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The displacement of normative discourse from legal theory to empirical sociology: Ferdinand Tönnies, natural law, the Historical School, Rudolf von Jhering and Otto von Gierke¹

The relationship of legal theory to the social sciences, and notably early modern German sociology has still to be explored in depth; an example is the role the study of law had played in the development of Max Weber's methodology. Here, we propose to look at an earlier "sociologist" who drew extensively from the discipline of law. For though Ferdinand Tönnies' work, *Gemeinschaft und Gesellschaft*, published in 1887, is regarded principally as the founding work of modern German sociology and occasionally as a work of political theory, borne out by the decision of Cambridge University Press to publish it in its series of classical "Cambridge Texts in the History of Political Thought",² it was also intended by its author to mark out a position in legal theory, and the entire third and final book of *Gemeinschaft und Gesellschaft* is devoted to questions of law: in "sociological foundations of natural law", Tönnies sought to promote the "renewal of natural law", an agenda Tönnies had pursued in a paper written early in the gestation of *Gemeinschaft und Gesellschaft*.³ Tönnies' "Renewal of Natural Law" contains two lectures he held at the Philosophical Club (*Philosophischer Verein*) in April, 1880 dealing with what Tönnies conceives to be elements of natural law in the work of Rudolf von Jhering and Adolph Wagner.⁴ Tönnies describes the development in *The Renewal of Natural Law*: "The science of natural law... went down...with the entire philosophy of Enlightenment. At the beginning of this century it was more or less noisily censured and banished. The terrors of the Revolution had gradually silenced many voices that had hitherto advocated the ideas of the revolution; and as those voices were silenced, tones rose from a long silent chorus whose opinions and interests had been impeded by the entire movement of the age – which they regarded, succumbing to a common illusion, as solely the product of

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¹ This article is an elaborated version of a lecture held at the University of Cologne in June, 2011, co-financed by the University Lyon 2 research laboratory LCE, directed by Professor Fabrice Malkani. I should like to thank both universities and Professor Hans-Peter Haferkamp for his encouragement and intellectual stimuli.

² Tönnies, Ferdinand. *Community and Civil Society*. Translated by Jose Harris and Margaret Hollis. Cambridge University Press, Cambridge, 2001. The most used version of the original is: Tönnies, Ferdinand. *Gemeinschaft und Gesellschaft, Grundbegriffe der reinen Soziologie*. Reprint of 8th edition, Darmstadt, 1979, xv ff. The long awaited appearance of a historical edition in Ferdinand Tönnies' complete works at De Gruyter has been projected for 2012.

³ Tönnies, Ferdinand. *Erneuerung des Naturrechts*, unpublished manuscript, Tönnies Estate, Landesbibliothek Schleswig-Holstein, Kiel.

⁴ Tönnies, Ferdinand. "Ferdinand Tönnies, Eutin." *Die Philosophie der Gegenwart in Selbstdarstellung*, Leipzig: Verlag von Felix Meiner, 1922, volume 3, 199-234, 12 (214), Tönnies to Paulsen, letter of April 1, 1880, Paulsen, Friedrich and Tönnies, Ferdinand. *Briefwechsel. 1876–1908*, ed. Klose, Jacoby and Fischer, Kiel: Ferdinand Hirt: Kiel, 1961, 80.

ideas; and they called for a pious return to the altars of the old gods. This intellectual current is Romanticism.”⁵The opposition of historicism to rationalism, which for Tönnies suffused the human sciences in the course of the nineteenth century and for which he sought to create a higher synthesis in *Gemeinschaft und Gesellschaft*, had its origins in the field of law, as Savigny founded the Historical School when refuting the universal premises of natural law and opposing the introduction of a code inspired by the Napoleonic code to Germany. The final book and culmination of Tönnies founding work on sociology is an exposition of his new theory of natural law.

Since 1887, various obstacles have obscured the influence of law on this early sociologist. Neither the previous exegeses of *Gemeinschaft und Gesellschaft*, such as that of E.G. Jacoby⁶ or Cornelius Bickel⁷ or Peter-Ulrich Merz-Benz⁸, nor the biographies of Tönnies, his own⁹ or that of Uwe Carstens¹⁰, has devoted much attention to the juridical sources in the work. Tönnies himself seems to have lost interest in legal philosophy in his later work, and legal theorists apart from Radbruch¹¹ appear to have taken little notice of the potential of the community-society dichotomy for legal thought. While the division of the human sciences has made it generally difficult for members of specialised disciplines to look over into other fields, the gulf between the social sciences on the one hand, and on the other law and jurisprudence, declared by Max Weber to be a “dogmatic” as opposed to an “empirical” science¹², sometimes seems almost unbridgeable. Tönnies’ position on behalf of value neutrality, a position of Max Weber’s he espoused more than understood, moreover has led many to overlook how absorbed Tönnies was by norms, on the one hand ethical¹³, on the other juridical. The difficulty of *Community and Society*¹⁴ may have kept many readers from advancing from the sociological description of medieval communities and advanced capitalism in the first book through the psychological

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- ⁵ Tönnies, Ferdinand. “Die Erneuerung des Naturrechts.” Unpublished manuscript in the archives of the State Library of Slesvig Holstein in Kiel.
- ⁶ Jacoby, Eduard Georg. *Philosophie und Soziologie. Ferdinand Tönnies’ wissenschaftlicher Weg*. Kiel: Verlag Ferdinand Hirt., 1970. Jacoby, Eduard Georg. *Die moderne Gesellschaft im sozialwissenschaftlichen Denken von Ferdinand Tönnies – eine biographische Einführung*. Stuttgart: Enke, 1971.
- ⁷ Cornelius Bickel. *Ferdinand Tönnies. Soziologie als skeptische Aufklärung zwischen Historismus und Rationalismus*. Opladen: Westdeutscher Verlag, 1991.
- ⁸ Peter-Ulrich Merz-Benz. *Tiefsinn und Scharfsinn : Ferdinand Tönnies’ begriffliche Konstitution der Sozialwelt.*, Frankfurt: Suhrkamp 1995.
- ⁹ Tönnies, Ferdinand. “Ferdinand Tönnies, Eutin”.
- ¹⁰ Carstens, Uwe. *Ferdinand Tönnies: Friese und Weltbürger; eine Biografie*. Norderstedt: Books on Demand, 2005.
- ¹¹ Radbruch, Gustav. *Einführung in die Rechtswissenschaft*. 13th edition, edited by Konrad Zweigert. Stuttgart: K.F. Koehler Verlag, 1980.
- ¹² Weber, Max. *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie*. 5th edition. Tübingen: Mohr Siebeck: 1, 2002.
- ¹³ Tönnies, Ferdinand. “Ferdinand Tönnies, Eutin.” Cf. Bond, Niall. “The grim probity of Arthur Schopenhauer and Ferdinand Tönnies.” Schopenhauer Jahrbuch, 2011.
- ¹⁴ *Community and Society* is the least misleading of the three titles chosen by the translators of Tönnies’ work. This observation does not detract from the fine work Jose Harris did notably in the exegesis of Tönnies’ legal arguments in the translation she produced with Margaret Hollis.

discussion of the underlying forms of volition in the second book through to the third book, dedicated strictly to the philosophy of law. Yet the influence of law was important and merits consideration. Tönnies himself pointed to sources he found in the early natural law thinkers, in the opposition of Friedrich Carl von Savigny (1779–1861) and Karl Ludwig von Haller (1758–1854) to the notion of natural law, and more recently in the writings of Rudolf von Jhering (1818-1892), influenced by utilitarians such as Jeremy Bentham (1748–1832) and John Austin (1790-1859), and in the works of Otto von Gierke (1841–1921) and Sir Henry James Sumner Maine (1822-1888). When Tönnies lists those authors who had most influenced him after the sociologists, August Comte and Herbert Spencer, and the socialists of the lectern, Adolf Wagner, Rodbertus and Schäffle, two – Maine, whose works *Ancient Law*, *Village Communities in the East and West*, *The Early History of Institutions*, *Early Law and Custom* Tönnies names, and Gierke, whose first three volumes of *Das deutsche Genossenschaftsrecht*¹⁵ and *Johannes Althusius*¹⁶ are cited – are jurists. The third was Karl Marx, of enormous importance for Tönnies.

Although his “renewal of natural law” was not taken up during his lifetime, Tönnies did not go entirely unnoticed in the field of law. At least two eminent scholars in legal theory, Georg Jellinek and Gustav Radbruch, express their appreciation of Tönnies, without going so far as to receive what Tönnies regarded as his original contribution to legal theory, namely the elaboration of a natural law of community. In his *General theory of the State*, first published in 1900, Georg Jellinek (1851-1911), an expert on the emergence of natural law doctrine and the notion of human rights¹⁷ makes praising reference to various publications of Tönnies’, such as his essay on the development of sociology in the nineteenth century¹⁸, Tönnies’ critique of applications of Darwin’s origin of the species to society¹⁹, Tönnies’ early articles on Hobbes and his biography of Hobbes²⁰, and Jellinek cites *Gemeinschaft und Gesellschaft* when discussing the concept of society (*Gesellschaft*)²¹; however, he makes no mention of Tönnies’ proposition that a natural law of community exists alongside a natural law of society. In his *Introduction to the science of law* of 1910, the legal philosopher Gustav Radbruch (1878-1949) presents Tönnies as having produced a category for thinking about the State that transcended the previous opposition of the “individualist” and the “super-individualist”, offering a “transpersonal” interpretation of social life, seeking “the highest task of life not in itself, or in individual or total personalities, but in the works it brings forth and leaves behind it and the totality of the

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¹⁵ Gierke, Otto Friedrich von. *Das deutsche Genossenschaftsrecht*, Berlin : Weidmann, 4 vol., 1868-1913.

¹⁶ Gierke, Otto Friedrich von. *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien*. Breslau: Marcus, 1880.

¹⁷ Jellinek, Georg. *Die Erklärung der Menschen- und Bürgerrechte*. 2nd extended edition, Leipzig: Duncker & Humblot, 1913.

¹⁸ Jellinek, Georg. *Allgemeine Staatslehre*, 3rd edition, Bad Hamburg, Berlin, Zürich: Verlag Dr. Max Gehlen, 1966, p. 69.

¹⁹ *Ibid*, p. 75.

²⁰ *Ibid*, p. 207, 210.

²¹ *Ibid*, p. 84.

works – culture, with the highest task of the State being to maintain work on culture... Thus, the transpersonal interpretation of the State is the place for “community” (*Gemeinschaft*) – the great word of our age! – but not within the parochial understanding of an ethnic community (*Volksgemeinschaft*), but as a community of work (*Werkgemeinschaft*).²² Tönnies sought indeed to transcend the opposition between “individualist” and “super-individualist” positions in legal theory, often represented by the contract theorists of the State such as Thomas Hobbes on the one hand and Savigny and Haller on the other. In so doing, he created a synthesis of the universalising thought of natural law and the historical presentation of positive law in the tradition of Savigny’s historical school. He drew inspiration from more contemporary representatives of methodological individualism and an organic theory of the State respectively – Rudolf von Jhering, on the one hand, Otto von Gierke on the other. Radbruch describes the latter as the “chief representative of the organic theory of the State”, according to which “the totality does not exist on behalf of its members but the members exist on behalf of the totality”.²³ One of the chief influences behind the synthesis was the British legal historian, Maine, who presented a dichotomy of status and contract which fed into the *Gemeinschaft-Gesellschaft* dichotomy. After presenting anticipations of Tönnies’ dichotomy of community and society in contemporary legal theorists’ works, we shall outline Tönnies’ own dual theory of natural law, designed to reconcile the universalists of the natural law tradition with the particularists of the historical school.

Individualist and super-individualist interpretations of the State

The opposition of super-individualist and individualist interpretations of the State coincided to an extent with the “opposition between the historic and the rationalist points of view,” which according to the foreword of the first edition of *Gemeinschaft und Gesellschaft* had “penetrated all of the fields of the social and cultural sciences in the course of this century.”²⁴ Tönnies sums up the significance of rational natural law and rational economics respectively: “the needs of life and passions and activities of human nature are treated initially without consideration of time and place by rational disciplines which attempt, starting with abstract individuals in natural conditions all rationally pursuing their aims, to define on the one hand, the relations and associations of individuals and their wills, and on the other the change of their material conditions produced by these contacts.”²⁵ Tönnies observes that rational natural law and rational economics are particularly fruitful in understanding and dealing with social reality in developed and complex cultures. “However, up until now, almost all “organic” and “historic”

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²² Radbruch, Gustav. *Einführung*. 32.

²³ Radbruch, Gustav. *Einführung*. 25.

²⁴ Tönnies, Ferdinand. *Gemeinschaft und Gesellschaft*. Darmstadt: Wissenschaftliche Buchgesellschaft, 1979, Foreword, first edition.

