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Searching for the best legal interpretation and the ideal formula of a state – Otto von Gierke and corporatism as the basis for a new federal state

Introductory remarks

The German Confederation (*Deutscher Bund*) established by the Congress of Vienna in 1815 was the successor of the Holy Roman Empire (dissolved in 1806, and temporarily replaced with the Confederation of the Rhine 1806–1813). The liberal ideas of the French Revolution gained public support in Germany, and the result of such perception was the Spring of Nations of 1848. The unification of Germany into the German Empire (*Deutsches Reich*) was proclaimed in 1871. On the one hand, due to the lack of the national German codification and the significance of Roman law, in the most part of the 19th century, German legal scholarship concentrated on the medieval Roman law. On the other hand, the introduction of the Napoleonic Code in France created in Germany a similar desire for a civil code, which would systematize and unify various and heterogeneous laws. In the 1870s, several committees were formed in order to draft a bill that was to become a civil law codification for the entire country. It is significant that the German code *Bürgerliches Gesetzbuch* of 1896, unlike the French codes, was developed during the period of social stability and gradual political consolidation.

The purpose of the article is to present the German historical school of law and the contribution of Otto von Gierke (one of its leaders) to the discourse on the legal method and interpretation of legal acts, and his idea of corporatism as the basis for the development of a federal state. The main questions the present study strives to answer are: What were the main scientific positions on the method of interpretation of law which appeared in German jurisprudence

in the 19th and the first half of the 20th century? What was the attitude of Otto von Gierke towards the sources of patterns for legislation? What was his perception of the formula of a state? Unfortunately, since the modest scope of this article does not allow for an exhaustive treatment of the subject, the present work is contributory in nature. In this particular study the historic-descriptive method of theoretical analysis and legal methods (including formal legal method) were applied to address the research questions and to reach the conclusions.

The work consists of two parts. At first, there is a short exposition of the main representatives of the German historical school and the other currents, and methodological quest in the German legal science developed in the 19th and the first half of the 20th century. The views strayed from the mainstream considerations as well as the internal ideological disputes have been omitted. The scientific output of Otto von Gierke is taken into closer consideration in the second part of the article. To include a comparative aspect in the present studies, some chosen positions regarding the method of interpretation of law that have appeared in the contemporary French legal thought are presented.

German jurisprudence in the 19th and the first half of the 20th century – methodological quest and the attitude towards codification

The “natural law” movement during the Age of Enlightenment provoked scientific discourse on the method of interpretation of law in the European legal thought. The 19th century might be perceived as a new era of national codes in the civil law countries. German and French legal scholarship developed different methodological approaches referring to some social, historical, and multidimensional foundations and aspects of law. German historical school reached its peak in the 19th century. The theories that emphasized the significance of tradition, its timeless wisdom, and the approaches oriented towards the law set in a social context constituted its main profile. After some time, two factions in this direction might have been observed. The first one – Romanistic current – concentrated on the research on the sources of Roman law. The pandectist approach and its methodological foundations were formed by the Romanistic section of historical school. Scholars gathered around that direction, relying on the sources of Roman law, developed a number of theoretical and practical structures, which became important to the civil law. They were guided by the assumptions of rationalism, legal naturalism, and liberalism¹.

¹ It is interesting to consider that the school was inspired by the ideas of Romanticism. It turned negatively toward the Romanticist concept of natural law. The origins of the movement

The representatives of the second faction of the historical school – Germanistic – referred to the German tribal law and the medieval *Volksrecht*².

The treatise *Of the Vocation of Our Age for legislation and Jurisprudence* of Friedrich Karl von Savigny published in 1814 might be perceived the cornerstone of the historical school³. The intellectual foundations of this work were disputes present in the German legal discourse, in which the possibilities and legitimacy of the codification of the applicable law were considered. Savigny attacked the views of Anton Friedrich Justus Thibaut (1772–1840), who as a supporter of the Enlightenment rational concepts of law was in favor of issuing a uniform civil code for Germany⁴. Arguing against this solution, Savigny referred to revolutionary France⁵. He also exposed the imperfections of legal norms created ad hoc, without referring to the achievements of previous generations. In his opinion, any legislator is authorized to impose the law by arbitrary decisions.

