Kiliass (Eds.), *L'éthique et le droit; discordances et points de rencontre*, p. 67-109 (2000), p. 67 ff.; fundamentally: Zumbansen, Spiegelungen von "Staat und Gesellschaft": Governance-Erfahrungen in der Globalisierungsdebatte, in: Anderheiden/Huster/Kirste (Eds.), *Globalisierung als Problem der Steuerungsfähigkeit des Rechts und der Gerechtigkeit*, ARSP Beiheft 79, p. 13-40 (2001) with further references.

<sup>75</sup> Compare Kenney/Curry, *Beyond Transaction Costs: E-commerce and the Power of the Internet Dataspace*, Working Paper 18, E-Conomy Projekt, Berkeley p. 1-39 (2000), p. 2 f. and p. 6 ff. in the Internet.

<sup>76</sup> In fact, for the beginning of the second half of the 19th century Kocka only counts 3-5 % of the population toward the economic bourgeoisie, together with the small bourgeoisie and the middle classes they are, however, 13 %, see Kocka, *Bürgertum und bürgerliche Gesellschaft im 19. Jahrhundert: Europäische Entwicklungen und deutsche Eigenarten*, in: Kocka (Eds.), *Bürgertum im 19. Jahrhundert* p. 11-76 (1987), p. 11 ff.

<sup>77</sup> Teubner, *Nach der Privatisierung? Diskurskonflikte im Privatrecht*, *Zeitschrift für Rechtssoziologie* p. 16-36 (1998), p. 14 f.; see also Teubner/Karavas, <http://www.CompanyNameSucks.com>: The Horizontal Effect of Fundamental Rights on 'Private Parties' within Autonomous Internet Law, 4 *German Law Journal* No. 12 (1 December 2003), available at: <http://www.germanlawjournal.com/article.php?id=356>.