

codification of German private law, work which was to last for more than twenty years.

In 1874 a *First Commission* was appointed and charged with producing a draft. It had eleven members, including six judges, three officials from the Ministry, and two professors (though no practising lawyer); the leading figures were probably GOTTLIEB PLANCK, a prominent judge also famous as a liberal politician, and BERNHARD WINDSCHEID, the most outstanding pandectist professor of his day. The Commission did its work in seclusion, without any contact with representatives of commerce or other social groups, and thirteen years later, in 1887, published a First Draft with supporting 'Motive'. A storm of criticism broke out. In addition to a host of suggestions for improvements on points of detail, there were attacks of principle. There was general objection to its unduly scholastic structure, largely attributable to the abstract conceptualism of the Pandectist School, as well as to the legal jargon in which it was drafted, accurate and precise at the cost of clarity and comprehensibility, and finally to its unduly complicated system of cross-referencing. The criticism of OTTO V. GIERKE made a great impression; in a very spirited attack he took exception to the Draft for bypassing many legal traditions of Germanic origin which were still vital among the German people, and for ousting the traditional ethical obligations and relationships of trust in family and society in favour of an extreme and impersonal individualism. The objections of ANTON MENDER, a Viennese academic socialist, were even more pointed, though not much notice was taken at the time; his book on *Das bürgerliche Recht und die besitzlosen Volksklassen* (1891) showed how the principle of freedom of contract could lead to the suppression of the socially weaker classes because the socially stronger could dictate the terms of contracts, and how the institutions of private property and succession guaranteed to the propertied classes, who alone benefited from them, the perpetuation of their power of controlling the means of production. These criticisms had no great practical effect. It is true that the *Second Commission* which was called into being in 1890 included a few laymen (one bank director, one chief forester, a professor of national economy, and no less than three of the landed gentry!), and that their labours were more public than those of the First Commission. But the alterations made by the Second Commission, necessary and insufficient though they were, were mainly to the *language* of the draft; in substance they added only a few 'drops of socialist oil' to the soulless individualism of the First Draft. The Second Draft with its 'Protokolle' was published in 1895, passed through the legislative process with a few relatively insubstantial alterations, and was adopted in the summer of 1896 by the Reichstag, only the Social Democrats voting against. At the Emperor's personal request, the date of entry into force was set for 1 Jan. 1900; the new century was to have a brilliant start.

II

The German Civil Code

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 COING, 'Erfahrungen mit einer bürgerlich-rechtlichen Kodifikation in Deutschland', *Zvgl RW* 81 (1982) 1.
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 —, 'Das Bürgerliche Gesetzbuch in der Gegenwart', in: *Fünfzigjahrfeier des deutschen Bürgerlichen Gesetzbuches* (ed. Nipperdey, 1950) 14 ff.
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 RABEL, 'Zum 25. Geburtstag des Bürgerlichen Gesetzbuchs', *DJZ* 26 (1921) 515, reprinted in: Rabel, *Gesammelte Aufsätze I* (ed. Leser, 1965) 389.
 —, 'The German and the Swiss Civil Codes', *10 La. L. Rev.* 265 (1950).
 F. SCHMIDT, 'The German Abstract Approach to Law. Comments on the System of the Bürgerliches Gesetzbuch', 1965 *Scand Stud. L.* 131.
 ANDREAS B. SCHWARZ, *Das schweizerische Zivilgesetzbuch in der ausländischen Rechtsentwicklung* (1950).
 —, 'Einflüsse deutscher Zivilistik im Auslande', in: *Symbolae friburgenses in honorem Ottonis Lenel* (1935) 425 ff.
 WIEACKER, *History of Private Law* (tr. Weir, 1995) 385 ff.

I

CODES of private law are stamped by the particular historical situation in which they are produced. Many codes consolidate the results of a recent reconstruction of society; their advantage is that the idea of man and the model of society which inspired them may be expected to remain valid for a considerable period. Other codes, by contrast, are created at a time of relative social and political stability; their spirit is often retrospective and reflective, seeking to maintain a situation favourable to the establishment. The German BGB is one of these rather conservative codes: RADBRUCH said that