In the perception of Savigny, law develops parallel with a nation, and the nation's consciousness is the fountainhead of law. Therefore, the legislator does not create law but he discovers it as a special historical fact, and then he grants

were linked with the activities of Gustav von Hugo (1764–1844). In his address published in the beginning of the 19th century, he expressed the key message of the historical school concerning the custom based lawmaking process. Cf. A. Zięba, *Profesor Józefat Zielonacki (1818–1884) na tle XIX-wiecznej pandektystyki*, "Zeszyty Prawnicze UKSW" 2007, vol. 7(1), pp. 77–78. For more see: P. Becchi, *German Legal Science: The Crisis of Natural Law Theory, the Historicisms, and "Conceptual Jurisprudence"*, [in:] E. Pattaro et al. (eds.), *A Treatise of Legal Philosophy and General Jurisprudence. Vol. 9. A History of the Philosophy of Law in the Civil Law World, 1600–1900*, Springer Netherlands 2009, pp. 186–188.

² Karl Friedrich Eichhorn (1781–1854) was one of the most influential representatives of the school. Cf. K. Sójka-Zielińska, *W sprawie oceny romanistycznego i germanistycznego kierunku szkoły historycznej w niemieckiej nauce praw I połowy XIX wieku*, "Czasopismo Prawno-Historyczne" 1959, vol. 11(2), p. 131. About the development of the German historical school, see more in, e.g. N. Levine, *The German Historical School of Law and the Origins of Historical Materialism*, "Journal of the History of Ideas" 1987, vol. 38, no. 3, pp. 431–451, <https://doi.org/10.2307/2709761>; N. Foster, S. Sule, *German Legal Systems and Laws*, New York 2010, pp. 27–28. About the later perception of the historical current, see M. Stolleis, *A History of Public Law in Germany 1914–1945*, trans. T. Dunlap, Oxford 2004, pp. 3–4. See also subject related Polish literature, e.g. G. Jędrejek, *Teoria prawa niemieckiej szkoły historyczno-prawnej w świetle piśmiennictwa polskiego z XIX wieku*, "Czasy Nowożytne" 2000, vol. 8(9), pp. 175–194; idem, *Kilka uwag dotyczących oceny niemieckiej szkoły historyczno-prawnej w polskiej nauce prawa*, "Czasy Nowożytne" 2001, vol. 11(12), pp. 59–74; A. Ogurek, B. Olszewski, *Dzieje niemieckiej myśli prawa cywilnego do końca XIX w.*, [in:] M. Sadowski, P. Szymaniec (eds.), *Acta Erasmiiana II. Prace z myśli polityczno-prawnej oraz prawa publicznego*, Wrocław 2012, pp. 93–106; A. Tabak, *Nauka prawa w ujęciu niemieckiej szkoły historycznej*, "Biuletyn SAWP KUL" 2018, vol. 13(15/2), pp. 291–300.

³ For more about Savigny, see K. Opalek, *Wstęp. Savigny i szkoła historyczna w prawoznawstwie*, [in:] F.K. von Savigny, *O powołaniu naszych czasów do ustawodawstwa i nauki prawa*, trans. K. Opalek, Warszawa 1964, p. 44.

⁴ F.C. Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, trans. A. Hayward, New York 2002, pp. 176–181; M. Szczaniecki, *Powszechna historia państwa i prawa*, Warszawa 1995, p. 414.

⁵ F.C. Savigny, op. cit., pp. 71, 73.

the shape of a legal norm to it⁶. Savigny recognizes that all values that are essential and necessary for the operation of law were shaped by the past and inevitably determined the present, but in his approach there is some space for theoretical and systematic considerations. An indication of the fact that Savigny was not only confined in historicism it was his research on the “pure” Roman law, disregarding its historical process of changes during its reception. The scholar indicated some universal and perfect forms of the legal technique in Roman law, timeless and legal wisdom in the Roman jurisprudence⁷. Therefore, we can recognize here the attempt to combine the historical and philosophical perspectives. They both constitute the proper context of considerations regarding the freedom of a private person in connection with the requirements of social life. Civil law is the reflection of the specificity of these relationships, and in order to avoid randomness and arbitrariness, this law should be of a deliberate and systemic structure. It should be based on the principles appropriate to a given social organization⁸.