²⁵ *Ibid.*

points of view have been opposed to them”.²⁶ Tönnies proposes to incorporate both visions, the individualist and the organic, in an intellectual synthesis. He resumes the importance of rational natural law in the foreword to the second edition, written in 1912: “Philosophy, which aspired to the same status as mechanist natural science, disposed of a philosophy of law and a social theory which constituted the main parts of ethics of this philosophy. The tendency of this ‘practical’ philosophy was necessarily anti-theological, anti-feudal, and anti-medieval: it was individualistic and (in keeping with my concepts) typical of society (*gesellschaftlich*). Its major achievements are (explicitly rationalist) natural law and the ‘political economy’ of the physiocrats, which was profoundly linked to natural law (as W. Hasbach has shown in detail), followed by the British ‘classical’ school. In my preface to the first edition to this work, I compared natural law with geometry, political economy with abstract mechanics. Natural law and political economy made substantial contributions to the development and emergence of modern society, as well as the modern State.”²⁷ Natural law theory was revolutionary in effect. But Tönnies points out that the revolution was opposed in legal theory by “reactionary tendencies”: “With the *Restoration of the Sciences of the State* – while alluding to this famous title, I am also alluding to the Historical School of Law as a whole – an attempt was made to put an end to natural law, and in particular the rational and individualist construction of the State (to the theories of the social contract), and this attempt was successful, at least as regards the ‘academic’ public representation of these doctrines – at least in Germany. For in England, the analytical theory of legislation and jurisprudence of Bentham and Austin consciously took up with Thomas Hobbes.”²⁸

Natural law in the tradition of Hobbes was based upon the construction of a rational agent free in his choice. In Hobbes’ theory, man took the decision to sacrifice the liberties of nature to a sovereign with absolute power to protect himself from humankind, driven by the human condition to mutual destruction. John Locke, on the other hand, as Tönnies observes, who was more “optimistic” than Hobbes saw an absolutist state as unnecessary, and felt that humans would be induced by sociability to create a civil society in accordance with their individual interests.²⁹ This rationalist individualism is also, as Tönnies sees it, the basis of the utilitarian school of Bentham and Austin. Parallel to the continuation of this tradition of rational individualism in the English-speaking world, Tönnies observes that these theories, “the core of which had still convinced Kant, Fichte and Anselm Feuerbach, and prevailed in all modern legislation, from the emancipation of the serfs to the freedom of commerce and industry, and had gained influence on political economy and the entire internal administration of the State” had fallen into disrepute in Germany, where developments moved in a very different direction. The

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²⁶ *Ibid.*

²⁷ *Ibid.*, Foreword 2nd edition.

²⁸ *Ibid.*

²⁹ Bond, Niall. “Rational natural law and German sociology: Hobbes, Locke and Tönnies.” *British Journal of Philosophy*. 2011.

rationalist legal tradition, which corresponded to the *individualist* theory of the State, deducing the need for a State from the needs of individuals, was refuted by the *organicist* vision, which was both *historicist*, inasmuch as it affirmed that the basis of method should be not deduction from some posited abstract human universals but should follow a narrative of historic fact, and *super-individualist*, since individuals never existed on their own; their factual interdependence conferred upon groups and notably the State a superior metaphysical value. This refutation of rational individualism by historicist super-individualism received much impetus from legal thinkers during the period of German romanticism.

Tönnies writes that in Germany, the philosophy of law – “not entirely neglected” – had been represented by 1) Gustav Hugo (1764-1844), who pointed out that a tension existed between *philosophy*, which aimed at critical thinking and independence from outside rules, and *positive law*, which sought to accommodate itself with the status quo,³⁰ 2) Savigny, who linked the philosophy of law to “natural philosophy”, and 3) Friedrich Julius Stahl (1802-1861), a convert from Judaism to Protestantism, whose philosophy of law was, according to Tönnies’ interpretation, based upon Schelling’s initially pantheist philosophy of nature. In his *Philosophy of Law from a Historical Perspective*, Stahl declared that law had to be based upon a return to a belief in Christian revelation and denies the rationalistic doctrines of natural law.³¹ Tönnies comments that “the vacuum left by the annihilation of natural law and its theory of the State allowed for the emergence of historical jurisprudence, the organic theory of the State and a groping eclecticism, the theological component of which was repeatedly underscored to reinforce confidence in the theory and to guarantee the approval of the powerful.”³² *Restauration der Staatswissenschaften* (1816–1834), written by the Swiss, Karl Ludwig von Haller, became particularly popular among German princes, because it was derisory of the supposed equality of all men argued by natural law, pointing instead to the undeniable superiority in strength of some men over other men.³³ In his *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* of 1814, Friedrich Carl von Savigny argued against individualist natural law that it was not the task of legislators to produce law, but merely to allow law to emerge as *Gewohnheitsrecht*, customary law (or more literally a law of “habit”) from the spirit of the people, the *Volksgeist*. Tönnies attributes the term *Volksgeist* to Voltaire’s use of the term *esprit* and Herder’s understanding of the *Volk* or people. This understanding of the source of law coloured Tönnies’ description of law in *Gemeinschaft*, in pre-modern community, and corroborated his deriving of community phenomena from habit.

³⁰ Hugo, Gustav von. *Lehrbuch des Naturrechts als einer Philosophie des positiven Rechts, besonders des Privatrechts*. Reprint of original Berlin, 1819 edition, Glashütten im Taunus, Auvermann, 1971, 1.

³¹ Stahl, Friedrich Julius. *Philosophie des Rechts, nach geschichtlicher Ansicht*. 2 volumes, Heidelberg, 1830-56

³² Tönnies, Ferdinand. *Gemeinschaft und Gesellschaft*. Foreword 2nd edition.

³³ Haller, Karl Ludwig von. *Restauration der Staatswissenschaften oder Theorie des natürlich-geselligen Zustands, der Chimäre des künstlich-bürgerlichen entgegengesetzt*. Aalen: Scientia, 1964.

Tönnies refers to yet other nineteenth century German jurists. The legal philosophy developed by Heinrich Ahrens (1808-1874) under the influence of the philosopher Karl Christian Friedrich Krause (1781-1832) was a new corpus of natural law based upon social needs in opposition to the individualist rationalist natural law of the enlightenment.³⁴ This attempt may have directly inspired Tönnies' own attempt to place a natural law of community alongside the natural law of society he found in the wake of Thomas Hobbes. More cogently, Hegel had tried to develop the idea that the "objective mind" (*objektiver Geist*) poses its abstract object in law and rises to morality, the idea of which is realized in the State. Tönnies writes that the importance of the Hegelian system lay in its recognition that *modern* social structures were *natural* and thus necessary products of the mind, rather than simply to reject modernism as the result of theoretical errors, as had romanticism and the Historical school. The Hegelian system had led to a "glorification of ... the Prussian State of the restoration, a State which was incapable of entirely disavowing its radical past." This ambiguity is for Tönnies the source of the divide between the Hegelian Right and Left.³⁵

Tönnies' *Gemeinschaft und Gesellschaft* revives the rationalist individualist tradition of natural law, which he views as particularly appropriate for describing advanced capitalist society, while placing it alongside an organic theory of community, inasmuch as the realities of pre-modern or biological community are less determined by purposive and instrumental rationality. The organic theory "again emerged recently, in part, as I have said, in the context of the philosophy of nature, with which there are still affinities to theology (Stahl), but also under the new cloak of the biological analogy which has a mutual relationship with sociology: while biology tries to explain and elucidate the natural organism through comparison with facts of social life, sociology attempts to explain and elucidate the 'social' body in the reverse manner."³⁶ In 1887, Tönnies presents the analogy to the organism as half of his theory, namely the approach that allows social scientists to grasp the functioning of pre-modern community, as opposed to modern society. At the turn of the century, a debate on the validity of the organism analogy and the increasing success of "individualising" methodologies, such as that of Carl Menger in economics and Max Weber in sociology in the first decade of the twentieth century may have induced Tönnies to distance himself from his original approach. For in 1912, Tönnies writes that he "never ignored the fact that a good number of these analogies are effectively justified. They are based upon general and common phenomena of life... On the other hand, I see no valid reason to claim that the State, the commune (*Gemeinde*) or any human association *is* an organism, although Gierke defended this idea with all the force of his idealism, most recently in

³⁴ Ahrens, Heinrich. *Das Naturrecht oder die Philosophie des Rechts und des Staates*, volume 1: *Die Geschichte der Rechtsphilosophie und die allgemeinen Lehren*. Reprint of 6th edition, Vienna, 1870. Aalen: Scientia-Verlag, 1968.

³⁵ Tönnies, Ferdinand. *Gemeinschaft und Gesellschaft*. Foreword 2nd edition.

³⁶ *Ibid.*

his beautiful speech of 1902 on the ‘*Essence of human associations*’.³⁷ Tönnies tries to capture the idea of the organism analogy by declaring that “external and internal experience leads us to believe that human association provokes a real effect – part of the impulses behind our action is based upon the communities that heavily influence us; the certainty of the reality of our I is also extended to the certainty that we are a sub-unit which is part of higher units of life – even if we do not find these units in our conscience and can only indirectly deduce that social bodies are physical and spiritual through the effects of community.”³⁸ These associations are “*natural*” as opposed to “*cultural or artificial*”. For “apart from real human unities and contexts, there are unities and contexts which have been created and remain determined by the will of men, and are thus ideal in character. They must be understood as having been created or made by men, even if they effectively take on objective power over the individuals, which is always equivalent to the power of the associated wills over the individual wills.”³⁹

Tönnies sees “the deep meaning of natural law... as lying in trying to offer an anthropological understanding of those essences that had previously been understood mainly theologically”, i.e. in understanding associations as “formations of human thought and human will”.⁴⁰ The rationalist system of natural law, the basis of which was developed by Hobbes, was negated rather than disproved by early nineteenth century historicist and reactionary legalists. Tönnies found new expressions of both the rationalist generalising trend of thinking about law and the organicist school of thought in Rudolf von Jhering and Otto von Gierke, respectively. A stimulus found in the thinking of the Scottish legal scholar, Maine, was to allow Tönnies to create a sort of synthesis between rationalist mechanist and historic organic thought.

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Rudolf von Jhering’s rational utilitarianism

As Tönnies noted in his autobiographical sketch, one of his principal aims in writing *Gemeinschaft und Gesellschaft* was to refute Rudolf von Jhering’s *Der Zweck im Recht*, (*The Purpose in Law*).⁴¹ Tönnies quoted largely from the first volume of Jhering’s *Zweck im Recht*, of 1877. Jhering wrote that his work was a “by-product” of another work on the spirit of Roman law, and modestly regrets not having the philosophical erudition necessary to address issues of ethics adequately.⁴² It at any rate inspired Tönnies’ contradiction. On April 1, 1880, Tönnies produced a new outline of his work on natural law with a logical evaluation of Jhering’s *Zweck im Recht*, as well as comparative legal research related to economic history, and the influence of

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³⁷ *Ibid.* The text to which Tönnies refers is Gierke, Otto von. *Das Wesen der menschlichen Verbände*. Berlin: Buchdruckerei von G. Schade, 1902.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Tönnies, Ferdinand. “Ferdinand Tönnies, Eutin.”

⁴² Jhering, Rudolph von. *Der Zweck im Recht*. Volume 1. Leipzig: Breitkopf & Härtel, 1877. Volume 2. Leipzig: Breitkopf & Härtel, 1883. *Volume 1*, vi, vii.

Darwinism and of socialism.⁴³ The two volumes of Jherings *Der Zweck im Recht* had appeared just prior to and during the elaboration of *Gemeinschaft und Gesellschaft*.⁴⁴ Tönnies writes that the first volume of *Zweck im Recht*⁴⁵ was a fragment, founded “on an entirely rationalist approach, which for me was a reason to regard his theory as a ‘renewal of natural law’⁴⁶, just as I understood the profound discussions of legal philosophy in A. Wagner’s *Grundlegung*, volume 1, first of 1876, notwithstanding (or rather because of) his leanings towards state socialism”.⁴⁷ Tönnies saw a relationship between ideology and the methodological suppositions of natural law: while natural law had been used since Locke to legitimize liberal individualism, reactionary thought in Germany in particular refuted it. Tönnies felt that Jhering’s work signaled a revival in the seeking out of universals in law. But Tönnies saw the need for a *renewal* of natural law not in the *liberal individualist* tradition espoused by Jhering, but in a *collectivist communitarian* tradition, inspired by Wagner, whose state socialist convictions underpinned his understanding of natural law. Another likely source of inspiration was the aforementioned Heinrich Ahrens. *Gemeinschaft und Gesellschaft* is Tönnies’ incipient attempt to offer a natural law of community to flank that of individualistic society.

There was overlap between Tönnies’ approach to law and that of Jhering, as summarized by Robert Sumner: “The nature of Jhering’s criticisms is well known. He criticized the pursuit of abstractness and symmetry in legal concepts and legal doctrines for their own sake, criticized the mere deductive unpacking of legal propositions in disregard of their practical consequences, criticized the willingness to dismiss some lines of reasoning from existing doctrines as logically impossible, criticized formalistic hair splitting in legal analysis and criticized the notion that law is a closed system that must be taken to provide for all cases. For example, in *Der Geist des römischen Rechts*, Jhering made these critical observations: The particular cult of the logical, which tries to twist jurisprudence into mathematics of law, is an aberration and rests on ignorance about the nature of law. Life is not here to be a servant of concepts, but concepts are here to serve life. What will come to pass in the future is not postulated by logic but by life, by trade and commerce, and by the human instinct for justice, be it deducible through logic or unlikely to happen at all.”⁴⁸

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⁴³ Paulsen, Friedrich and Tönnies, Ferdinand. *Briefwechsel. 1876–1908*, ed. Klose, Jacoby and Fischer, Kiel: Ferdinand Hirt: Kiel, 1961.