it is more 'the cadence of the nineteenth than the upbeat to the twentieth century', and ZITELMANN observed (*DJZ* 1900, 3) that 'rather than boldly anticipating the future it prudently sums up the past'. The Code does indeed accurately reflect the society of BISMARCK's Empire. The chief role in the state at that time was played by a liberal *grande bourgeoisie* which had produced the imperial German nationstate by co-operating with the conservative powers of authoritarian Prussia. It was the day of a marked liberalism in economics, of the belief that the general good would spontaneously ensue from the interplay of economic forces provided that the state did not interfere. In the 1870s and 1880s, admittedly, some movements towards social justice, paternalistic though they were, led to the enactment of provisions to protect workmen and to the impressive statutory construction of a social insurance system. But in private law these progressive tendencies made no headway; private lawyers were so concerned with positivistic exegesis that they either did not see or deliberately blinded themselves to the great social challenges of the time which any onlooker with insight could easily see. For example, the draftsmen of the BGB seem to have taken no notice of the great social change which was occurring in Germany in the final decades of the nineteenth century; commerce and industry were becoming much more important economically than farming, and urban populations were expanding rapidly, especially with industrial workers. Yet for the BGB the typical citizen is not the small artisan or the factory worker but rather the moneyed entrepreneur, the landed proprietor, and the official, people who can be expected to have business experience and sound judgment, capable of succeeding in a bourgeois society with freedom of contract, freedom of establishment, and freedom of competition, and able to take steps to protect themselves from harm.

II

In language, method, structure, and concepts the BGB is the child of the deep, exact, and abstract learning of the German Pandectist School with all the advantages and disadvantages which that entails. Not for the BGB the simple common sense of the Austrian General Civil Code, the clear and popular style of the Swiss Code, or the sprung diction of the Code civil, instinct with the ideal of equality and freedom among citizens. The BGB is not addressed to the citizen at all, but rather to the professional lawyer; it deliberately eschews easy comprehensibility and waives all claims to educate its reader; instead of dealing with particular cases in a clear and concrete manner it adopts throughout an abstract conceptual language which the layman, and often enough the foreign lawyer as well, finds largely incomprehensible, but which the trained expert, after many years of familiarity, cannot help admiring for its precision and rigour of thought. The concepts used

by the draftsmen—'Verfügung', 'Vollmacht', 'Einwilligung', 'unverzüglich', 'in gutem Glauben', and many others—are always used in exactly the same sense. Sentence construction indicates where burden of proof lies, and repetitions are avoided by means of cross-references to amplifying sections. But the BGB has none of the elegance and rich compactness of the Code civil, none of its epigrammatic pith and suppressed passion; instead, in deference to accuracy, clarity, and completeness it often goes in for a prim Chancery style, complex syntax, and rather Gothic cumbrousness, even where it would have been easy enough to hit upon more lively and clearer words. The BGB, then, is no work of literature, but 'the legal calculating machine par excellence' (A. B. SCHWARZ, *Das schweiz. ZGB* (above p. 143) 8), 'legal filigree work of extraordinary precision' (ISELE (above p. 143) 6), 'perhaps the code of private law with the most precise and logical legal language of all time' (GMÜR (above p. 143) 28). In France, Austria, and Switzerland ordinary citizens may have a feeling of warm affection, of closeness to their Code; in Germany not even the lawyer does; instead, the undeniable technical merits of the BGB exact a cool, even grudging, admiration.

Following the divisions arrived at the Pandectist School, the BGB has five books, each devoted to a different subject matter. Two of these areas deal with questions related at the factual level: *Family Law* (Book IV) and the *Law of Succession* (Book V). The *Law of Property* (Book III) and the *Law of Obligations* (Book II) concern 'iura in rem' and 'iura in personam' respectively, a conceptual division derived from Roman law. Thus the *law of property* deals with 'real rights' which a person enjoys *in respect of a particular thing* and can assert against *all the world*, such as ownership, mortgage, usufruct, and pledge. In the *law of obligations*, on the other hand, we are concerned with 'personal' rights, which give one person a claim against another *particular person* on the basis of contract, unjustified enrichment, or tort. This division makes for clarity of thought but it has the consequence that rules governing a single transaction may be placed in widely separated parts of the Code, while provisions closer together may concern quite distinct factual problems. For example, it is obvious to the Anglo-American lawyer that the 'law of sale' should deal not only with the question whether and when the purchaser can demand delivery of the goods he has agreed to buy, but also with the question whether and when the ownership in those goods passes to him. In contrast, the BGB deals with the first of these questions in the law of obligations (§§ 433 ff.) and with the second a long way away in the law of property (§§ 929 ff.). The Anglo-American follows the view that all aspects of a unitary transaction should be dealt with in the same place in the system, while the German lawyer recognises that since ownership in things may pass not only by a reason of a sale but also by *gift* or *exchange*, it conduces to the orderly and rational disposition of the law to give unitary treatment to the passing of ownership as a whole.