Savigny wished to create the system of Roman law adjusted to the contemporary time relaying on historical foundations. The title of his most mature work was *System des heutigen römischen Rechts* (1840). Therefore, Savigny’s intent was to rid the Roman law of the influences of the *ius commune* (which was applied by the *Reichskammergericht*), and the *usus modernus pandectarum* applied later. Why did Roman law become the reference point for Savigny and his followers? Since the end of the 15th century, the *Reichskammergericht* treated Roman law (as *ius commune*) as a subsidiary basis for adjudication⁹. On the one hand, Savigny wanted to get rid of the *ius com-*

⁶ On the ontological level, the law is an organic integrity, which, on the one hand, manifests itself in the consciousness of the nation, and, on the other hand, it functions as a science practiced by lawyers. The relationship between the law and the life of a nation Savigny calls the political element of law. At the same time, specialized and scientific development of law appears as a technical element. The law is created at first by the customs and beliefs of the nation, and then by jurisprudence, not by arbitrary acts of the legislator. See more in *ibidem*, pp. 61–68.

⁷ Cf. K. Sójka-Zielińska, *op. cit.*, p. 135. In the legal methods applied by Roman jurists Savigny identified almost geometrical model that excluded arbitrariness and ensured stability – H. Harata, *An interim report on Savigny’s methodology and his founding of a modern historical jurisprudence*, 2013, p. 130, [www.sllr.j.u-tokyo.ac.jp/08/papers/v08part08\(harata\).pdf](http://www.sllr.j.u-tokyo.ac.jp/08/papers/v08part08(harata).pdf) (accessed: 15.03.2022). For more about Savigny’s methodology, see F.C. Savigny, *op. cit.*, pp. 43–52; J. Rückert, *Friedrich Carl von Savigny, the Legal Method, and the Modernity of Law*, “*Juridica International*” 2006, vol. 11, pp. 56–67.

⁸ Savigny analyzes the unique nature of international private law. Its main sources are treaties that should take into account the pluralistic structure of a global society that is made up of many independent legal orders. The individual freedom should be also taken here into consideration. In this area, Savigny recognizes the benefits of intellectual solidarity among legal researchers, who in their inquiries go beyond national systems and consider historical jurisprudence – H. Harata, *op. cit.*, pp. 126, 142; F.C. Savigny, *op. cit.*, pp. 53–60.

⁹ Christoph-Eric Mecke is of the opinion that we may observe such significance of Roman law in Germany due to the fact that German judges (trained in Roman law) were often unaware of the local law, and contrary to the rule of *iura novit curia*, they did not need to know that law if the

mune elements, but on the other hand, the long presence of Roman law in the jurisprudence of German courts made it possible to claim that it was essentially in line with the spirit of the nation. Moreover, he considered Roman law to be a modern law. He was of the opinion that only such law, which is examined by the means of historical method, may lay the foundations for the modern legislation adjusted to the needs of the 19th century¹⁰. Savigny did not act against the idea of codification as such, in the matter of fact, he argued that it was 'too early' to create the national German code. In his opinion, lawyers need a historical consciousness, going beyond the simple compilation of facts, and striving for a deeper, comprehensive understanding of the normative foundations of a given era. Methodical consciousness is also necessary because it allows to organize the concepts and rules, and organic relationships between them within a structural integrity.

The views of Savigny influenced the Romanistic faction of the historical school, which concentrated on systematics and quest for some inspirations in Roman law in order to create some modern civil law structures¹¹. In the research of Savigny, historicism based on formal and dogmatic methods was more flexible and open¹². This direction was developed by Georg Friedrich Puchta (1798–1846). He systematized the theoretical achievements of the school, and worked out the division of law from the perspective of its creation. He proposed the division of law: common/custom (developed directly in the consciousness of the nation, and manifesting itself in its habits); statutory (developed as a result of the legally announced will of the legislative authority); and legal (resulting from the study of law)¹³. Unlike the Roman jurisprudence, he adopted the axiomatic-deductive method, according to which the logical deduction is able to lead out a coherent and complete scientific system from the

existence of such law was not proven by a party during the course of a trial. See: idem, *Dyskurs o zasadniczej myśli prawniczej w „Themis Polskiej” (1828–1830) na tle programu historycznej szkoły prawa w Niemczech*, "Forum Prawnicze" 2018, vol. 3(47), p. 25.

¹⁰ H. Coing, *German "Pandektistik" in its Relationship to the Former "Ius Comune"*, "The American Journal of Comparative Law" 1989, vol. 37, pp. 13–14.

¹¹ This approach differed from the traditional Roman jurisprudence because the systematics did not arouse its interest. Cf. K. Kupiszewski, *Prawo rzymskie a współczesność*, Warszawa 1988, p. 76; W. Wołodkiewicz, *Czy prawo rzymskie przestało istnieć?*, Kraków 2003, p. 392.