⁴⁴ von Jhering, Rudolf. *Der Zweck im Recht. Erster Band*. Druck und Verlag von Breitkopf & Härtel, Leipzig 1877. Rudolph von Jhering. *Der Zweck im Recht. Zweiter Band*. Druck und Verlag von Breitkopf & Härtel, Leipzig 1883.

⁴⁵ Jhering, Rudolf von. *Der Zweck im Recht*. Volume 1.

⁴⁶ Tönnies, Ferdinand. *Die Erneuerung des Naturrechts*. Unpublished manuscript, State library, (Landesbibliothek), Schleswig-Holstein, Kiel.

⁴⁷ Tönnies, Ferdinand. *Gemeinschaft und Gesellschaft*, 2nd foreword.

⁴⁸ Summers, Robert S. “Rudolf von Jhering’s influence on American legal theory – A selective account.” *Jherings Rechtsdenken. Theorie und Pragmatik im Dienste evolutionärer Rechtsethik. Abhandlungen der Akademie der Wissenschaften in Göttingen*. Edited by Okko Behrends. Göttingen: Vandenhoeck & Ruprecht, 1996, 61- 76, 63.

Yet notwithstanding Jhering's rejection of the doctrinaire spirit, Tönnies was convinced that Jhering had himself fallen prey to a utilitarian dogma: the belief that a "purpose" or "ends", *Zweck* could be found in all law. Tönnies held that although the deliberate *mechanical* distinction between means and ends was increasingly prevalent, there had been forms of life in which this distinction was not made and areas in which norms developed *organically* without the conscious divorce of the means and the end. Tönnies thus writes that his "own theory had emerged... in a negative relationship to Jhering."⁴⁹ Tönnies applauded Jhering's challenging of the prevalent assumption among legal historicists that there were no universals in law. Jhering's thought appeared to be a throwback to the utilitarianism of Jeremy Bentham or John Austen, which Tönnies sees as a continuation of natural law inasmuch as it aimed at universal standards, even though Bentham had no patience for the discourse surrounding "natural law" or "natural rights", with their metaphysical connotations. Jhering, who regarded the founder of utilitarianism as one of his intellectual forebears, posited that the universalist principle in interpreting the law was to uncover the intents and *purposes* of an actor, the *législateur*. Jhering transcends the limits imposed upon interpreters of law by Savigny.

12

Jhering sees the aim of science in establishing laws of causality. Like Tönnies, he is a monist insistent upon the unity of mind and matter, and as such in opposition to the Scholastic and the later Kantian dualism of matter and mind. Jhering emphasises that there is "absolutely no contradiction between the monist belief to which I herewith declare I adhere, and the assumption that there is twofold law for the world of phenomena: a law of causality for the inanimate and the law of the purpose for animate creation."⁵⁰ His discussion of the "law of the purpose" commences with the declaration that there is no phenomenon without a cause, referring to this "fact" as the "law of causality."⁵¹ But while the inanimate follow the dictates of causes, humans have intent: Jhering writes, "A stone falls not for the sake of falling but because it must do so, i.e. because the support upon which it rested is withdrawn, whereas humans who act do so not due to a 'because' but due to an 'in order to' – in order to achieve something."⁵² The rest of Jhering's work focuses upon this "in order to" – the purposive rationality behind the law. But Tönnies saw that law was not only governed by purposive rationality.

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Jhering's desire to rehabilitate the notion of purpose needs to be understood against the backdrop of a current of legal thought that posited that there were legal norms the intents of which needed no or even defied elucidation, as they had simply organically evolved, and consequently were to be accepted as such. This form of conservatism saw human institutions as intrinsically irrational emanations of nature. Jhering opposed it with his own form of conservatism, which sought out rationality absolutely everywhere. He goes so far in his obsession with purposive rationality even to see it in the unconscious processes of nature.

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⁴⁹ Tönnies, Ferdinand. "Ferdinand Tönnies, Eutin.", 13.

⁵⁰ Jhering, Rudolph von. *Der Zweck im Recht*. Volume 1, xii.

⁵¹ *Ibid*, 1.

⁵² *Ibid*, 4.

“Animal life, as nature has conceived of and formed it is the *imposition of existence from its own force* (*volo, not cogito, ergo sum*), life is the *practical purposive relationship of the external world to its own existence*. Everything with which living beings are equipped – their feeling, understanding, memory – serve the sole purpose of supporting the living being. Understanding and feeling would not suffice without memory, for memory collects and secures the fruits of both in experience so as to use them for the purposes of existence. Will is no more dependent upon self-awareness than life itself, and whoever recognises the intimate relationship between both will consider the idea that animals, in the absence of self-awareness, cannot be said to have a will, which is revered for the human species, not as a profound, as it is considered by its proponents, but as a superficial and prejudiced point of view.”⁵³

Jhering’s main idea – that any legal norm can ultimately be scrutinised with a view to the intent of the lawgiver as against the view that existing legal norms are justifications unto themselves – is based upon the supposition that everything has a *will* and corresponding *intent*.⁵⁴ An argument that could have allowed for the *ideological critique* of existing law is thus transformed into a *wholesale justification* for all existing law. Tönnies will have found both the narrow-minded utilitarianism and the intrinsic conservatism of Jhering’s position offensive. The ubiquity of the notion of “purpose” in Jhering’s thought detracts from his argument. “The second reservation against the absolute necessity of a purpose I maintain... consists in the possibility of purposeless and unconscious action. It had already been disproved before it was raised, namely when ... it was proved earlier that for animals consciousness is not a prerequisite for having a will and therefore a purpose. Even insane acts, inasmuch as the word ‘to act’ can be used to describe the deeds of the insane, are not without purpose, and his actions... are different from those of rational humans not in the absence of purpose but in the peculiarity and abnormality of the purpose, and I would claim that in final remnants of humanity (of the insane) when compared with animals are manifest in those purposes that go beyond those of pure animal life and of which animals are altogether incapable – the humanity of the insane is recognisable in this distorted image.”⁵⁵ Here, entangled in contradiction, Jhering seeks purpose in the instinctive behaviour of animals while wishing at the same to reserve it for the higher species of man.

Jhering rejects the charge of atheism, underscoring the difference between his utilitarian thought and that of Bentham. “The will is the truly creative force in the world, i.e. that which creates itself – as in God, also in Man in His image. The lever of this force is the *purpose*. Purpose envelopes man, humanity and history. The particules *quia* and *ut* reflect the contradiction of two worlds, *quia* is nature, *ut* is man – in this *ut* resides his supremacy over the entire world, for *ut* means the possibility of relating the external world to the ego, a relationship which is limited neither by his ego nor by the external world; by giving man *ut* God gave man the entire world,

⁵³ *Ibid.*, 9.

⁵⁴ Cf. Behrends, Okko. *Jherings Rechtsdenken : Theorie und Pragmatik im Dienste evolutionärer Rechtsethik*. Edited by Okko Behrends, Göttingen : Vandenhoeck und Ruprecht, 1996.

⁵⁵ Jhering, Rudolph von. *Der Zweck im Recht*. Volume 1, 20.

just as announced in the creation according to Moses (Genesis 1, 26, 28).”⁵⁶ Jhering applies his notion of purpose to the instinctive behaviour of animals, to instrumental rationality in man and to the divine creation, veering sharply away from the utilitarian tradition.

In the sixth chapter, “Life through and for others or society”, the concept of purpose, initially used to establish the intent behind norms becomes teleological. Jhering writes “All peoples of culture throughout the world have contributed to our present-day culture; if it were possible to dissolve our culture into its elements and pursue it back to its origins, we would establish a table of families and names of peoples that have since fallen into oblivion. For our purposes, what we already know and what we see every day suffices to justify the claim that the proposition, ‘Everyone is there for the world’ is as valid for peoples as for individuals, and that it is the *supreme law of culture in history*.”⁵⁷ Alongside this altruistic reading of purpose, Jhering posits, in the title of the third chapter, “*Egoism in the service of the purposes of others*.” “Nature has shown man the path he has to take to win over others for his purposes, and that is *connecting his purpose with the interest of the others*. This formula is the basis for the life of all human institutions: society, commerce and communication. A cooperation of various people for a single purpose can only come about when the interests of all converge at a single final point. Perhaps no one is pursuing the purpose as such, but everyone is only pursuing their own interest, however the coincidence of their interests with the general purpose means that in pursuing his own interest, everyone will be working for the purpose at the same time.”⁵⁸

“Purposes of the group” may, according to Jhering, be either *organised purposes* “for whose pursuit there is an apparatus based upon a regulated, fixed arrangement between partners to the purpose”, and *unorganised purposes* depending “exclusively upon the free decision of single individuals”.⁵⁹ “Because of the imponderable number of organised purposes in today’s world, it is difficult to cite examples. Jurists only need to be reminded of the forms of such organisation: the association or club, (*Verein*), the cooperative, (*Genossenschaft*), the company or society (*Gesellschaft*), legal entities, so as to have an immediate vision of the infinite wealth of purposes.”⁶⁰ Jhering’s definition of society (*Gesellschaft*) may have had some influence upon Tönnies’ own definition: “*Gesellschaft* (societas) within the legal meaning designates an association of several persons who have united in order to pursue a common purpose, therefore making everyone who is working for the purpose of the society work equally for themselves. A society or company (*Gesellschaft*) within this legal meaning presupposes a contract, namely the corporate contract aimed at its creation and its regulation.”⁶¹ Jhering leaves uncommented the fact that the term “*Gesellschaft*” refers both to a discreet association based upon intent and

⁵⁶ *Ibid*, 25.

⁵⁷ *Ibid*, 91.

⁵⁸ *Ibid*, 42.

⁵⁹ *Ibid*, 45.

⁶⁰ *Ibid*, 47.

⁶¹ *Ibid*, 94.

the totality of humans into which one is born. “It is society (*Gesellschaft*) itself that makes that proposition correct: the world is there for me, inasmuch as it provides me that world I need in the community (*Gemeinschaft*) which it founds. But it can only do so through the antithesis: you are there for the world, it has altogether the same right to you as you to it.”⁶² This declaration that each human individual serves the world’s purpose marks the transition to a justification for a coercive state: “It thus follows that the concept of society (*Gesellschaft*) coincides partially with that of the State. But only partially; only to that extent as the purpose of society (*Gesellschaftszweck*) can only be realised through the application of external coercion. This is only necessary to a moderate extent. Trade and commerce, agriculture, manufacture and industry, arts and science, the customs of the household and of life are essentially organised through themselves.”⁶³ Liberal in tendency, Jhering leaves justification for recourse to the coercive State.⁶⁴

Jhering moves from his would-be demonstration that everything is endowed with purpose to the doctrine that all human beings are invariably egotistical. In Chapter IV, “*The Problem of Self-Denial*”, he tries to show that self-denial is an expression of egotism. “The previous development showed that acting for others is within the capacity of egoism. But it linked it to an important supposition, namely that the action undertaken for someone else be linked to an action undertaken for oneself. This is the case in innumerable actions in our lives – but who would claim for all? Is a mother being self-seeking when she sacrifices herself for her child? Or the merciful nurse who risks her own life at the bed of a victim of the plague so as to save someone else’s life? Whoever knows of no motive for human action other than egotism is faced with insoluble mysteries.”⁶⁵ “Self-denial” exists when “the actor is seeking nothing for himself in the action but everything for the others. The possibility of such an action does not run contrary to the law of the will, as we saw previously, or to the law of purpose; self-denial also aims at something in the future, but not for oneself, but for others.” Although “self-denial” can be grasped neither by reason nor through experience, Kant’s “concept of duty includes the postulate of absolute self-denial; man must fulfil his duty without any reference to himself. Kant’s categorical imperative, the basis of his entire ethics, expects the will to be moved with no self-interest at all, driven merely ‘by the formal principle of will altogether, without any consideration whatsoever for the effect produced’.”⁶⁶ Jhering has no place for this assumption in his doctrine of ubiquitous egotism.

Jhering notes, “I am aware that by praising egotism I shall offend every reader who has not given the matter much thought. Egotism in commerce, it may be pointed out, is a necessary evil, but where it does not exist, one should not invoke it, but be pleased that it is possible to

⁶² *Ibid*, 95.

⁶³ *Ibid*, 96.

⁶⁴ *Ibid*, 289.

⁶⁵ *Ibid*, 53.

⁶⁶ *Ibid*, 54-55.

live without it. Fine! But the reader should test this idea himself. Imagine having the choice of travelling in a country where there are inns everywhere or in a country in which there are absolutely none, but in which the absence of inns is compensated for by a general sense of hospitality. In such a case,” Jhering writes, “the inn (*Gastwirtschaft*) is better than hospitality (*Gastfreundschaft*).” (*Gastwirtschaft* literally means guest *economics*, *Gastfreundschaft* guest *friendship*). “An inn ensures that I will be taken in and the money paid spares me the humiliation of having to ask or accept charity or having to say thank you – my wallet is my freedom and my independence when I travel.”⁶⁷ With this curious statement of his preference of “*Gesellschaft*” – self-sufficiency and indifference – over “*Gemeinschaft*” – mutual solidarity and affection – Jhering concludes his first volume of *Der Zweck im Recht*, and it is of little surprise that Tönnies set out to refute Jhering. Tönnies had found in Jhering on the one hand a “renovator” of natural law inasmuch as Jhering was seeking out universals derived from a posited human nature, but on the other hand a near caricature of egotistical or “*gesellschaftlich*” individualism whom Tönnies would use as an antipode to define his own position.