Contrariwise, a common lawyer cannot see much affinity between the law of sale and the law of tort; even in the lecture-room he treats them as quite independent areas of law. For the BGB, a common characteristic of sale and tort is that they both afford one person a right 'to claim something' from another, so that both matters are dealt with in the law of obligations and still form part of the same course of instruction.

These four books on Obligations, Property, Family Law, and Succession are preceded by a book with the title 'General Part' (*Allgemeiner Teil*)—a legacy of the Pandectist School whose value to the BGB has been gravely doubted. The General Part does not contain general rules about the exercise of rights in society (see art. 2 ZGB) or basic principles of the construction of statutes, customary law, the powers of the judge, or burden of proof (see art. 1 ZGB, 1 ff. Codice civile), which would have been perfectly sensible and indeed desirable. Instead, the General Part sets out to expound certain basic institutions common to the whole of private law which the lawyer meets with in the law of obligations as well as the law of property, family law, and the law of succession. As GUSTAV BOEHMER said, these matters are 'factored out'. It was thought that this would make for greater logical compactness and internal economy in the Code and would avoid tiresome repetitions. The legal institutions which appear in the General Part were not invented by the draftsmen of the BGB; they were taken over from the learned pandectists of the nineteenth century who distilled them from particular cases by means of a long and wearisome process of increasing generalization. Here are to be found general provisions concerning 'natural persons' (capacity, majority, interdiction, domicile) and 'legal persons', ending with a detailed regulation of the law of juristic entities and foundations, not really suitable for a 'General' Part, followed by some definitions appertaining to the law of property, and finally general rules about 'legal acts' and prescription. Much of this material is in the General Part only because of an exaggerated passion for abstraction: the provisions on 'natural persons' (§§ 1 ff.) and on 'things' (§§ 90 ff.) could simply have been included in family law and property law respectively. The idea of 'legal act' is also far too abstract a notion. For the German scholar, 'legal act' includes not only the normal type of contract such as sale or lease and also the so-called 'real contract', namely that special agreement needed in German law to transfer a real right or create a real right over another's property, but it also includes the contract of family law, such as the contract of adoption or the agreement made by bride and bridegroom before the registrar at the marriage ceremony, and even includes the making of a will, the giving of notice to terminate or to rescind a contract, as well as, for example, the resolution to increase a company's capital made by a formal meeting of its shareholders. Although legal declarations of such diverse sources and significance fall within the concept of 'legal act', the BGB enacts rules about voidability on the grounds of error, deceit, or duress, about

agency, conditions, and so on, which it solemnly asserts to be applicable to *all* legal acts of whatever type. This extreme position has proved an inexhaustible source of controversy about the range of application of these general rules. In fact it was only the normal contracts which the draftsmen of §§ 116 ff. BGB had in mind, and so the provisions we have mentioned apply only to *this* type of legal act; it would therefore be preferable to have the rules on voidability on the ground of error, deceit, and duress, rules about agency and so on, contained in the *law of contract* and to direct the judge to apply these rules, if really applicable, to other kinds of legal declarations, deeds or relationships as well (as in art. 7 ZGB, 1324 Codice civile, § 876 ABGB). Of course it makes no difference for the practical operation of law where in the Code the concept of domicile is defined, where agency is regulated, or where one finds the rules which determine when a contract may be rescinded for fraud: the judge or lawyer who knows his way around the Code will find the applicable paragraphs (and also, through the commentaries, the relevant judicial decisions) regardless of the internal 'correctness' of their location in the system. But the abstract conceptual calculus of the General Part may still mislead the novice, and sometimes the practising lawyer as well, by suggesting that the correct solution of a living problem depends more on being able to classify it correctly than on seeing and understanding all its factual aspects.

For German discussions of the merits and demerits of the General Part, see WIEACKER (above p. 143) 486 ff.; A. B. SCHWARZ, *Das schweiz. ZGB* (above p. 143) 25 ff.; BOEHMER (above p. 143) 68 ff.; KOSCHAKER, *Europa und das römische Recht* (2nd edn., 1953) 279 ff.; all these contain further references. For the criticisms of a Swedish lawyer, see FOLKE SCHMIDT (above p. 143).