¹² For more about Savigny, see, e.g. K.A. Mollnau, *The Contributions of Savigny to the Theory of Legislation*, "The American Journal of Comparative Law" 1989, vol. 37, pp. 81–93; M. Reimann, *The Historical School against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, "The American Journal of Comparative Law" 1989, vol. 37, pp. 95–119; S. Riesenfeld, *The Influence of German Legal Theory on American Law: The Heritage of Savigny and His Disciples*, "The American Journal of Comparative Law" 1989, vol. 37, pp. 1–7, <https://doi.org/10.2307/840437>; J.E. Toews, *The Immanent Genesis and Transcendent Goal of Law: Savigny, Stahl, and the Ideology of Christian German State*, "The American Journal of Comparative Law" 1989, vol. 37, pp. 139–169; J. Rückert, *The Unrecognized Legacy; Savigny's Influence on German Jurisprudence after 1900*, "The American Journal of Comparative Law" 1989, vol. 37, pp. 121–137.

¹³ H. Olszewski, *Historia doktryn politycznych i praunych*, Warszawa 1982, p. 242.

first sentences, axioms, and basic concepts by means of logical deduction¹⁴. Concepts become here the foundation of which each detailed case can be resolved using the logical rules. This method initiated the *Begriffsjurisprudenz*¹⁵, and although this trend was treated as the *bête noire* of jurisprudence, it triggered the evolution of the 19th century legal thought from the autonomous construction of laws and legal institutions to the analysis of social reality; from the logical existence of law to direct it towards the pursuit of individual and social interests; from the freedom of human will to the natural laws of causally determined reality; from the a priori approaches to law to the fact based explanations; from the ideal of justice to social eudaemonism; from conceptual jurisprudence to sociological approaches to the aims of law¹⁶.

It should be taken into consideration that the discourse of the German pandectists was not purely theoretical. Their dispute over the legal method strove to find the reliable (not arbitrary) interpretation of law, which would defend the autonomy of the judiciary against the influence of clergy, representatives of any social interest groups, or monarchs. The scholars transformed the unstructured and ambiguous sources of Roman law. They tried to find their application to the economic conditions of the time. Therefore, under the influence of such research, the 19th century jurisprudence laid the important foundations for the modern civil law. In fact, it formulated some new, characteristic for capitalism, concepts and legal institutions (capital partnership, securities transactions, conveyance, *culpa in contrahendo*, or new forms of credit operations)¹⁷.

The growing significance of the empirical method and development of historical and comparative research led to the evolution of the concepts where

¹⁴ Roman jurisprudence applied the casuistic-inductive method striving to discursive quest for the best solution for the actual state or case. Cf. K. Kupiszewski, op. cit., pp. 75–76, 78.

¹⁵ The term was applied in 1884 r. by Rudolf von Ihering to indicate the way of reasoning connected with contemporary pandectism, towards which Ihering took a negative standpoint. In his perception, pandectism was detached from reality, and it overestimated the dogmatic method. He also criticized its logical and epistemological puerility. It is indicated in the subject related literature that the complete definition of the term of *Begriffsjurisprudenz* has not been worked out yet. It is opinion that *Begriffsjurisprudenz* is a German term, which describes speculative orientation in adjudication which relays on three promises: a particular law is able to create a logically organized system of notions (a pyramid of notions); there are no loopholes in law; new legal notions may be deduced from the superior terms, which are created inductively by the method of inversion. Cf. H. Hofmann, *From Jhering to Radbruch: On the Logic of Traditional Legal Concepts to the Social theories of Law to the Renewal of Legal Idealism*, [in:] E. Pattaro et al. (eds.), op. cit., p. 301; H.P. Haferkamp, *Begriffsjurisprudenz / Jurisprudence of Concepts. Enzyklopädie zur Rechtsphilosophie*, IVR (Deutsche Sektion) und Deutsche Gesellschaft für Philosophie, 2011, p. 1, <http://www.enzyklopaedie-rechtsphilosophie.net/inhaltsverzeichnis/19-beitraege/105-jurisprudence-of-concepts.pdf> (accessed: 1.02.2022). Georg Friedricha Puchta indicated above, Bernard Windscheid (1817–1892) – one of the creators of the German BGB Code and the proponent of a legal formal-dogmatic method, and also Karl Bergbohm (1849–1927) might be mentioned here as scholars associated with the German *Begriffsjurisprudenz*. Cf. A. Zięba, op. cit., p. 91.