Otto von Gierke’s organic theory of fellowship

In stark contrast to Jhering, Otto von Gierke (1841-1921) offered an apotheosis of the *fellowship of community* in his *Genossenschaftsrecht*,⁶⁸ translated into English by Mary Fisher as “Community in historical perspective”⁶⁹ following an earlier translation of those parts devoted to natural law by Ernest Barker.⁷⁰ Tönnies specifically cites Gierke’s *Genossenschaftsrecht* as well as his presentation of Johannes Althusius, first published in 1879,⁷¹ which however presents little interest for an exegesis of *Gemeinschaft und Gesellschaft*. Tönnies writes that Gierke’s work “contributes to the understanding of the formation of law and the indissoluble bond between legal life and the entirety of cultural life, eruditely and profoundly illuminating not just legal aspects, but also the cultural, economic, social and ethical history of the community.”⁷²

Frederic William Maitland sums up Gierke’s agenda in his presentation of Gierke’s political theories of the Middle Age: German law had savoured of “the open air, oral tradition and thoroughly unacademic doomsmen”, but since its modernization or codification, it “has had

⁶⁷ *Ibid*, 125 f.

⁶⁸ Gierke, Otto. *Das deutsche Genossenschaftsrecht*, Volume one, *Rechtsgeschichte der deutschen Genossenschaft*. Berlin: Weidmannsche Buchhandlung, 1868.

⁶⁹ Gierke, Otto. *Community in historical perspective: a translation of selections from Das deutsche Genossenschaft (The German law of fellowship) by Otto von Gierke, principally from volume 1: Rechtsgeschichte der deutschen Genossenschaft (A legal and moral history of the German fellowship) / translated by Mary Fischer ; selected and edited by Antony Black*. Cambridge : Cambridge University Press, 1990.

⁷⁰ Gierke, Otto. *Natural Law and the Theory of Society, 1500 to 1800 ... [Five subsections from “Das deutsche Genossenschaft” vol. 4.] With a lecture on the Ideas of Natural Law and Humanity, by Ernst Troeltsch*. Translated with an introduction by Ernest Barker. Cambridge: University Press, 1934.

⁷¹ Gierke, Otto. *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien. Zugleich ein Beitrag zur Geschichte der Rechtssystematik*. 4th edition. Breslau::Verlag von M.&H. Marcus, 1929.

⁷² Tönnies, Ferdinand. *Gemeinschaft und Gesellschaft*, 2nd foreword.

to be disinterred by modern professors.”⁷³ Gierke based his German *Genossenschaftstheorie* upon the contrast between the “joint-stock company” and “agrarian communities with world-old histories” in a time at which complaints abounded of injustice to peasants and in which a term was sought “which would unite many groups of men, simple and complex, modern and archaic”. Gierke chose *Genossenschaft*, which, as Maitland notes, cannot be translated as partnership, company and society, but perhaps the least inadequately as “fellowship with its slight flavor of an old England.”⁷⁴ For Gierke, Maitland writes, “our German Fellowship is no fiction, no symbol, no piece of the State’s machinery, no collective name for individuals, but a living organism and a real person, with body and members and a will of its own. Itself can will, itself can act; it wills and acts by the men who are its organs as a man wills and acts by brain, mouth and hand. It is not a fictitious person; it is a *Gesammperson* and its will is a *Gesammpwille*; it is a group-person, and its will is a group-will.”⁷⁵ These considerations, and various inspirations from Romantic authors, fed into Tönnies’ theory of *Gemeinschaft* or community.

Gierke had adopted methods of historicism but insisted that the tradition founded by Savigny of looking for Romanist sources was wrong: as John D. Lewis has shown, Gierke’s and the Germanists’ “historical research took them back not to the Roman Empire, the Digest and the Reception, but along the path marked out by Grimm, to the law and custom of the ancient German *Mark* and *Gemeinde*, to feudal records, to town charters, to the rules of an endless variety of guilds and ‘fellowship’.”⁷⁶ Gierke finds a specific form of unity in these sources: “As the forward march of world-history is inevitably realized, there appears in an unbroken ascending arch the noble structure of those organic associations which, in ever greater and more comprehensive circles, bring into tangible form and reality the interdependence of all human existence, unity in its multi-colored variations. From marriage, the highest of those associations which do not outlast their members, grow forth in abundant gradations families, races, tribes and clans, *Gemeinde*, states and leagues of states; and for this development one can imagine no other limit than when, some time in the distant future, all mankind shall be drawn together into a single organized community, which shall visibly demonstrate that all are but members of one great whole.”⁷⁷ “The town personality was based upon territory and the associational personal union of the citizenry. Town personality thus grew out of factors which had earlier given rise to the *Herrschafts*-union on the one hand and the *Genossenschaft*-union on the other. The town was, further, a composite ‘living organism’ made up of lesser associations and of its own organs

⁷³ Maitland, Frederic William. “Introduction”. Gierke, Otto. *Political theories of the Middle Age*. Translated with an introduction by Frederic William Maitland. Cambridge: University Press, 1900, xiii.

⁷⁴ *Ibid*, xxv.

⁷⁵ *Ibid*, xxvi.

⁷⁶ Lewis., John D. *The Genossenschaft-Theory of Otto von Gierke. A study in Political Thought*. Madison: University of Wisconsin (Studies in the social sciences and history, number 25), 1935, 17.

⁷⁷ Gierke, Otto. *Das deutsche Genossenschaftsrecht*, 1, quoted Lewis, John D. *The Genossenschaft-Theory*, 24f.

of administration. The unity of the town and the unified personality immanent in the structure of the town was always a composite, organically conceived unity.”⁷⁸

Gierke’s aim was to construct a theory of association drawing from German legal traditions while meeting the demands of a modern society. Gierke was from a conservative Prussian background opposed to the 1848 liberal movement towards unity and freedom, but the revival of German nationalism under Bismarck allowed conservative nationalists to adopt the claims for “freedom in unity” of the liberals of 1848, and the period during which Gierke developed his theory was one in which Germans clamoured for unity and freedom. In the opening paragraph of *Genossenschaftsrecht*, Gierke points to associations as the source of the strength of the living and of development and history. Such associations rise in forever larger and more comprehensive circles, referred to by Gierke as “organic confederations”, “*organische Verbände*”.⁷⁹ Gierke continues that as necessary as the idea of *unity* is the opposing thought, that of continuing *diversity* in unity, “the thought of right and the autonomy of all decreasing units down to the single individual – the thought of freedom”.⁸⁰ This passage, reminiscent of the appeal to unity, right and freedom (*Einigkeit, Recht und Freiheit*) in Germany’s later national anthem, necessarily struck a chord among patriotic Germans. Gierke affirms that no nation that neglected freedom in its quest for unity or that failed to attain unity because of its freedom could survive. Although Germans had not yet attained unity, he writes, they were inferior to none in “the quest for universality and the ability to organize as a State”, superior to most in “love of freedom”, and had an advantage over other peoples which gave substance to the idea of freedom and certainty to that of unity: the gift of “creating fellowships” (*Genossenschaftsbildung*).⁸¹

Gierke presents a historic overview of Germany’s development from the period leading up to the coronation of Charlemagne in 800, a predominantly *patriarchal* period, through a *patrimonial and feudal* constitution in which rule prevailed over fellowship until 1200, to a period of *fellowship*, obscured by a fourth period of *absolutism*, which lasted until 1806. Gierke attributes this absolutism to Roman law. He writes that present-day Germany was at the dawn of a fifth period, in which general citizenship and a representative state would allow for the reconciliation of ancient oppositions: it was to be a period of “free association”.⁸² Gierke’s ideological agenda was to provide the legitimacy of law to a State that embraced the principles of unity and freedom, but one which contrasted with the spurious constitutionalism of the French model which according to Gierke had created civil duties without civil rights.⁸³ Gierke’s discussion culminates in the presentation of the State as the highest of associations. Lewis notes two antithetic tendencies in Gierke’s *Genossenschaftstheorie*: the first stresses the “spontaneous

⁷⁸ Lewis, John D. *The Genossenschaft-Theory*, 38.

⁷⁹ Gierke, Otto. *Das deutsche Genossenschaftsrecht*. Volume 1. *Rechtsgeschichte der deutschen Genossenschaft*. Berlin: Weidmannsche Buchhandlung, 1868, .1.

⁸⁰ *Ibid*, 1

⁸¹ *Ibid*, 3,4.

⁸² *Ibid*, 8-10.

⁸³ *Ibid*, 823.

unity of associated groups and their autonomous or semi-autonomous position in a social whole, ... a tendency which ran counter to the temper of German academic thought in the nineteenth century, and which required, therefore, the support of the traditions of an earlier past. The second, stressing the organic integration of associated groups in a larger whole and the special position of the sovereign state and the monarchy, was, as Gierke himself realized, quite in the tradition of the German thought of his period.”⁸⁴ The State, conceived of as an organic unit, is viewed by Lewis as a precursor of Carl Schmitt’s understanding of the state as an “over-individual phenomenon” whose authority is not derived from individuals, and Othmar Spann’s understanding of the State not as derived from individuals but having its own independent source.⁸⁵

It is from the second volume of Gierke’s *Genossenschaftsrecht* of 1873 that Tönnies quotes most extensively in his own theory of *Gemeinschaft* or community. The second volume, a history of the German concept of incorporation, notes that the “fellowship”, a “particular legal entity per se” applied to such corporations under German law that were neither the State nor the parish.⁸⁶ Gierke makes an essential distinction between those corporations which have become (organically) (*gewordene*) and those which have been created by choice (*gewillkürte*).⁸⁷ The distinction was to become one of the various and heterogeneous key distinctions between Tönnies’ *Gemeinschaft* (community) and *Gesellschaft* (society). One instance of the former, according to Gierke, is the city, the *Stadt*, “a necessary polity (*Gemeinwesen*), whose existence did not have to be affirmed or negated by the free will, but simply accepted as given.”⁸⁸ Both the language and the logic square fully with Tönnies’ writings in *Gemeinschaft und Gesellschaft*. Tönnies feels such an affinity for Gierke that he takes far-reaching liberties in quoting him. For instance, he replaces Gierke’s “*genossenschaftliche Ordnung*” with his own “*gemeinschaftliche Ordnung*”, apparently supposing an identity of intent between Gierke’s thought on fellowship and his own thought on community.⁸⁹ Further on, when discussing the use of commons (*Allemende*) as an instance of using a common good for immediate needs in keeping with the consciousness of the age, Tönnies replaces Gierke’s “*Zeitbewusstsein*” or consciousness of the age with “*der gemeinschaftlichen Denkungsart*”, or “community attitude”.⁹⁰ This

⁸⁴ Lewis, John D. *The Genossenschaft-Theory*, 92.

⁸⁵ *Ibid.*, 95.

⁸⁶ Gierke, Otto. *Das deutsche Genossenschaftsrecht*. Volume 2.: *Geschichte des deutschen Körperschaftsbegriffs*. Berlin: Weidmannsche Buchhandlung, 1873. 865, 866.

⁸⁷ *Ibid.*, 830: „Es liessen sich mithin *gewordene* und *gewillkürte* Körperschaften unterscheiden.“

⁸⁸ *Ibid.*, 830: „Die Stadt war ein nothwendiges Gemeinwesen, dessen Dasein der freie Wille nicht zu bejahen oder zu verneinen, sondern als etwas Gegebenes hinzunehmen hatte.“

⁸⁹ At *ibid.*, 216-218, Gierke writes: “war der Einzelne durch das über ihm stehende Gesamtrecht mannichfach beschränkt, indem ihn der Flurzwang bei der Bewirthschaftung seiner Wiesen, Felder und Weinberge an die genossenschaftliche Ordnung band.” Tönnies replaces “*genossenschaftliche*” with “*gemeinschaftliche*”.

⁹⁰ Tönnies replaces, for instance „In allen diesen Fällen indes erschien das, worin wir eine Verwendung der Allmende zur Bezahlung besonderer der Gemeinde als solcher geleisteten Dienste zu erblicken geneigt sind, dem *Zeitbewusstsein* gleichzeitig als eine Verwendung des Allen gemeinen Gutes für die unmittelbaren Bedürfnisse aller.“ (Gierke, Otto. *Das deutsche Genossenschaftsrecht*. Volume two: *Geschichte des deutschen Körperschaftsbegriffs*, Berlin: Weidmannsche Buchhandlung, 1873, p. 239) with: „In allen diesen

misquote in Tönnies is followed by the sentence, “They can be compared with organs of their body. The constitution of social life is economic, i.e. communitarian – *gemeinschaftlich* – , (communist).”⁹¹ By distorting Gierke’s words and adding that “*gemeinschaftlich*” and “communist” are synonymous, apparently arguing that the Commons of medieval economies corresponded to a communist ideal, Tönnies displaces Gierke’s ideas, seemingly transforming a conservative Prussian patriot into a communist sympathizer.