More than anything else, the general theories elaborated by the German pandectists and the General Part of the BGB which rests on their achievements have exercised a particular fascination on foreigners. We have already seen the effect of these doctrines on *Italian* law (see above Ch. 8 IV) and will shortly see their importance for *Austrian* and *Swiss* law. In *France* also the General Part has had a strong influence, principally through the mediation of RAYMOND SALEILLES, a pioneer of comparative law; his two influential works on the general law of obligations in the BGB and on the theory of the declaration of will induced the authors of French textbooks on private law to break away from the structure of the Code civil and present 'general theories' such as we find in equivalent German books. In England the teaching of the pandectists had very little effect. This is hardly surprising since only in a few areas did England grant admission to Roman institutions and methods of thought: English lawyers, if only to secure their professional monopoly by keeping the law obscure, blocked any attempts to rationalize the concepts and structure of their law as a whole. German teaching did have

a great influence on a few professors of law, especially JOHN AUSTIN (1790–1859), the acknowledged founder of 'jurisprudence', the legal discipline known in Germany as 'Allgemeine Rechtslehre'. After profound study of the Civil Law and its theoretical foundations he declared that an English jurist who can get to the Continent to study law 'escape[s] from the empire of chaos and darkness to a world that seems by comparison the region of order and light' (*Lectures on Jurisprudence* (5th edn., 1885) 58). Other famous Anglo-American jurists such as HOLLAND, SALMOND, ANSON, POLLOCK, and MAITLAND were also familiar with German pandectist teaching and used their knowledge of those methods in their textbooks on 'jurisprudence' and the 'law of contract'. MAITLAND's observation when the BGB came into force shows that these English lawyers recognized the intellectual merits of German pandectism; he said that it was 'the best code that the world has yet seen'; 'never, I should think, has so much first-rate brain power been put into an act of legislation'.

On the influences of German private legal scholarship abroad, see ANDREAS B. SCHWARZ, 'Einflüsse deutscher Zivilistik im Auslande' (above p. 143) 471, from which the citations from MAITLAND are taken.—The Civil Codes of *Brazil* and *Portugal* have followed the BGB in having a General Part, though with many deviations (see above p. 109, 115); the same is true of the *Greek* and *Japanese* Codes (see below Ch. II IV, Ch. 21 III), and the new Civil Code of the *Netherlands* also follows the German model to a limited extent (see above Ch. 8 II). During the work on the reform of the Code civil in France which started after the Second World War but has since been abandoned there was much discussion of the question whether the new code should have a 'livre préliminaire' containing at least the rules concerning the 'acte juridique'; see *Travaux de la Commission de réforme du Code civil* (1945/1946) 97 ff. and (1946/1947) 229 ff.; also *Travaux de l'Association Henri Capitant* I (1945) 73 ff. The outcome was an agreement to have a 'livre préliminaire' containing only the rules of conflicts of law in time and space; the doctrine of legal acts was to be contained in a special Book IV ('des actes et des faits juridiques'), to follow the first three books on Persons, Succession, and Property. See JULLIOT DE LA MORANDIÈRE in: *Avant-projet du Code civil* (ed. Ministère de la Justice, 1955) 25 ff.—The General Part was not adopted in *Switzerland* or *Italy*.—On the whole question see IONESCU, 'Le Problème de la partie introductive du Code civil', *Rev. int. dr. comp.* 19 (1967) 579.

III

Given that the BGB is impregnated with the legal values of bourgeois liberalism and is thus, to use an expression of RADBRUCH, 'more cadence of the nineteenth century than the upbeat of the twentieth', how has it been able, without fundamental revision, to survive the political, economic, and social crises and catastrophes of recent German history, including the period of total perversion of law under Hitler? Here we can make only a few observations about the development of the law of contract and delict, and of family law.

The *law of contract* in the BGB is unequivocally dominated by the bourgeois idea that contracting parties are formally free and equal. This idea expresses itself in the legal principles of freedom of contract and the duty to respect contracts: on the one hand, everyone—servant as well as master, consumer as well as manufacturer—is entitled to decide, freely and on his own responsibility, what contracts to enter and on what terms; on the other hand, contracts so formed must be adhered to in all cases, precisely because they arose from the free decision of reasonable contracting parties of sound judgment. Only a few marginal rules seek to protect those for whom the freedom of contract is nugatory, as being economically inferior to the other contracting party or dependent on him in some other way: thus contracts are void under §138 BGB if they are *contra bonos mores* or if one party has exploited the plight, inexperience, or lack of judgment of the other. In addition, contractual penalties may be modified by the court if they are unduly high (§343 BGB). Yet the tenant receives **virtually no special** protection, and the section on the contract of employment contains only a few rules requiring the 'person entitled to the services' to see to the safety of the place of work and to provide sick-pay within limits.