¹⁶ H. Hofmann, op. cit., p. 301.

¹⁷ H.P. Haferkamp, op. cit., pp. 6–7.

the law was deeply set in a sociological context. Although, the proponents of the free research on law (*Freirechtsschule*) have appeared, the current was not so influential like other contemporary positions¹⁸. The representatives of the school were, e.g. Eugen Ehrlich (1862–1922), Herman Kantorowicz (1877–1940), and Ernst Fuchs (1859–1929). In opposition to the predominant formalism and positivism in jurisprudence and legislation, the representatives of the free law school argued that the stiffness of the formal-dogmatic approach ought to be complemented with the more free assessment of judges. Therefore, they formed a dynamic and reformative movement.

At the same time, French scholars abandoned the vision of the perfect legislation. François Gény (1861–1959) postulated the constant quest for the new solutions in jurisprudence (*libre recherche scientifique*). Raymond Saleilles (1855–1912) postulated the need for the evolutionary perspective in legal science¹⁹. The approach of a German scientist – Rudolf Stammler (1856–1938) – was in some respects similar to the approaches of the mentioned French legal scholars. From their perspective, law appears as the manifestation of a complex and dynamic social life, in which some universal criteria are needed in order to legitimate the law.

Rudolf von Ihering (1818–1892) developed the research on the purpose of a legal rule²⁰. Ihering argued that passive and trustful waiting for the effect of the national cognition of law is a mistake. Although, the law always reflects the hierarchy of dominant values in a society, this hierarchy is prone to changes, which consequently lead to the friction between various reasons and interests that the law should mitigate. In this perspective, it should be assumed that the purpose of law is peace, and by struggle this goal might be achieved²¹. The struggle is carried on at the national, governmental, state, and individual levels.

¹⁸ J.E. Herget, S. Wallace, *The German Free Law Movement as the Source of American Legal Realism*, “Virginia Law Review” 1987, vol. 73(2), pp. 401–406. See also A.S. Foulkes, *On the German Free Law School (Freirechtsschule)*, “Archiv für Rechts und Sozialphilosophie” 1969, vol. 55(3), pp. 367–417.

¹⁹ For more about contemporary French discourse over the legal method, see E. Sokalska, M. Augustyniak, *Legal Interpretation from the Perspective of French Jurisprudence: From Positivist Exegesis to Free Scientific Research*, “Review of European and Comparative Law” 2022, vol. 48, nr 1, pp. 175–189, <https://doi.org/10.31743/recl.12394>; E. Sokalska, M. Augustyniak, *French Jurisprudence and the Dispute over the Method: From Positivist Exegesis to Free Scientific Research*, “Przegląd Prawa Konstytucyjnego” 2021, vol. 64(6), pp. 223–235, <https://doi.org/10.15804/ppk.2021.06.18>

²⁰ It is significant that Rudolf von Ihering developed some basis for what will be later called *jurisprudence of interests*. In fact, Philip Heck (1858–1943) was the person who created the *Intressenjurisprudenz*. See more in C.E. Mecke, *Rudolf von Ihering’s struggle for law – the rejection of alternative forms of dispute resolution?*, “Transformacja Prawa Prywatnego” 2017, vol. 4, pp. 37–47.

²¹ R. Ihering, *The Struggle for Law*, trans. J.J. Lalor, Chicago 1915, p. 12. The original *Der Kampf ums Recht* was published in Vienna in 1872.

Legal interpretation, corporatism, and a federal state from the perspective of Otto von Gierke

Otto Friedrich von Gierke is an almost forgotten scholar whose juristic and political writing seems to be important in the context of history of legal systematism. He was born in Szczecin (Poland, then set in Prussia). He worked and lived in Berlin from 1887 to 1921²². The scholar was a representative of the Germanistic section of the historical school of jurisprudence strongly referring to some historical national elements in the German law. In 1889, Gierke presented his public lectures *The soziale Aufgabe des Privatrechts*²³. Then, he was perceived a leading critique of the codification of private law in the German Civil Code. He was the author of a three-volume commentary on German private law and a four-volume treatise *Genossenschaftsrecht*, which was in fact a history of the German law of associations and corporations, in which Geirke “sought to re-narrate the social life of law, back to the day when Tacitus recorded the habits of German tribes”²⁴. It is significant that “this project led him to reject a reimposition of supposed ‘Roman law’ stricture by codification”²⁵. The research work of Gierke focuses on legal dogma. The social role of civil law influenced his perception of a legal method²⁶. Gierke argues that law should be unified and animated by social groups, and it should pursue a common goal. Therefore, the Roman abstractions of legal institutions, e.g., property, contract, etc., are not needed²⁷.