Tönnies makes no reference to the third volume of *Genossenschaftsrecht*, published in 1881, which looks at the development of thought on the State and the Church.⁹² The fourth volume of Gierke’s *Genossenschaftsrecht* did not appear until 1913; Gierke had left his original concern with the realization of “unity, right and freedom”, and returned to nationalist conservatism, recalling his struggle to maintain “Germanic thought in future German private law” in 1888 when the Civil Code for the German Empire was being debated.⁹³

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The *Gemeinschaft-Gesellschaft* dichotomy in Jhering and Gierke

Tönnies observers in the “theme” of *Gemeinschaft und Gesellschaft* that the terms *Gemeinschaft* and *Gesellschaft* had been synonymous in origin but were used indiscriminately by contemporary authors; it was his aim to arrive at a binding semantic distinction so as to stabilize the language, working out an intrinsic contrast between the terms.⁹⁴ Usage both by Jhering and by Gierke show that the terms, particularly the term *Gemeinschaft*, were used in a more general sense than that of Tönnies, which was to prevail after the appearance of *Gemeinschaft und Gesellschaft*. Jhering’s sentence – “It is society (*Gesellschaft*) itself that makes that proposition correct: the world is there for me, inasmuch as it provides me that world I need in the community (*Gemeinschaft*) which it founds”⁹⁵ – vaguely suggests that society, i.e. the network of human relations as a whole, is a prerequisite for community, i.e. the specific human relationships of each individual. But the terms are not presented as a dichotomy.

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In the first three volumes of Gierke’s *Genossenschaftstheorie*, with which Tönnies will have been acquainted, we find no pertinent use of *Gemeinschaft* and *Gesellschaft* as a dichotomy. However, curiously, in a work which Gierke published in 1887 and which Tönnies could not have seen prior to finishing *Gemeinschaft und Gesellschaft*, but which

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Fällen ... zu erblicken geneigt sind, *der gemeinschaftlichen Denkungsart* zugleich als eine Verwendung des allen gemeinen Gutes für die unmittelbaren Bedürfnisse aller.“

91 “Sie sind Organen ihres Leibes vergleichbar. Die Verfassung des Zusammenlebens ist ökonomisch, d. h. gemeinschaftlich (kommunistisch).” Tönnies, Ferdinand. *Gemeinschaft und Gesellschaft*, book 1, § 17.

92 Gierke, Otto. *Das deutsche Genossenschaftsrecht*. Volume 3: *Die Staats- und Korporationslehre des Alterthums und des Mittelalters und ihre Aufnahme in Deutschland*. Berlin: Weidmannsche Buchhandlung, 1881.

93 Gierke, Otto. *Das deutsche Genossenschaftsrecht*. Volume 4. *Die Staats- und Korporationslehre der Neuzeit*. Berlin: Weidmannsche Buchhandlung, 1913, vii. „Die im Jahre 1888 erfolgte Veröffentlichung des Entwurfes eines bürgerlichen Gesetzbuches für das Deutsche Reich zwang mir den Kampf für die bedrohten germanischen Gedanken im künftigen deutschen Privatrecht auf.“

94 Tönnies, Ferdinand. *Gemeinschaft und Gesellschaft*, book 1, §1.

95 Jhering, Rudolph von. *Der Zweck im Recht*. Volume 1, 95.

even more remarkably was written without knowledge of Tönnies' work, we find that Gierke had fully anticipated Tönnies' dichotomy. Thus, in the foreword of *The Theory of Fellowship and German Jurisprudence*, written in Heidelberg in March, 1887, Gierke promises a "thorough presentation of law of communities (*Gemeinschaften*) extending beyond community (*Kommunion*) and society (*Societät*), and particularly the community of goods of marriage (*eheliche Gütergemeinschaft*) alongside its extensions and trading companies (*Handelsgesellschaft*) in all of its ramifications".⁹⁶ In individual law, Gierke promises to deliver a modern "*Gemeinschafts- und Gesellschaftstheorie*" (!) transcending the system of Roman law.⁹⁷ He observes that the community of goods in marriage (*eheliche Gütergemeinschaft*) is still expressed using the Latin *condominium* and trading companies (*Handelsgesellschaften*) are still described using the Latin term, *societas*.⁹⁸ And he specifies that the "community of goods, *Gütergemeinschaft*, is effected and its specificity determined by the association of its subjects by law."⁹⁹ Further on, Gierke writes that a trading company – *Handelsgesellschaft* – like all other legal entities – *Rechtsgemeinschaften* – is characterised "in contrast to other similar communities as society – *Gesellschaft* – by the law of persons, indeed as a union established by contract..."¹⁰⁰ The *Handelsgesellschaft*, "in contrast to communities (*Gemeinschaften*) established by the law of the family are *chosen (gewillkürte)* communities (*Gemeinschaften*), whose existence depends upon the creative strength of free will."¹⁰¹ Here, the proximity to Tönnies is all the more striking inasmuch as Gierke uses the word "*gewillkürt*" to express "choice": in Tönnies' *Gemeinschaft und Gesellschaft*, "*Willkür*" (in 1887), and later "*Kürwille*" (from 1912 onwards) is the "psychological" term Tönnies chose to define the form of volition that underlies *Gesellschaft*.¹⁰² Although Gierke did not share Tönnies' aim of establishing a dichotomy which unambiguously opposed *Gemeinschaft* and *Gesellschaft*, we can see that in his work of 1887, written entirely independently of Tönnies' *Gemeinschaft und Gesellschaft*, Gierke's reflections on distinctions between family law on the one hand

⁹⁶ Gierke, Otto. *Die Genossenschaftstheorie und die deutsche Rechtssprechung*. Reproduction of the 1887 Berlin edition. Hildesheim: Georg Olms, 1963, v. „Erst nachdem der Druck schon weit gediehen war, stellte sich der ganze Umfang der in Angriff genommenen Aufgabe heraus. Insbesondere war es die allmählich erkannte Nothwendigkeit, die Darstellung des Körperschaftsrechts durch die Einschlebung einer ausführlichen Darstellung des Rechtes der über Kommunion und Societät hinausschreitenden Gemeinschaften und namentlich der ehelichen Gütergemeinschaft nebst ihren Fortsetzungen und der Handelsgesellschaft in all ihren Verzweigungen zu ergänzen, wodurch der ursprüngliche Plan eine, wie der Augenschein lehrt, sehr beträchtliche Erweiterung erfuhr.“

⁹⁷ *Ibid*, 10.

⁹⁸ *Ibid*, 11.

⁹⁹ *Ibid*, 372: Gierke writes of the community of goods (*Gütergemeinschaft*): "durch die *personenrechtliche Verbundenheit ihrer Subjekte* bewirkt und in ihrer Eigenart bestimmt."

¹⁰⁰ *Ibid*, 436. „Die Handelsgesellschaft ... charakterisirt sich aber in Gegensatz zu anderen derartigen Gemeinschaften als eine personenrechtliche *Gesellschaft*, mithin als *vertragsmässige* Vereinigung, und im Gegensatz zu anderen personenrechtlichen Gesellschaften als eine *handelsrechtliche* Gesellschaft, mithin als vertragsmässige Vereinigung zu einer durch eine Firma ausgedrückten und dem Handelsrecht unterstellten kaufmännischen Einheit.“

¹⁰¹ *Ibid*, 468: „Im Gegensatz zu den familienrechtlichen Gemeinschaften handelt es sich hier um schlechthin *gewillkürte* Gemeinschaften, deren Bestand auf der *schöpferischen Kraft des freien Willens* beruht.“

¹⁰² Tönnies, Ferdinand. *Gemeinschaft und Gesellschaft*, book 2, § 10.

and commercial law on the other led him to make the logical distinction that was to serve as the basis of Tönnies' sociological dichotomy. This dichotomy was displaced from legal to sociological theory. It would be less correct however to speak of *influence* than of *affinity*. Although Tönnies goes so far as to distort quotes from Gierke of 1873 to reinforce the impression that his terminology corresponded fully to contemporary juridical usage, he would have found a striking corroboration of his theses in the work by Gierke of 1887, but the two authors were unfamiliar with the other's respective writings of 1887.

Genossenschaft, Gemeinschaft and economic, social and nationalist ideology in nineteenth-century German legal theory

The ideal of community was to be found readily in discussions of private law in Germany when Tönnies was at work on *Gemeinschaft und Gesellschaft*. As Tilman Reppen observed in his study of the science of jurisprudence and legal codification at the end of the nineteenth century, the notion of community was the “drop of socialist oil” even in the field of private law; Gierke did not consider humans as isolated individuals, but in their relations to those others with whom they formed a community.¹⁰³ Sibylle Hofer's study of private law discussions in the nineteenth century corroborates these findings. Contractual freedom was considered the central principle of law according to liberal doctrine, and the renewal in legal thinking at the end of the nineteenth century inaugurated by Gierke pointed to the need for social as opposed to uniquely individualist considerations.

Hofer points to the relationship between this discourse of community and a contemporary nationalist discourse, reflected in Gierke's championing of a Germanist as opposed to the Romance school of law. During the *Vormärz*, Beseler and Mittermaier had argued for restoring ancient German liberties, obscured by the absolutist regime, increasingly decried as of Roman (or French) origin; at a congregation of Germanist legal scholars in Lübeck in 1845, the jurist, Christ wrote that Germans, with their sense of inwardness, their family life and their conception of honouring women had to arrive at an altogether different form of law than the Romans.¹⁰⁴ An opposition was found between “a man's word, loyalty and simplicity” as the basis of German law and “formalism, the underlying tone of Roman law”. The Swiss jurist domiciled in Germany, Johann Caspar Bluntschli contrasted “personality and freedom of individuals” as characteristic of German law in contrast to the “absolute power” of Roman law.¹⁰⁵ In 1848, Theodor Mommsen saw Roman law less opposed to the “freedom of the individual” as to

¹⁰³ Reppen, Tilman. *Die soziale Aufgabe des Privatrechts. Eine Grundfrage in Wissenschaft und Kodifikation am Ende des 19. Jahrhunderts*. Tübingen, Mohr Siebeck 2001. See particularly his chapter on *Der Gemeinschaftsgedanke* p. 51-67.

¹⁰⁴ „Der Deutsche mit seiner Gemüthlichkeit und seiner Innerlichkeit im Familienleben und mit seinen Begriffen von Frauenehre musste überhaupt zu einer ganz andern Gestaltung seines Rechtes kommen, als der Römer.“ In Hofer, Sibylle. *Freiheit ohne Grenzen? Privatrechtstheoretische Diskussionen im 19. Jahrhundert*. Tübingen: Mohr Siebeck, 2001, p. 16.

¹⁰⁵ *Ibid*, p. 21.

“the principle of solidarity among citizens.”¹⁰⁶ An amalgamation was created between the notion of “freedom” and the “autonomy” enjoyed by various small towns (*Gemeinden*), or the territorial states (*Gliedstaaten*), or on the other hand the German nobility or the cooperatives (*Genossenschaften*).¹⁰⁷ Such distinctions between the spirit of Roman and Germanic law fed into C.A. Schmidt’s *Der prinzipielle Unterschied zwischen römischem und germanischem Recht* of 1853.¹⁰⁸ Although Tönnies does not cite these works, he will have been cognisant of this background to the defence by Gierke of German over Roman law. It is at any rate probable that Tönnies will have been familiar with Hegel’s characterisation of the “Roman principle” as lying in “the abstract personality... which becomes reality in private property”, contrasting with the Germanic peoples, who are the “bearers of the Christian principle”.¹⁰⁹

During the 1860s and 1870s, the two decades prior to Tönnies’ drafting of *Gemeinschaft und Gesellschaft*, Germanists had polemicized against Roman law, making reference to the Rodbertus’ *Zur Geschichte der agrarischen Entwicklung Roms unter den Kaisern oder die Adscriptitier, Inquilien und Colon* of 1864. The legal debate coincided with the combatting of the Free Trade school of economics in the *Kongress deutscher Volkswirte* by the historically oriented state socialists in the *Verein für Sozialpolitik*, of which Adolf Wagner, Tönnies’ mentor was a leading figure and which Tönnies was himself to join.¹¹⁰ Hofer points to four prominent reform issues in contemporary politics: freedom or enforced solidarity (*Gebundenheit*) of large land estates and agricultural work, freedom of commerce or authoritarian intervention in industry, free trade or protectionist tariffs, self-help (*Selbsthilfe*) or help from the state (*Staatshilfe*) in the social issues surrounding labourers.¹¹¹ It may be noted that Tönnies was on the side of the *Verein* in all of these issues, and that the conservative, Gierke, shared these concerns. These orientations were enhanced following the conservative and authoritarian response to the economic crisis of 1878, which caused many to turn away from liberalism and towards authoritarian state measures, which led to the setting up of the welfare state or *Sozialstaat*. In the debate on law, English liberal economic doctrine appeared to be an ally of Roman individualist legal doctrine, both of which were opposed by Germanists. Even the liberal utilitarian, Rudolf von Jhering relativized the principle of

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¹⁰⁶ “dem Prinzip der Solidarität der Bürger unter einander, nicht aber dem der Freiheit des Individuums widerstreitet.” Quoted *ibid*, p. 22.

¹⁰⁷ *Ibid*, p. 24.

¹⁰⁸ Cited *ibid*, p. 49.

¹⁰⁹ Hegel, Georg Friedrich Wilhelm. *Vorlesungen über die Philosophie der Geschichte*, Quoted in Hofer, p. 49. The original quote in Hegel’s work is: „Die Entwicklung besteht in der Reinigung der Innerlichkeit zur abstrakten Persönlichkeit, welche im Privateigentum sich die Realität gibt, und die spröden Personen können dann nur durch despotische Gewalt zusammengehalten werden.“ This description of the development of Roman society as reflected in its law might be a summary of the philosophy of history developed in Tönnies’ *Gemeinschaft und Gesellschaft*.