These few 'drops of oil' have proved to be quite inadequate. As the bourgeois state of the nineteenth century gave way to the social democracy of our own time, legislator and judge alike have had to qualify and limit the liberal principles of the law of contract wherever they gave one party power to threaten those basic conditions of decent life which the social state of today must guarantee to its citizens. Where, as often happened, the interlocking rules of the BGB afforded no sufficient basis on which the legal power of the individual might be modified in the interests of social morality, development had to take the form of creating important areas of law *outside* the Code. This happened in the law of competition and monopolies, in the law of housing, landlord and tenant, and agricultural holdings, but most of all in the law of employment. The draftsmen of the BGB simply did not see the great problem of how to regulate the situation of dependent labourers; indeed they adopted an anti-labour, almost a police-state position, since they deliberately gave trade unions the legal form of the 'corporation without legal personality' with the quite unsatisfactory consequence that trade unions could not even sue in their own name. (But see now BGHZ 42, 210; 50, 325.) Here the *legislator* stepped in and produced a fundamental change by means of provisions concerning security of employment, worker participation, minimum rates of pay, and so on, but the *courts* also without much statutory basis imposed on the employee a general duty of fidelity and on the employer a general duty of care for the safety and welfare of his employees and a duty to treat them equally, principles which are used today to solve the very great variety of concrete problems which may arise out of the contract of employment. Thus developed the great mass of *labour law*,

largely independent of the provisions of the BGB which were inadequate, incomplete, and old-fashioned even in 1900.

But this tendency to emphasize the mutuality of social responsibility has led to extremely significant legal developments even in the area of private contractual law. This 'moralization' of contractual relations was made possible by the famous 'general clause' of §242 BGB, which is still much relied on today. That clause simply says in quite general terms that everyone must perform his contract in the manner required by good faith (*Treu und Glauben*) in view of the general practice in commerce, yet the courts, left more or less in the lurch by the draftsmen, have had to rely on it in order to solve the extremely important economic and social problems which arose after the First World War with the collapse of the economy, inflation, and revaluation, and after the Second World War from the loss of East Germany and the change of currency. The rigorous individualism of the original contract law of the BGB has been qualified by means of devices developed by the courts, with names such as 'clausula rebus sic stantibus', 'collapse of the basis of the transaction' (see Ch. 37), 'improper exercise of rights', 'venire contra factum proprium' and 'Verwirkung' (forfeiture of right, especially by laches). The courts long used §242 BGB in order to control the content of General Conditions of Business: standard terms excluding or limiting one party's liability were invalidated as inconsistent with good faith if 'they are inequitable on a balancing of the interests of those who typically enter such transactions' (BGH NJW 1963, 99, 100; for the actual position today see Ch. 24 IV). Thus the general clause of §242 BGB has proved a splendid device for adapting the law of contract to the changed social and moral attitudes of society. HEDEMANN has called this 'the flight into the general clauses' and though the development was inevitable, it is true that it runs the risk of producing judicial decisions which are undirected, exuberant, and variable. Legal writers here have an important and responsible task, to put some order into the variety of cases so that they may be surveyed, learnt, and mastered, to reveal and criticize the value-judgments of the courts, and so to produce some degree of certainty in the law even where the general clauses and legal institutions they engender are being applied.

The *torr* law of BGB still rests on the principle of liability for fault. So far as compensation for accidents is concerned, this principle has been greatly weakened both by statute and by judicial decision. There are special statutes for important types of accidents which grant the victim compensation for his loss without his having to prove any fault in the defendant. These cover industrial accidents, railway accidents, traffic accidents, aircraft accidents, and accidents in electricity, gas, and nuclear power stations, as well as many others. But the general principle of liability for fault has also been altered in response to the growing need to protect large sections of the community from the distress and impoverishment which an accident may cause: here

the courts have greatly improved the victim's position in many ways—by vastly extending the duty of care, by treating the mere facts as evidence of fault, or even by openly reversing the burden of proof and sabotaging §831 BGB (see Ch. 41 IV)—to such a degree indeed that it is not easy in practice to distinguish between liability for fault and strict liability. This development was made very much easier because *insurance*, now much more widely used by the public and often required by law, provides a device for spreading individual losses among the community at large and so diminishes the chance that a defendant held liable in damages will be personally ruined. Apart from the case of accidents, the principle of fault still applies in full force to compensation for material and immaterial harms. The courts have gradually extended protection against intentional and negligent invasions to some interests which the draftsmen of the BGB did not see fit to protect: here one may mention interests of personality and the so-called 'right in an established and active trade or business' (see the full treatment in Ch. 40 II, 43 II).