It is interesting to consider that the research of Otto von Gierke is valuable in the context of the 20th century perception of corporatism. Presently, corporatism advocates the organization of society by corporate groups of people (e.g. military, agricultural, scientific, labour) on the basis of their common interests. Corporatist ideas have been expressed in ancient societies and later, also in the 20th century. In 1850s, corporatism was the response to the rise of classical liberalism and Marxism. Instead of class conflict, it advocated closer cooperation between the classes. In the interwar period, corporatism as an

²² For more about his biography and literary oeuvre, see K. Dąbrowski, *Otto von Gierke i teoria spółdzielczości*, [in:] M. Safiański (ed.), *Wybrane historyczne i współczesne aspekty rozwoju banków spółdzielczych w Polsce*, Włocławek 2012, pp. 11–13.

²³ English version: O. von Gierke, *The Social Role of Private Law (1889)*, trans. E. McGaughey, “German Law Journal” 2016, vol. 19(4) (orig. pub. in German 1889), pp. 1017–1116.

²⁴ E. McGaughey, *Introduction*, [in:] *The Social Role of Private Law (1889)*. O. von Gierke, trans. E. McGaughey, “German Law Journal” 2016, vol. 19(4), p. 1018.

²⁵ *Ibidem*.

²⁶ About Gierke’s methodology, see J. Javier, L. Jacoiste, *La Responsabilidad civil extracontractual. Una exploración jurisprudencial y de filosofía jurídica*, Centro de Estudios Ramón Areces, Madrid 2010, p. 358.

²⁷ O. von Gierke, *op. cit.*, pp. 2018–2019.

idea of self-governance based on trade unions (workers and employers) enjoyed considerable popularity in response to the Great Depression²⁸.

In the opinion of Jakub Zapala, the writing of Georg Hegel became the foundations of the works of Gierke. The Hegelian triad way of reasoning concept of society, the idea of a state, and the concept of civil society were crucial. Hegel saw the difference between the civil society and the state. For him, families, as natural associations, formed some opposition to the central state power, and individuality should be devoted to the common good. Gierke applied “the Hegelian triad, finding the endless cycle of synthesis and change in history of societies”²⁹.

It should be taken into account that Otto von Gierke might have been also inspired by the works of Johannes Althusius (1557–1638), a German Calvinist, who emerged out of the reformist tradition, and built a political philosophy based on the covenant theology³⁰. It is argued that the concept of federalism that grew out of a particular view of the polity of Althusius had pervasive direct and indirect impact on European and American political orders. The influence of his political thought was gradually diminishing by the end of the 17th century, but during the 20th century, it regained its renaissance. The Germanistic faction of the historical school criticized the law of nature, and argued that the source of law was consciousness that developed parallel with a nation, its culture, and language. The current treated law as a historic phenomenon, which should be examined with particular reference to the nation’s life. Gierke revealed the political thought of Althusius, and pointed out its importance to the Western political theory³¹.

In Germany, the debate on the nature of legal personality of groups gathered momentum and focus after 1868, “with the criticism mounted by Gierke on Savigny’s theory of corporate personality and with the intensifying controversies over the drafting of the German Civil Code”³². For Gierke, legal entity

²⁸ Cf. J. Zapala, *Otto von Gierke and His Early Corporatism*, “Przegląd Humanistyczny” 2020, vol. 3, p. 8, <https://doi.org/10.31338/2657-599X.ph.2020-3.1>.

²⁹ *Ibidem*, p. 9.

³⁰ O. von Gierke, *The Development of Political Theory* (reprint 1939), Routledge 2018, *passim*. The influence of Althusius on Otto von Gierke in Polish subject related literature is emphasized by Karol Dąbrowski. Cf. *idem*, *op. cit.*, p. 14.