¹¹⁰ Bond, Niall. “Ferdinand Tönnies and academic ‘socialism’”, *History of the Human Sciences*, vo. 24, issue 3, July 2011, 23 – 46.

¹¹¹ *Ibid*, p. 78.

individual liberty in law, where it no longer corresponded to “practical need”.¹¹² As for the situation of labour, the conservative, Gierke noted that an economic personal cooperative – or *wirtschaftliche Personalgenossenschaft* – would help the “working classes” gain autonomy.¹¹³ Gierke expresses the idea of class struggle by observing that there is always an underlying tension between the principles of fellowship or cooperation (*Genossenschaft*) on the one hand, and authority (*Herrschaft*) on the other, in which one decides for all.¹¹⁴ To allow the worker to rise from his position of subjugation as a “subject” in an economic organisation¹¹⁵ vis-à-vis a modern entrepreneur, whose position Gierke likens to that of the Roman *pater familias* who disposed of slaves.¹¹⁶ The economic associations (*wirtschaftliche Associationen*) advocated by Gierke and Ferdinand Lassalle to liberate the workers were to become the preferred cause of Ferdinand Tönnies, who used the term “cooperatives” (*Genossenschaften*) as one of his primary political goals. Although Gierke in his conservative liberalism was opposed to state initiative and management, he was not opposed to “accompanying state aid” (*mitwirkende Staatshilfe*).¹¹⁷ Among Gierke’s legates in German political and legal thought are the liberal who influenced the framing of Germany’s Basic Law, Hugo Preuss, who declared that “property entails obligations” (*Eigentum verpflichtet*), and the Hegelian, Julius Binder, who linked freedom to duty.

German nationalism was championed by contemporary juridical Germanists, including Gierke, who used the expression *deutsch-frei* as a synonym for *genossenschaftlich* and declared that Roman private law was individualist and Germanic law was “*sozial*” or socially considerate in his speech, *Die soziale Aufgabe des Privatrechts (The social task of private law)*.¹¹⁸ Given the prevalence of nationalism in the discourse of “social law” observed by Suzanne Pfeiffer-Munz¹¹⁹, one remarkable feature of Ferdinand Tönnies’ social and legal theory is the absence of jingoism in *Gemeinschaft und Gesellschaft*. When wondering why Tönnies’ thought seems so free of the *Deutschtümelei*, the insistence upon a superior German typicality so characteristic of his precursors and his contemporaries, various hypotheses spring to mind, some biographical, others systemic. Tönnies’ origins in the Grand Duchy of Schleswig-Holstein, first under Danish and then under Prussian hegemony made him sceptical of the nation-state and of Germany as a grand power for which many of his contemporaries showed such clear yearnings. His political socialisation did not lead him to conceive of liberty as fundamentally opposed to the “social” or social commitment. But the absence of nationalist sentiment in *Gemeinschaft und Gesellschaft* notwithstanding Tönnies’ reception of Gierke at the apogee of Germanist jingoism

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¹¹² Jhering, *Zweck im Recht*, volume 1, p. 551, quoted in Hofer, p. 115.

¹¹³ Gierke, *Genossenschaftsrecht*, I, p. 1036.

¹¹⁴ Gierke, *Genossenschaftsrecht*, 1, p. 89, quoted Hofer, p. 117.

¹¹⁵ Gierke, *Genossenschaftswesen*, p. 788, cf. Gierke, *Genossenschaftsrecht* I, p. 1037.

¹¹⁶ Hofer, op. cit. 118 ff.

¹¹⁷ *Ibid*, p. 121.

¹¹⁸ *Ibid*, p. 143.

¹¹⁹ Pfeiffer-Munz, Suzanne. *Soziales Recht ist deutsches Recht*. Zürich: Schultheiss, 1979.

is above all due to Tönnies' desire to produce a non-partisan work of science which can be systematically applied to the development of all societies according to universally applicable academic standards. The result of Tönnies' ambition was to leave posterity a work of sociology the impact of which has spanned the globe.

Ferdinand Tönnies' Natural Law

The third book of Tönnies' *Gemeinschaft und Gesellschaft*, entitled "Sociological Foundations of Natural Law", lays out Tönnies' main ideas on law and justice, engaging primarily with legal thinkers, implicitly with Gierke¹²⁰ and explicitly with Savigny, whose *Das Obligationsrecht als Teil des heutigen römischen Rechts*¹²¹ he quotes twice¹²², Maine, also quoted twice¹²³, and Jhering¹²⁴. In fact, he devotes practically no space to any authors who were not juridical. Tönnies' aim is to reinstate natural law as an intellectual approach, thus combating the disdain in which the universalism of natural law had fallen since the rise of legal positivism in Germany. In so doing, he applies the question Schopenhauer had put to the study of normative philosophy or ethics – *what is the factual basis of ethical norms?*¹²⁵ – to the scientific analysis of legal orders. He arrives at the juxtaposition of the rationalist natural law tradition established by Hobbes and the historicist criticism applied by Savigny and his followers in a *system of parallel natural laws*. His own stand on natural law issues from his own normative passion and sense of justice. Natural law, he concludes, "as understood as the very idea of justice, is an eternal and inalienable possession of the human mind".¹²⁶ He notes this in the context of the injustice of the prevailing distribution of land, suggesting that he was going to offer a natural law that would countervail the liberal natural law that served as a justification of private property. The background was the debate on land consolidation (*Flurbereinigung*) subsequent to the privatisation of land in the eighteenth century¹²⁷; these measures and the ensuing social ills had remained controversial in Germany throughout much of the nineteenth century. Tönnies seems to argue that the privatisation of land in keeping with the movement towards individualism and privatisation provoked such moral indignation that new measures for collectivising the land would have to be taken on behalf of a natural law of community.

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¹²⁰ *Ibid*, book 3, §1 f.

¹²¹ Savigny, Friedrich Carl von. *Das Obligationsrecht als Teil des heutigen römischen Rechts*, 2 vol., Berlin: Veit, 1851-1853, I, 9.

¹²² Tönnies, Ferdinand, *Gemeinschaft und Gesellschaft*, book 3, §6 and §14.

¹²³ *Ibid*, book 3, §7 and §16.

¹²⁴ *Ibid*, book 3, §9.

¹²⁵ Bond, Niall "The grim probity of Arthur Schopenhauer and Ferdinand Tönnies." *Schopenhauer Jahrbuch*, 2011.

¹²⁶ Tönnies, Ferdinand. *Gemeinschaft und Gesellschaft*, book 3, §20, last line.

¹²⁷ Wolfgang Prange. *Die Anfänge der großen Agrarreformen in Schleswig-Holstein bis um 1771*. (Quellen und Forschungen zur Geschichte Schleswig-Holsteins 60) Neumünster: Wachholtz, 1971.

Tönnies seeks to do justice to the *liberal individualistic tradition* of natural law, which had put an end to serfdom and served as the basis for the peaceable pursuit by individuals of their happiness, while also doing justice to the *historicist critique* of commercial society, individualism and the parcelling out of the Commons which had been carried out in the wake of liberal natural law. His solution is to offer a set of parallel natural laws, one which corresponds to the underlying logic of modern commercial and primarily urban society, inspired by the quest for universal normative truths on behalf of individuals in modern natural law and by the codification and rationalisation of positive law, the other to the underlying logic of pre-modern largely agrarian community. While doing so, he is also implicitly taking a stand on behalf of Gierke's party which defended Germanic against Roman law in the Second Empire, suggesting that the former is more akin to community, the latter bearing greater affinities to society. For Tönnies suggests that the rise of rationalism in Roman codified law in the days of the Roman Empire and the moral decline of Rome were as inextricably linked as the rationalisation of modern law and concomitant moral decline. "Few seem to recognise the necessary relationship, the unity and the mutual influence of these two movements."¹²⁸ Those scholars who admired the Roman Empire and Roman law while deploring the concomitant decline of the family and morality were often unable to arrive at a free and objective understanding of the "physiology and pathology" of social life and to see these phenomena as necessarily interdependent.

Tönnies' book on natural law within *Gemeinschaft und Gesellschaft* is divided into three parts, a first part entitled "*Definitions and theses*", which establishes a balance between forms of law and perspectives on law corresponding respectively to Tönnies' understanding of community and society; a second part entitled "*The natural in law*", elaborating on the ways in which law can be conceived of as an emanation of nature; and a third part entitled "*Forms of associations of will, polity (Gemeinwesen) and the State*", in which he presents opposed understandings of the political entity, one based upon an organic, the other upon a mechanical conception of political entities. In the chapter, "*the protoplasm of law*" in the second part, he notes that ancient legal philosophy had raised the problem as to whether law was a *natural* product (*physéi*) or *artificial* product (*théséi* ou *nomô*).¹²⁹ His answer is that man's will, as demonstrated throughout the second book of his work, is alternatively natural or artificial, depending upon the level of reflection. Reflection or rationalisation increasingly allows man to liberate himself from or even oppose nature, while subjecting him to the laws of rationalisation, which harbour their own enthrallment. The law of *community* is a product of the human mind progressing from the general to the particular, as its own aim, even if it is in an apparent relationship with the organic whole that engenders it. Since solidarity among humans is natural and necessary, it is fair to speak of a "protoplasm of law" as a primitive and necessary product of living together. For, as Tönnies notes, even animals share certain laws, which are thus shared by all humanity. Tönnies relates the transformation of this protoplasm of law, which served as

¹²⁸ Tönnies, Ferdinand. *Gemeinschaft und Gesellschaft*, book 3, § 190.

¹²⁹ *Ibid*, book 3, §15.

the basis of life within the household, to modern, rational and codified law. With the rise of agriculture, the idea of property also evolved. Rising individualism entailed the equality of sons in their relationships with their father, of wives in their relationships with their husbands, and of domestics with regard to their employers. At the same time, remote and at base indifferent or even hostile merchants engaged in facile and courteous trade, enjoying the freedom to meet, the facility to do business and an equality among rational agents engaging in exchange was something which was then seen as altogether natural.¹³⁰ And with these social developments, the law of community was gradually being supplanted by the law of society. However, both the *organic* spontaneous ordering of relations among humans who all form part of a natural whole and the *mechanical* juxtaposition of individuals artificially pursuing their self-interest were to be found in existing orders: Tönnies refers to community and society as “empirical forms of culture” since they both could be shown to exist.¹³¹ Thus, it was justified to present both a natural law applicable to society, i.e. the natural law derived from modern liberal individualism, of which Jhering provided an example, and another natural law applicable to community, the bases of which are to be found in Gierke’s organic understanding of law.

Tönnies presents the ramifications of an opposition between the law of community and the law of society in his “definitions and theses”. Particular orders are fortuitous, he writes; the only necessity is there exist an order at all.¹³² He opens his definitions and theses with a discussion of the relationship of the parts to the whole, noting that all human individuals consist of parts, organs, and organs of cells, constituting a *unum per se* (implicitly in community). When applied to the concept of the *purpose*, Tönnies notes, clearly drawing inspiration from Jhering, every whole is its own purpose, i.e. a unity, maintaining itself through its own or external forces. This *organic* consideration of humans in their communities is based upon a consideration of humans not as abstractions but as the concrete incarnation of humanity, considered as a real and universal species, descending in numerous concentric circles via the race, the people and the tribe to the isolated individual. Such a whole can be represented realistically by the *natural association* of a real body living within a larger group, represented by a privileged group of leaders or even a single individual concentrating within himself the essence and will of all of the others.¹³³ The organic understanding of the social body of community Tönnies offers thus lends itself to the romanticizing of the relationship between all of its members and notably the representation by its head, prototypically the patriarch.

A contrasting approach is the consideration of the “person”, a “subject” and “creation” of “arbitrary will”, the unity of which is not organic, but *mechanical*, external and accidental (*unum per accidens*). The very concept of the person is a “fiction or (more tangibly) a

¹³⁰ *Ibid*, book 3, §15.

¹³¹ The original subtitle of *Gemeinschaft und Gesellschaft* in the 1887 edition was “*Der Socialismus und der Communismus als empirische Kulturformen.*”.

¹³² Tönnies, Ferdinand. *Gemeinschaft und Gesellschaft*,

¹³³ *Ibid*, book 3, §1.

construction of scientific thought intended to express the unity of a set of causes contributing to its existence".¹³⁴ In contrast to natural organic unity, this unity is contrived; we are reminded of Tönnies' definition of community as "unity in plurality" and of society as "plurality in unity".¹³⁵ The legal "person" or entity – the Latin word "person" meant *mask* – can act as a subject with a will provided it is capable of deliberation and decision taking. This is rendered possible in fictitious legal persons or entities through the "assembly", a grouping of peers, free to pursue their objectives, employing the means necessary to attain them completely independently.¹³⁶ An assembly is an "artificial person", dependent upon formal recognition by its members in the pursuit of an isolated and defined purpose.¹³⁷ To the extent that the very concept of a person is artificial and a fiction, the *person* is more likely to pursue the purposes of "arbitrary will" with a single mindedness not to be found in real human beings, who in reality are never exclusively concerned by their advantage. We are reminded of the single-mindedness with which general assemblies of corporations pursue profit.