In *family law* also the BGB originally bore the marks of the conservative and patriarchal age of the bourgeoisie. It was for the husband to make decisions during the marriage and it was the husband who exercised parental power. The rules of matrimonial property were devised on the basis of the prevailing practice among the classes of officers and officials that the spouses brought to the marriage an interest-bearing capital sum which was to be administered by the husband. The rules of divorce and illegitimacy were influenced by Christian morality. Accordingly, the BGB used to permit divorce only when the breakdown of the marriage was attributable to the fault or insanity of the defendant spouse. In comparison with legitimate children illegitimate children were deliberately disfavoured, for fear that extramarital adventures, which the law discounted, might otherwise be legalized and that immorality and undesirable concubinage might be encouraged. An illegitimate child was treated in law as unrelated to his father; instead he was fobbed off with a claim for maintenance whose amount depended on his *mother's* social position and which came to an end when he was 16.

Most of the work of bringing family law into line with altered social and economic circumstances has been done by the legislature, through the only really deep incisions which have been made in the text of the Code. The work of reform after the Second World War received a striking impetus from the Basic Law which provides that men and women should have equal rights and that all rules of private law inconsistent with this principle should cease to have effect on 31 March 1953 (see art. 3 par. 2, 117 GG). The legislature, however, allowed this date to go by without taking any action, so there was a lacuna in the law which had to be filled by the courts. Four years elapsed before the Law of Equal Rights of Man and Woman came into force in 1957; it made important alterations in private law, some of which had

been anticipated by judicial decision. Thus in *matrimonial property* law the statutory régime is to be one of separate property, with the modification that acquisitions by the spouses during the marriage are to be divided between them; on *divorce* the proceeds are to be divided equally between the spouses, while if the marriage is dissolved by *death*, the surviving spouse's statutory right of succession is proportionately increased (the so-called property regime of 'community of acquisition'). The draftsmen of the Law of Equal Rights decided to maintain the husband's priority in regard to the exercise of *parental power* (called *parental care* since 1979) and especially the right to be the *statutory representative* of his children, only to be told by the Federal Constitutional Court that such a provision was void as being inconsistent with Art. 3 GG (BVerfG NJW 1959, 1483). The legal position of *illegitimate children* has been decisively improved by a law which came into force in 1970, also pursuant to express constitutional mandate (see art. 6 par. 5 GG). The preconditions and consequences of *divorce* are now determined by a Law of 1976. This Law abandons the principle of fault and adopts the principle of breakdown of the marriage, for it declares that a marriage may be dissolved 'when it has collapsed' (§1565 BGB). The fault of the parties is in general equally irrelevant for the *consequences* of divorce, especially with regard to the validity and extent of a claim for maintenance. An important innovation deals with the adjustment of pension rights and rights to other benefits (*Versorgung*): if during the marriage one spouse has acquired greater rights of this sort than the other, the latter is to receive one half of the difference. This is done by creating new entitlements in the disadvantaged party (and proportionally diminishing those of the partner) carrying an independent personal claim against the body liable to provide the benefit or pension in the future. Furthermore, the law of adoption was reconstructed by an enactment in 1976, and the law of parental care by a Law of 1979. Indeed, there is hardly a paragraph in family law that is recognizably the same as in 1900.

Despite this, the structure of the BGB, taken by and large, looks very much the same as it did a century ago, for all the intervening changes in economic and social conditions since then. In part this is explained by the fact that areas of law which were developing very rapidly have assumed an independent existence outside the BGB but many areas of law, especially family law, have been greatly altered and modernized by intervening *legislation*. Still, the maintenance of the general structure of the BGB is really the work of the *courts*, whose performance in fitting the original text of the code to modern demands and keeping it socially vital has been as significant as it has often been misunderstood. In the result, whole parts of the BGB, just as of the Code civil, are covered by a heavy gloss of judicial decision, often to the point where a mere reading of the text will not disclose the law as it actually is. But while in France it was the gaps and technical

imperfections of the Code civil which gave the judges their opportunity to develop the law, the courts in Germany have relied above all on the general clauses of §§138, 157, 242, and 246 BGB. These general clauses have operated as a kind of safety valve, without which the rigid and precise terms of the BGB might have exploded under the pressure of social change.