³¹ O. von Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien. Zugleich ein Beitrag zur Geschichte der Rechtssystematik*, Breslau 1880, *passim*. For more about the political ideas of Alshusius and his influence on the modern theories of federalism, see T.O. Hueglin, *Early Modern Concepts for a Late Modern World. Althusius on Community and Federalism*, Toronto 1999, pp. 2–3; T.O. Hueglin, *Johannes Althusius: Medieval Constitutionalist or Modern Federalist?*, “Publius: The Journal of Federalism” 1979, vol. 9(4), pp. 9–41; E. Sokalska, *Legal and Political Dimensions of American Federalism: Development and Interpretations*, Olsztyn 2018, pp. 78–88.

³² R. Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business*, “Washington and Lee Law Review” 2006, vol. 63, p. 1422. About the scientific discourse concerning *BGB*

is not a fictitious creation or the effect of a pure agreement that depends on legal rules³³. It is a real social entity. From his perspective, legal entity is shaped like a biological organism, with its own will and legal personality. Legal personality of a state (and any other legal entity) has much in common with community³⁴.

Gierke saw the nature of citizenship in community. In this context, a state was also a kind of community. An association used to be a natural state of humanity. The highest form of associations is a corporation. Associations and central government are in a continuous conflict, and their domination depends on the areas. The development of a state is strongly connected with fluctuation in this conflict. In this context, the 20th century will be the age of associations, and corporations will be fundamental in order to build a federal state³⁵. Therefore, federalism is seen by Gierke from the perspective of a corporate body or entity³⁶. It is interesting to consider that the political thought of Otto von Gierke is sometimes associated with the articulation of the modern-states system. The scholar is perceived the originator of the influential way of organizing international society³⁷.

It is interesting to consider that progressive American scholars were interested in Gierke's ideas, despite the fact that "Gierke himself was a conservative and a nationalist. He believed in Germanness, the *Reich*, and after its ruin, the *Deutschnationale Volkspartei*"³⁸. In the words of Ron Harris, "the German-Gierkian real entity theory of the corporation journeyed through several contexts and discourses in Britain and the United States"³⁹. Gierke's perception of the state was taken up enthusiastically by some American scholars who emphasized the role of the professional lawyer over the legislature in developing the law⁴⁰.

In 1900, Frederic W. Maitland (the University of Cambridge) published a partial translation of Gierke's work (*Political theories of the Middle Ages*). The work was read by Oliver Wendell Holmes, Jr., an eminent American jurist

between Germanists and Romanists, see M. Kopczyński, *Otto von Gierke o sporze między nurtami germańskim i romańskim w niemieckiej historycznej szkole prawa*, "Studia Prawno-Ekonomiczne" 2018, vol. 107, p. 57, <https://doi.org/10.26485/SPE/2018/107/3>.

³³ M. Kopczyński, *Reforma ustroju miast pruskich barona vom und zum Steina z 19 listopada 1808 roku w organicystycznej interpretacji Ottona von Gierke*, "Studia Prawno-Ekonomiczne" 2015, vol. 96, p. 103.

³⁴ Cf. K. Dąbrowski, op. cit., p. 14.

³⁵ O. von Gierke, *The Development of Political...*, pp. 108–121.

³⁶ Cf. J. Zapala, op. cit., p. 7.

³⁷ B. Holland, *Natural Law and the Theory of International Society: Otto von Gierke and the Three Traditions of International Society*, "Journal of International Political Theory" April 2012, vol. 8, p. 48, <https://doi.org/10.3366/jipt.2012.0025>.

³⁸ E. McGaughey, op. cit., p. 1018.

³⁹ R. Harris, op. cit., p. 1422.

⁴⁰ Ibidem, p. 1423.

and legal scholar, the associate justice of the U.S. Supreme Court (1902–1932), widely cited, and one of the most influential common law judges in American history. Ewan Mc Gaughey argues that Holmes shared an *organic relation* theory that he owed it to Gierke, because in one of his dissenting opinions he argued that “a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views”⁴¹. Therefore, it can be observed that to some extent Gierke’s political and legal writing influenced the Supreme Court of the United States rulings. In 1909, he was awarded a doctorate at Harvard.

Concluding remarks

In the 19th and the first half of the 20th century, the evolution of scientific positions on the method of interpretation of law in German jurisprudence might be observed. At the beginning of the 19th century, due to the lack of the national German codification and the significance of Roman law, German legal scholarship still concentrated on the Medieval Roman law. German Roman law studies have served as an essential conduit for the development of a coherent approach to the reform and codification of civil law. Pandectists, a new school of Roman law, dominated German legal science in the field of private law. Friedrich Carl von Savigny put forward the idea of a multidimensional approach to legal research. In the 1850s, the *Begriffsjurisprudenz* has dominated the German legal science. It was the German version of positivism. In the last decades of the 19th century, several new tendencies have been initiated. From the perspective of Rudolf Stammler, law appears as the manifestation of a complex and dynamic social life. Rudolf von Ihering developed the approach based on the research on the purpose of a legal rule. Nevertheless, the traditional Roman law scholarship in Germany was very influential up to the turn of the 19th century.