This opposition between humans or *selves* living in an organic *whole* on the one hand, and the fictitious *person* represented by the *assembly* serves as an introduction to the opposition between family law, on the one hand, and contract theory or *Obligationenrecht* on the other.¹³⁸ While the *community* transcends the isolated wills of its members to express itself through a particular and lasting will in the seeming pursuit of its own *perpetuation*, an artificial person in *society* only comes about in order to achieve a *specific purpose* aimed at by the wills of the freely contracting parties. If objective law is defined as what is wanted by an association of wills, the law of society is a product of the absolute freedom of the contracting parties, whereas the law of community, based upon the metaphysical union of body and blood, proceeds from its own vital source. Consequently, Tönnies distinguishes between a system of law in which people act like natural members of a whole, and another system of law in which they only behave as entirely independent individuals according to their own arbitrary will. This distinction, according to Tönnies, serves as the basis of family law and contract law, respectively. Tönnies goes on to make practical applications, referring to the "spheres" of essential and arbitrary will, or community and society, respectively. That property which is wanted by real humans upon the basis of their immediate use, i.e. wanted ardently through their *essential wills* is termed *possession (Besitz)*; while that property which is merely used by individuals to reap greater returns and can readily be relinquished or yielded arbitrarily for a more lucrative investment by *arbitrary wills* is referred to as *assets (Vermögen)*.¹³⁹ Tönnies thus prepares a philosophical distinction that might serve as a basis for redistribution through law. Tönnies goes on to relate

¹³⁴ *Ibid*, book 3, §2.

¹³⁵ *Ibid*, book 1, § 1, *Thema*.

¹³⁶ *Ibid*, book 3, § 2, last line.

¹³⁷ *Ibid*, book 3, §3.

¹³⁸ *Ibid*, book 3, §4.

¹³⁹ *Ibid*, book 3, §5.

the distinction between the essential produce of organic activity and the product of arbitrary deliberation to work: in community, when a member works, the whole house works, whereas in society, each individual rents out his labour for individual compensation. Rewards in community are the result, rather than the purpose of the work, whereas in society no one works without the prospect of gain. Obligations or contracts can only be made upon such goods that are fungible and have pecuniary value, Tönnies notes, following Savigny's *Obligationenrecht*.¹⁴⁰ Thus, land which cannot be readily parceled for exchange is at the opposite end of the spectrum from money, the most fungible of commodities.¹⁴¹ Tönnies seems to be preparing the case that land as the possession of those who work the soil should belong to those who are closest to the soil.

Tönnies notes that the legal scholar, Sir Henry Maine had anticipated the distinction between relationships rooted in ancient hierarchy and relationships established through agreements in the pursuit of a given end in his work on *Ancient Law*, citing the famed distinction between contract and status: "The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account... Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the family. It is the Contract.... Thus the status of the Slave has disappeared – it has been superseded by the contractual relation of the servant to his master."¹⁴² Here, Tönnies characteristically adds "the worker to the entrepreneur" to Maine's quote to do justice to the entirety of employment relationships and to approach Maine to Marx' critique of capitalism.¹⁴³ Maine concludes, "If we then employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement from *Status* to *Contract*."¹⁴⁴

Whereas in community, authority and property belong to the whole, in society, authority and property are derived from the individual. The authority of community can be that of the father over children – *potestas* – implying an obligation to care – or relationships of partnership reflect power within a marriage – *manus*.¹⁴⁵ As for the character of working relationships and remuneration, Tönnies points out that remuneration for labour had fundamentally changed in the course of history. Jhering proceeded from the utilitarian supposition that humans had forever been rational animals, calculating their own propensity to achieve utility or happiness

¹⁴⁰ Savigny, Friedrich Carl von. *Das Obligationenrecht als Teil des heutigen römischen Rechts*, 2 vol., Berlin: Veit, 1851-1853, I, 9.

¹⁴¹ Tönnies, Ferdinand. *Gemeinschaft und Gesellschaft*, book 3, §6.

¹⁴² Maine, Henry James Summer. *Ancient Law*, 7th edition, John Murray, London, 1878, 168.

¹⁴³ Tönnies, Ferdinand. *Gemeinschaft und Gesellschaft*, book 3, §7.

¹⁴⁴ Maine, Henry James Summer. *Ancient Law*, 168. Quoted in Tönnies, *Gemeinschaft und Gesellschaft*, book 3, § 7, Harris edition, 192f.

¹⁴⁵ Tönnies, Ferdinand. *Gemeinschaft und Gesellschaft*, book 3, §8.

in a purely egotistical spirit. Tönnies charges Jhering with not having grasped the true nature of the term and the phenomenon, *Lohn*, wages or reward, which Jhering, in his argument that all actions committed by humans are *for* reward as a purpose, assumes is the starting point of all labour, suggesting that no labour is performed without an incentive. Tönnies argues to the contrary that in community, such reward (*Lohn*) was volunteered out of beneficence and was not based upon reciprocal calculation.¹⁴⁶ This difference marks the distinction between service (*Dienst*) and contract (*Kontrakt*)¹⁴⁷, as well as between *Verbindungen* – bonds between human beings – and *Bündnisse* – mere alliances aimed at achieving a single end.¹⁴⁸ Extreme opposed examples of associations to be found in community or society respectively are the family at the one extreme and the public limited company at the other, devoted exclusively to increasing its returns. Tönnies contrasts the *normative basis* of law as it is developed in community and society respectively. The “general and united will” in community is expressed in the individual as “faith” and in the group as “religion”, whereas in society it is expressed as “dogma” or “theory” in the individual, and as “public opinion” in the group.¹⁴⁹

“Natural law” in the societal sense – freedom, ease and equality in exchange – came to prevail, Tönnies wrote, “over the civil law of the Romans and of all political communities in ancient civilisation.”¹⁵⁰ Tönnies refers to the attempt made by the Romans of establishing a law “common to all nations”, following Maine’s description of Roman practice in *Ancient Law*: “Whenever a particular usage was seen to be practised by a large number of separate races in common, it was set down as part of the Law common to all Nations, or *Jus Gentium*”.¹⁵¹ Tönnies translates *jus gentium* – misleadingly, as Jose Harris observes – as “*das gemeine Recht*”, which translates literally as “common law.” This “*gemeines Recht*” led to dissolution, “thrown into the melting-pot as a chemical reagent designed to dissolve all the widely varying subject matter into the same basic elements.”¹⁵² With the recognition that everyone should be able to form relationships with one another at will, those laws that put the indigenous in a position of privilege over the foreigners appeared to be arbitrarily erected barriers, “*contrary* to the dictates of nature.”¹⁵³ Tönnies’ own position is that marital union can only be valid among members of the same nation when he writes that the Greek man can only live in a valid union with the Greek woman.¹⁵⁴ He concludes that the “rule of Rome over the *orbis terrarum*... brings all cities closer to one city, and gathers together all the shrewd, bargaining, prosperous individuals,

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¹⁴⁶ *Ibid*, book 3, §11.

¹⁴⁷ *Ibid*, book 3, §10.

¹⁴⁸ *Ibid*, book 3, § 13.

¹⁴⁹ *Ibid*, book 3, § 30.

¹⁵⁰ *Ibid*, book 3, §16, Harris edition, 212.

¹⁵¹ Maine, Henry James Sumner. *Ancient Law*, 49, quoted Tönnies, Ferdinand, *Gemeinschaft und Gesellschaft*, book 3, §16, Harris edition, 214.

¹⁵² Tönnies, Ferdinand, *Gemeinschaft und Gesellschaft*, book 3, §16, Harris edition, 213.

¹⁵³ *Ibid*, book 3, §17, Harris edition, 215.

¹⁵⁴ *Ibid*, book 3, §17, Harris edition, 216.

the entire ruling elite of the boundless empire, all haggling together in the Forum. It erases their differences and inequalities, gives them all the same outward appearance, the same language and form of expression, the same currency, the same culture, the same covetousness and the same curiosity.”¹⁵⁵ This process of the imposition of the societal understanding of natural law found “its ultimate and crowning expression in the imperial declaration which conferred Roman citizenship on all free men within the empire, granting them access to law-courts and freeing them from taxes.”¹⁵⁶

Polity and the State

Tönnies crowns his presentation of natural law with the distinction of public law he makes between two forms of *political entities*: *Gemeinwesen*, which we translate here as “polity”, on the one hand, and *Staat* or State on the other. Tönnies announces that since natural law can be understood in a dual sense, law can be understood either as an expression of common *essential* will or common *arbitrary* will.¹⁵⁷ The term, *Gemeinwesen* is particularly difficult to translate because of its cultural connotations in German. Those connotations emerged during the Romantic movement and suggest a natural and organic unity of members of the body politic; when Karl Marx used the term, it was in a utopian understanding. German authors notably used *Gemeinwesen* in opposition to the modern State, *Staat*, understood as a mechanical structure justified by natural right theorists in the wake of Thomas Hobbes and based upon mechanistic thought and complex sets of rules and statutes.

In his gradual and gentle introduction of the notion of *Gemeinwesen*, Tönnies commences with a presentation of the categories of custom (*Brauch*) and mores (*Sitte*), respectively analogous to habit and feeling.¹⁵⁸ Custom is rooted in the soil, upon whose *habits* norms are established among those who are not bound by the norms imposed by common *blood*.¹⁵⁹ Customary law is directed at the organisation of marriage, sharing, satisfying needs, organising the use of soil and family rights, regulating issues such as dowry and inheritance. Concord and custom serve as a basis for the social peace and the primitive harmony of the spirit of family.¹⁶⁰ The law of custom presents itself as *positive* law¹⁶¹, the sort of positive law, moreover, that Savigny implored be considered in contradistinction to arrogant natural law. Such positive law, Tönnies writes, is borne by the people in the form of *Gemeinwesen* or *polity* (or commonwealth), which Tönnies explains is the “organised people” analogous to an individual capable of entertaining a great number of possible relationships with its members and

¹⁵⁵ *Ibid*, book 3, §18, Harris edition, 217.

¹⁵⁶ *Ibid*, book 3, §19, Harris edition, 218.

¹⁵⁷ *Ibid*, book 3, § 21.

¹⁵⁸ *Ibid*, book 3, §21.

¹⁵⁹ *Ibid*, book 3, §22.

¹⁶⁰ *Ibid*, book 3, § 23.

¹⁶¹ *Ibid*, book 3, §24.

organs.¹⁶² Tönnies' *Gemeinwesen* recalls the organic theory of the *Gemeinwesen*, defined by Christoph Martin Wieland (1733-1813) as reposing upon the "basic law that each member work exclusively for the good of the indispensable affairs of the whole and be brought up to do so"¹⁶³, or by Johann Gottlieb Fichte (1762-1814) as the autarkical political order of "*Gemeinschaft*": "The pupils of this new education, although segregated from the common adult world, will undoubtedly live in a community for themselves, and thereby create a segregated and autarkical polity, ("*Gemeinwesen*"), which has its own perfectly defined constitution, as founded upon the nature of things and entirely required by reason."¹⁶⁴ The poetic polity or *Gemeinwesen* proffered by the Romantics as an alternative to the mechanical State was the inspiration for Tönnies' distinction.¹⁶⁵ Tönnies proceeds to distinguish between a *patriarchal* polity, founded upon the home or *household*, where common land ownership is *not yet* essential, the *provincial* polity, based upon the *village*, at which common land ownership is *essential*, and the town, in which common land ownership is *no longer* essential.¹⁶⁶ Tönnies presents a metaphor: the polity is to community as the animal is to the plant, defending and fighting off enemies on behalf of friends, giving rise to ducal and royal dignities¹⁶⁷, creating a caste of warriors in nobility.¹⁶⁸ Inspired by the political development of the Holy Roman Empire, Tönnies observes that each province tends to become a polity itself.¹⁶⁹

Tönnies introduces the distinction between the *polity* (*Gemeinwesen*) and the State (*Staat*) by referring to the distinction between a cooperative (*Genossenschaft*), based upon fellowship or understanding (*Verständnis*) on the one hand, and an association or club (*Verein*), based first upon a complex of contracts (*Kontrakten*) that constitute an agreement (*Vereinbarung*) or statute (*Statut*) on the other. *Gemeinwesen* is a *Genossenschaft* writ large. The former, "existing, common essential will" is typical of community, the latter, "constituted common arbitrary will", of society; and the former is the product of organic development, the latter a fabricated construction.¹⁷⁰ For Tönnies, the State, like all constituted associations, is a fictitious and artificial person which deals with all individuals as equals. Tönnies writes that it has a "*dual character*": On the one hand, the State is "the most general form of association in society" aimed at "protecting liberty and property" and ensuring the implementation of contracts. It

¹⁶² *Ibid*, book 3, §24.

¹⁶³ Wieland, Christoph Martin. "Aristipp und einige seiner Zeitgenossen," *Sämtliche Werke. Hamburger Stiftung zur Förderung von Wissenschaft und Kultur in Zusammenarbeit mit dem Wieland-Archiv*. Hamburg: Greno, 1984, vol. 24, 103–4.

¹⁶⁴ Fichte, Johann Gottlieb. "Reden an die deutsche Nation" (1808), *Werke*, Berlin: de Gruyter, 1971, vol. 7, 293–94.

¹⁶⁵ Bond, Niall. "Ferdinand Tönnies' Romanticism." *The European Legacy, ELEG*, vol. 16, number 4, July 2011, Routledge, 487-504.

¹⁶⁶ Tönnies, Ferdinand, *Gemeinschaft und Gesellschaft*, book 3, §24.

¹⁶⁷ *Ibid*, book 3, §25.