But now we must ask whether this increasing divergence between the provisions of the Code and the rules of the actual law is still acceptable. Certain types of contract and heads of liability which are vital for the citizen receive no mention at all in the BGB; contracts of other types are hived off in special laws which can fall outside the purview of commentators and scholars; in many areas judge-made law has become so predominant that the foundation of codal texts could be withdrawn without any risk of having the edifice collapse. This is why the Ministry of Justice is considering redrafting the law of obligations in the BGB with a view to bringing it back into touch with modern legal practice. On this see the *Reports and Proposals for the Remoulding of the Law of Obligations* (three volumes ed. Federal Ministry of Justice, 1981-83). Meanwhile a Commission set up by the Ministry has made proposals to update the provisions in the BGB regarding liability for breach of contract, the rules relating to contracts of sale and services, and prescription. See the Final Report of the Commission for the Reform of the Law of Obligations (ed. Ministry of Justice, 1992).

After the collapse of the Soviet Union and the peaceful revolution in East Germany the internal border in Germany disappeared. The two legal systems clearly had to be harmonized. At the outset it was thought that this would take some time, but in order to facilitate the flow of capital from the West certain laws had to be introduced quite quickly, so many of the West German laws on the currency, the economy, and labour matters were brought into force in East Germany by the Treaty of 18 May 1990. Political developments occurred *apace*, however, and that very summer while the negotiations over accession were proceeding, the idea gained acceptance that West German law as a whole should be brought into force in the East. This was no foregone conclusion, for the East already had a modern code, the *Zivilgesetzbuch* of 1976. Despite its pieties about raising socialist morality and the need for the citizen to develop into a 'rounded socialist person', the ZGB contained many sensible rules couched in simple realistic language, especially in family law, but it soon emerged that it had one critical defect: because it dealt only with the relations between individuals on the one hand, and between individuals and state-owned enterprises on the other, it was not at all adapted to relations between organizations in a market economy. It was suggested that family and inheritance law could at least be retained for the time being, pending subsequent unification, but that would have meant having internal rules of conflict of laws to determine which law was to apply, so on 3 October 1990 the whole of West German law, including the BGB, was brought into force throughout the country by the treaty of unification of 31 August 1990. Many a citizen in the East felt that this was

rather brutal, and one can sympathize with the feeling, but there was really no practical or reasonable alternative.

IV

In the course of the nineteenth century the Historical School of Law and the Pandectist School exerted an influence which reached far beyond the boundaries of Germany and gave new life to legal theory in many European countries, especially Italy, France, and Austria, but even England as well. Thus when the BGB came into force in 1900 it could count on lively interest abroad because it expressly sought to give legislative form to the pandectist achievements in method and concept. The Code, indeed, was much admired on all sides, more perhaps abroad than in Germany at the time, but it really only influenced legal theory and legal doctrine; there was very little practical reception of the BGB, at any rate very much less than of the Code civil a century earlier. One reason for this was that its sophisticated structure and abstract conceptualist language was seen abroad as a typical product of German scholarship which, despite its technical merits, was not likely to take root very easily in alien legal soil, but the critical fact was that the more developed states of the world outside the Common Law family had already equipped themselves with civil codes during the nineteenth century and there was therefore no widespread need to import foreign models.

Even so, in the years following its enactment, the BGB had a great influence in quite widespread regions of the world, though political changes since then have diminished or extinguished it. As to the *Far East*, *Siam* and *China* introduced civil codes between 1925 and 1935 which, apart from family and inheritance law, were largely based on German law (see ARMINJON/NOLDE/WOLFF, *Traité de droit comparé* II 427 ff. (1950)), *Japan* having already adopted most of the BGB and the Code of Civil Procedure at the turn of the century (see below Ch. 21).—*Eastern and South-eastern Europe* used to be another area of influence. After gaining a degree of independence in the Austro-Hungarian Empire *Hungary* repealed the Austrian General Civil Code in 1861, and its courts began to rely increasingly on German law in addition to old Hungarian customary law and principles of Austrian law: German law also provided a series of statutes on commercial law and civil procedure. Several drafts for a Hungarian Civil Code were based on German law, and though they never actually became law, the courts treated them rather as if they had (see HEYMANN, *Das ungarische Privatrecht und der Rechtsausgleich mit Ungarn* (1917); EÖRSI, 'Richterrecht und Gesetzesrecht in Ungarn', *RabelsZ* 30 (1966) 117). The *Baltic* states were also clearly influenced by German law. *Czechoslovakia* and *Yugoslavia* came into existence in 1918; the principal influence was originally Austrian law, but subsequent legislation and drafts of private law statutes paid considerable attention to German law (see KORKISCH, 'Das Privatrecht Ost-Mitteleuropas in rechtsvergleichender Sicht', *RabelsZ* 23 (1958) 201). *Poland* and *Romania*, in contrast, then belonged to the Romanistic legal family (see CONSTANTINESCU, *Travaux de la Semaine internationale de droit* 1950