The intense juristic studies of both Roman and native German law aimed at the complete statement of law – rules, principles, concepts. The civil code *Bürgerliches Gesetzbuch* of 1896 was the outcome of German Roman law studies. The application of civil the code of Germany *BGB* unveiled some its flaws. Therefore, the legal theorists have noticed some opportunities in the judges’ interpretations of legal acts, e.g. the application of some general clauses (good faith, morality, etc.) in order to complement the specific rules of the legal act.

Active at the turn of the 19th and 20th centuries, Otto von Gierke argues that law should be unified and animated by social groups, and it should pur-

⁴¹ E. McGaughey, op. cit., p. 1021.

sue a common goal. In this context, the Roman abstract legal institutions are not useful. He presents an elaborate concept of corporatism based on legal, historical, and social studies. According to the scholar, corporations will be crucial to the development of a modern federal state. Gierke's ideas enjoyed considerable popularity with American progressivists.

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Summary

Searching for the best legal interpretation and the ideal formula of a state – Otto von Gierke and corporatism as the basis for a new federal state

Keywords: legal theory, legal method, German jurisprudence, codification, federalism.

The introduction of the Napoleonic Code in France created in Germany a similar desire for a civil code, which would systematize and unify the various and heterogeneous laws. The German code *Bürgerliches Gesetzbuch* (1896) was developed during the period of social stability and gradual political consolidation. The purpose of the article is to present the main scientific positions on the method of interpretation of law which appeared in German jurisprudence in the 19th and the first half of the 20th century, particularly the historical

school of law and the contribution of Otto von Gierke (one of its leaders) to the discourse on the legal method and interpretation of legal acts, and his idea of corporatism. In Germany, it was approved that some patterns for legislation might be drawn from the experience of previous generations, from history, particularly (in the perception of Friedrich Carl von Savigny) from the Roman law. Active at the turn of the 19th and 20th centuries, Otto von Gierke presented an elaborate concept of corporatism based on legal, historical, and social studies. According to the scholar, corporations will be crucial to the development of a modern federal state. Gierke's ideas enjoyed considerable popularity with American progressivists.

Streszczenie

W poszukiwaniu najlepszej interpretacji prawnej i idealnej formuły państwa – Otto von Gierke i korporacjonizm jako podstawa nowego państwa federalnego

Słowa kluczowe: teoria prawa, metoda prawnicza, jurysprudencja niemiecka, kodyfikacja, federalizm.

Wprowadzenie we Francji kodeksu Napoleona spowodowało chęć skodyfikowania prawa cywilnego również na terenie Rzeszy. Kodyfikacja taka usystematyzowałaby i ujednoliciła różnorodny system prawny. Niemiecki kodeks *Bürgerliches Gesetzbuch* (1896) powstał w okresie stabilizacji społecznej i stopniowej konsolidacji politycznej. Celem niniejszego artykułu jest przegląd głównych stanowisk naukowych dotyczących metody wykładni prawa, jakie pojawiły się w niemieckiej doktrynie w XIX i pierwszej połowie XX w., zwłaszcza w tzw. szkole historycznej. Otto von Gierke (jeden z jej liderów) i jego wkład do dyskursu dotyczącego metody prawnej i interpretacji aktów prawnych oraz idea korporacjonizmu stanowią przedmiot szerszych badań. W Niemczech uznano, że pewne wzorce ustawodawstwa można czerpać z doświadczeń poprzednich pokoleń, z historii, a w szczególności (w recepcji Friedricha Carla von Savigny) z prawa rzymskiego. Aktywny na przełomie XIX i XX w. Otto von Gierke przedstawił rozbudowaną koncepcję korporacjonizmu opartą na studiach prawnych, historycznych i społecznych. Zdaniem uczonego, korporacje będą kluczowe dla rozwoju nowoczesnego państwa federalnego. Prezentowane przez von Gierke poglądy zyskały popularność wśród amerykańskich progresywiwistów.