¹⁶⁸ *Ibid*, book 3, §26.

¹⁶⁹ *Ibid*, book 3, §27.

¹⁷⁰ *Ibid*, book 3, §28.

is by natural law *subordinate* to individuals as the representative is to the constituent. Here, civil society imposes its law upon the State, and the State depends upon society to derive the law which it interprets and executes. Society can oppose the extension of the State and its legislative power when the State exceeds its power, referring issues to an arbitrating judiciary power. However, on the other hand, the State is elsewhere deemed *identical to society itself*. In such a case, it allows for no law other than the law of the State. All jurisdiction depends upon the State, which applies its laws. Society can only express its general will, according to this interpretation, through the State. This idea is implemented in public administration, and its generalisation would become a possible form of socialism, conducted globally even a sort of World State. Tönnies notes that when the State claims its identity with society, it does so as a “capitalist institution”. We may surmise that his presentation of two understandings of the State squares with the distinction we had found in Radbruch between the individualist and super-individualist interpretations of the State. The individualist interpretation assumes the State’s dependency upon those individuals who inhabit it, the super-individualist interpretations accord the State, deemed to envelop society, a superior dignity. Tönnies’ argument appears to be that the latter is the final word of institutionalised capitalism, which declares the State and society identical in order to ensure the subordination of the individual.¹⁷¹ In 1887, Tönnies seems to see the danger of State authoritarianism as emanating from conservative capitalism. He writes in *The Renewal of Natural Law*:

“The entire issue of the dissolution of ownership of land and capital ownership revolves around the demands of the proletariat. These demands are often enough and with good reason asserted to be the requirements of *science*. But one would fall prey to a curious delusion if one were to believe that scientific conviction imparts to these people one mind, one courage and one will... I believe that there is a stronger element: the feeling of the unseemliness of their social situation as against the benefits of society that valid law must allow them to enjoy. Their yearnings call this feeling: *justice*.”¹⁷²

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The task of science, according to *The Renewal of Natural Law*, was to “join ranks with this class of society, so as to create the foundations of positive law for their rule – because it must become a ruling class.” This was Tönnies’ programme when he set out to write *Gemeinschaft und Gesellschaft*, which itself evolved before being finished seven years later. Although the existence of a common will of the proletariat is delusory, the affects of injustice call upon science to act as though it did. This fiction has been the source of considerable mischief in the course of the last century. As the bourgeois revolution that had been ideologically prepared by Locke had shown itself inadequate in meeting the needs of humanity, science in general and natural law in particular should prepare proletarian rule.

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¹⁷¹ *Ibid*, book 3, §29.

¹⁷² Tönnies, Ferdinand. “Die Erneuerung des Naturrechts.” Unpublished manuscript in Tönnies estate at State Library of Slesvig Holstein.

The renewal of natural law and National Socialism

We saw that notwithstanding the respect Tönnies enjoyed among various contemporary jurists, his proposal that a natural law of community be developed alongside that of society was simply ignored throughout his lifetime. It was not until the year of his death that his suggestion was taken up, albeit in a fashion that would have made him turn in his grave. One of the rare legal thinkers to adopt Tönnies' assumption that a natural law of community exists alongside that of society is Hans-Helmut Dietze, whose *Habilitation*, entitled *Naturrecht in der Gegenwart*, (Contemporary natural law) of 1936, inspired by Professor Ernst Wolgast, to whom Dietze attributes the community-society dichotomy, was aimed at justifying the National Socialist regime, and notably its racial doctrines. He writes "whoever analyses a social relationship from the vantage of the question – community or society? – will see the scales fall from his eyes. The theory is as natural and clear as that." He goes on to thank his comrades in the SA, with whom he learned the "essential law" of the new community orders through "storm attack service" ("*Sturmdienst*").¹⁷³ In the same work, Dietze writes that the "natural law of the German community prohibits marriage between people of German blood and Jews."¹⁷⁴ In his *Völkisch-politische Anthropologie*, another Nazi ideologue, Ernst Krieck, who was close to Alfred Rosenberg, raises the question as to whether the renaissance and reformation of the Germanic principles and conceptions of law corresponding to the German nature and racial being mean a return to *natural* law.¹⁷⁵ At the same time, the Nazi jurist Karl August Eckhardt was associating "*Gemeinschaft*" or community with "*Genossenschaft*" or fellowship in an authoritarian interpretation.

The manipulation of the notion of natural law by the Nazis has led the French jurist, Olivier Jouanjan to comment that by overruling positive law, the application of natural law that corresponds to the racial principles of the State created a legal "insecurity" which soon turned into physical insecurity. "It is in the name of a higher law that could always subvert the letter of laws that the greatest legal insecurity was justified. A mysterious non-written law was able to transform the letter of the law, however clear it was, from top to bottom, to such an extent that no one could know in advance which rule would be applied to his or her case." Thus, the Gestapo applied capital punishment to "correct" judicial rulings where it was felt that the natural (racial) basis of law had not been applied radically enough. "The idea of an informal

¹⁷³ „Wer ein soziales Verhältnis unter der Frage: Gemeinschaft oder Gesellschaft? betrachtet, dem ,fällt es wie Schuppen von den Augen', wie mir oft gesagt wurde. Derart natürlich und also anschaulich ist das Theorem. Weiterhin aber danke ich meinen S.A.-Kameraden, mit denen gemeinsam ich im Sturmdienst das Wesensgesetz einer wichtigen der neuen Gemeinschaftsordnungen kennen lernte. Aus dem Erlebnis der natürlichen und ungeschriebenen Ordnung unseres Sturmes vor allem schöpfte ich die Erkenntnis des heutigen Naturrechts überhaupt, in dem sich jede Gemeinschaft ursprünglich verfaßt weiß. [...] Würzburg, im Hartung 1936.“ Hans-Helmut Dietze, *Naturrecht der Gegenwart* (Habil.-Schrift Würzburg 1936), preface, Röhrscheid, Bonn, 1936, p. XII, X.

¹⁷⁴ *Ibid.*, 270.

¹⁷⁵ Krieck, Ernst. *Völkisch-politische Anthropologie*, volume 2, Armanen Verlag, Leipzig, 1937, p. 42.

law that was higher than written law justified the most complete insecurity.”¹⁷⁶ This argument is not that remote from Savigny’s original historicist critique of rational individualist natural law and the human rights that issued from it. The application of revolutionary natural law in the French revolution was argued to have also created greater legal insecurity than the positive law that had preceded it. Jouanjan’s discussion is a reminder that by proposing a natural law that competes with the natural law issuing from the individualist tradition of Enlightenment, Tönnies ran the risk of introducing a form of relativism into natural law which undermined the original intents behind natural law. However, it should be pointed out that Tönnies would have found the National Socialist renewal of natural law grotesque for various reasons. First and foremost, he utterly rejected National Socialism and took courageous stands against the regime. Secondly, as is clearly demonstrated in his positions against Social Darwinism, he found racial doctrines absurd. His favourite students were of Jewish origins, and of the three who did the most to spread his teaching, Eduard Jacoby, Werner Cahnman and Rudolf Heberle, the latter married Tönnies’ daughter and fathered Tönnies’ grandchildren. Tönnies anchored his natural law of community in the biological ties of the family, and would have found the charismatic basis of the charismatic all-male community glorified by Dietze following his SA experience and given theoretical underpinnings as the “*Bund*” by Herman Schmalenbach¹⁷⁷ suspect to say the least. Fabian Wittreck alludes to this perversion of the tradition of natural law by the Nazis to falsify Gustav Radbruch’s thesis from 1946 that legal positivism, with its assumption that the law as the law had to be complied with no matter how inhumane had served as the basis of National Socialism’s fundamental and systematic opposition to natural law; to the contrary, Wittreck argues that to achieve its criminal aims National Socialism had combatted legal positivism, occasionally but certainly not consistently reverting to a renewed natural law, neither the rationalist natural law of Enlightenment, nor the neo-scholastic Thomist natural law of Catholicism, but a natural law based upon the *völkisch* precepts of racism. Nazi justice was characterised by the application of insane laws, but equally by an insane lawlessness justified by a higher natural order occasionally referred to as “natural law”. Wittreck’s conclusion that neither legal positivism nor natural law bears any real guilt in the criminal transformation of law by the National Socialists¹⁷⁸ can be applied to Tönnies’ renewal of natural law: Tönnies rationally observed the existence of non-individualist organic motives for human existence which had to be taken into account for rational governance, and it is in this sense that he advocated a natural law of community to complement the natural law of society. The natural law of community proposed by various Nazis could be

¹⁷⁶ « c’est précisément au nom d’un droit supérieur qui pouvait toujours subvertir la lettre des lois que fut justifiée la plus grande insécurité juridique. Un mystérieux droit non écrit pouvait transformer de fond en comble la lettre, même claire, de la loi de sorte que nul ne pouvait plus savoir d’avance ce que serait la règle qui s’appliquerait à son cas... L’idée d’un droit informel, supérieur au droit écrit justifiait la plus complète insécurité.» ... Jouanjan, Olivier. Sur la philosophie du droit et de l’Etat du Front National. <http://nosophi.univ-paris1.fr/docs/Jouanjan.htm> , consulted on July 30, 2011.

¹⁷⁷ Schmalenbach, Hermann. “Die Kategorie des Bundes.“ *Die Dioskuren. Jahrbuch für Geisteswissenschaften*, 1922, 35-105.

¹⁷⁸ Wittreck, Fabian, *Nationalsozialistische Rechtslehre und Naturrecht. - Affinität und Aversion*. Mohr (Siebeck), Tübingen 2008.

refuted through the stupidity and the falsifiability of its racist assumptions and does not per se allow for any conclusions regarding Tönnies' attempts to develop a natural law of community.

If we seriously consider Tönnies' agenda, it is possible for the tradition of rational natural law to take account of the affective nature of social, communitarian ties which generate solidarity among humans, allowing them to surpass the individualistic instrumentalism and realise group or community ideals. At the time of the revolution, the desire of the revolutionaries to avoid the implication that humans might have bonds of solidarity led them to prefer the term “*fraternité*” over “solidarity”.¹⁷⁹ The emergence of the notion of solidarity and “*solidarisme*” in France somewhat after the appearance of *Gemeinschaft und Gesellschaft* at the turn of the century corroborates potential interest in the philosophical possibilities opened up by Tönnies in his Third Book of *Gemeinschaft und Gesellschaft*.

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Conclusion

We are convinced not just that the founding work of German sociology, Ferdinand Tönnies' *Gemeinschaft und Gesellschaft* can only be understood against the backdrop of preceding legal theory and the debates on methodology, land reform and distinctions between family and contract law from which that theory emerged; we are further convinced that jurisprudence and legal philosophy and theory may draw benefits from the logical and philosophical considerations to be found in that work. Tönnies advances a debate of legal theory of his day. He rejects the strict utilitarian teleology of Jhering and the assumption that human action can be exhaustively explained through purposive rationality. He accepts the organism analogy applied by the Romantics and by Gierke, arguing that *Gesellschaft* can be described through analogy to a mechanism and *Gemeinschaft* through analogy to an organism. The dispute into which both fell following Menger's announcement for political economy, incidentally as a response to Savigny, that humans act neither as a mechanical unit nor as an organism, may explain why Tönnies did not return to these arguments in later years. Still, subsequent sociology, such as that of Weber, recognised that there were other bases of human action than purposive rationality, and law is constantly called upon to take account of them.

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After 1887, Tönnies seems to have dropped the cause of a “renewal of natural law”, having found strictly no encouragement from legal theorists, who seem to have taken no account of the synthesis and the audacious innovation Tönnies was proposing. Instead, he grappled in the 1890s with the cult around Nietzsche and various social causes, such as the dockworkers strike in Hamburg, devoting himself increasingly to the cooperative movement – the *Genossenschaftsbewegung* in the course of the 1910s, and Germany's national cause during the First World War. The rebirth of natural law and natural right discourse seems to owe most to the rise of the totalitarian regimes of the 1930s. It is in Tönnies' honour that he again took

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¹⁷⁹ I express my gratitude to Professor Hugues Fulchiron for making this point in his opening comments at the Congress on Intergenerational Solidarity in Lyon in July, 2011.

a stand on behalf of rational Enlightenment at the apogee of its opponents' power during the National Socialist regime at the age of seventy-eight. The advent of the dictators occasioned Tönnies' return to the discourse and philosophers of Enlightenment.

As dated as many of Tönnies' considerations of 1887 may appear to be, and politically they seem to veer between revolutionary and extremely conservative consequences, they illuminate debates on a number of topics, such as the methodology of legal thought in the latter years of the nineteenth century, distinctions between law applied to relationships that are essential or contractual, and finally issues of recurring topicality. The issue as to the justified status of the legal entity when compared with real human beings is a subject of topical debate which Tönnies' philosophical discussions may help to illuminate, as is the question as to whether all considerations of natural law need be based upon purely rational individualist and consequently liberal assumptions or whether rights may not be formulated as appertaining collectively, as defended in Tönnies' natural law of the community. Tönnies' idea has been revived in the form of the commons – “a new way to express a very old idea—that some forms of wealth belong to all of us, and that these community resources must be actively protected and managed for the good of all.”¹⁸⁰ An exploration of Tönnies' sociological thought may yet prove fertile for a reasoned discussion of law.

¹⁸⁰ <http://onthecommons.org/about-commons>. Consulted on March 23, 2011.