(1954) 664). In deference to the changed political climate after the Second World War almost all these countries introduced new civil codes (see Ch. 24 IV of the second edition). Nowadays their legal systems need to be thoroughly overhauled. It would perhaps have been best if the countries of Eastern Europe could have agreed on a common plan and enacted at least a common law of obligations modelled on that of Western Europe, but that was never a real possibility. There has been a resurgence of national pride, and each country must go its own way. Sometimes they look to German and Swiss law, sometimes to the new Civil Code of the Netherlands, sometimes to the Vienna Convention on International Sales, and occasionally, in commercial and economic matters, to the Common Law.

The Pandectist School and the BGB had a particular influence on the Civil Code of *Greece*. Plans for a Greek civil code go back to the War of Liberation of 1821–27 in which the Greek people won their independence from Turkish domination. For a long time it remained doubtful what the model for such a code should be. Since the Greek Liberation Movement was essentially based on the ideas which led to the French Revolution, many voices were raised in favour of a reception of the Code civil but others wanted to codify the law of Roman Byzantium which, primarily in the form of a private collection of statutes of HARMENOPOULOS from 1345, had been the law of Greece during the nearly four centuries of Turkish domination. This was the view which won through in the course of the nineteenth century. During this period Greek lawyers increasingly ignored the alterations and additions which Byzantine Emperors had made to the Corpus Iuris of JUSTINIAN and concentrated instead on the Roman law of the Corpus Iuris as elaborated by the German pandectists. Contact with Germany was established in 1835 when the Wittelsbachs came to the Greek throne in the person of Prince OTTO, for he brought with him a group of legal advisers, including v. MAURER, a professor from Munich, whose contribution to procedural and penal legislation constituted a valuable form of 'legal aid to developing countries'. As a result of these contacts with Germany, the second half of the nineteenth century saw *German* professors teaching pandectist law at Athens University and writing textbooks alongside *Greek* professors trained in Germany; this meant that the Roman law familiar to the Greeks by reason of their history came in practice to take the form it had received at the hands of the pandectists. After many abortive attempts, preparatory work on a Civil Code for Greece entered a decisive phase in 1930, by which time all were agreed to look first to the *German* Code as being in closest contact with Roman law. The Greek Civil code was promulgated in 1940 but involvement in the Second World War and German occupation of the country delayed its entry into force until 23 February 1946.

In its structure the Greek Civil Code reflects the BGB. The General Part precedes books on the Law of Obligations, the Law of Property, Family Law, and the Law of Succession. In content also the Greek Civil Code relies

predominantly on the German Code, but it always takes account of subsequent German legal practice which filled gaps in the BGB or developed its rules. At the same time there are many echoes of Swiss law, and to a lesser extent rules have also been taken from the French Code civil and the Italian Code. In linguistic and conceptual style the Code steers a middle course between the German and the Swiss Codes, avoiding the sophisticated interfusion and the abstract conceptualist language of the BGB without aiming for the simple and popular tone characteristic of the Swiss Code.

On the origins and content of the Greek Civil Code, see MACRIS, 'Die Grundgedanken für die Ausarbeitung des Entwurfs eines griechischen Zivilgesetzbuchs', *RabelsZ* 9 (1935) 586; GOGOS, 'Das griechische Bürgerliche Gesetzbuch vom 15.3.1940', *AcP* 149 (1944) 78; ZEPOS, 'The New Greek Civil Code of 1946', 28 *J. Comp. Leg.* 56 (1946); ZEPOS, 'Der Einfluß des schweizerischen Privatrechts auf das griechische Zivilgesetzbuch', *StZ* 1960, 358; MARIDAKIS, 'La Tradition européenne et le Code civil hellénique', in: *L'Europa e il diritto romano, Studi in memoria di Paolo Koschaker* II (1954) 157; PLAGIANAKOS, *Die Entstehung des griechischen Zivilgesetzbuchs* (1963); SONTIS, 'Das griechische Zivilgesetzbuch im Rahmen der Privatrechtsgeschichte der Neuzeit', *SavZ/Rom.* 78 (1961) 355.