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Private Law, Judge-Made Law and *Heimatfront*

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Abstract

What influence did the First World War have on German civil law court rulings? Recently completed studies have stressed the importance of a concept called the 'home front' for understanding the so-called decisions of the courts during the Second World War. This concept is associated with ideas such as the 'stab-in-the-back' legend. It rests on the assumption that the population's good will is decisive for the outcome of war. This historiography suggests that, particularly in their decisions on the general clauses of the BGB (German civil code), the courts advanced what were in effect legislative ideas in seeking to stabilise the 'home front', to adapt the law to the changed circumstances brought about by the war. This essay analyses whether the notion of a 'home front' was also determinative in the First World War. Reaching out further, the influence of the First World War on the judiciary's self-image in Germany will be investigated.

I. INTRODUCTION

Recent research on liability lawsuits in the district court of Bonn[1] during the Second World War produced a surprising result. Most of the cases concerned traffic accidents between civilians and military vehicles, which characterises the picture of the streets at that time. It is noticeable that in 88 per cent of cases, the Wehrmacht, ie the belligerent state, lost against its citizens. Remarkably, the judges often did not believe soldiers when they gave evidence as witnesses. These cases do not match our assumptions about how civil law operates in wartime. One would expect that citizens would have had to absorb any losses caused by the war, according to the National Socialist principle *Gemeinnutz geht*

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1 The study will be published soon. Some of the results have already been published in Dominik Thompson, 'Der Krieg als Schaden—Haftpflichtprozesse im Krieg' in Hans-Peter Haferkamp, Margit Szöllösi-Janze and Hans-Peter Ullmann (eds), *Justiz im Krieg. Der Oberlandesgerichtsbezirk Köln 1939–1945* (Lit Verlag, 2012) 101, 109.

vor Eigennutz ('common good before self-interest'). However, these cases suggest that the courts instead deliberately discriminated against the state, and required the state to compensate for war-related damage.

In what follows, it will be suggested that the origins of this kind of judicial approach to the problems of the 'home front' can be traced in the courts' responses to the social and economic problems generated in the First World War. Scholars considering the influence of the First World War on German civil law court rulings have emphasised two aspects which were considered the hallmark of a new jurisprudence in the Weimar Republic. On the one hand, Weimar jurists identified new legal doctrines—mostly in the law of contract—which were developed by the courts in order to react flexibly to changes in circumstances caused by the war. In this context, the doctrine of frustration and so-called economic inability are particularly notable. On the other hand, they also identified a shift to more substantive reasoning—or (to use Max Weber's terminology) 'materialisation'. This can be traced in the way judges used vague legal terms such as 'good faith' and '*bona fides*'—found in the general clauses of the BGB—to enforce justice in individual cases against regulations of the German civil code and the terms of contracts which were thought to be too restrictive.

This essay aims to relate those general jurisprudential developments more firmly to the concrete crises of the First World War. In this context, the concept of the 'home front' plays a special role. This is the idea that war is also waged at home, which entails recognising that the social and economic stability of a country is a decisive factor for the outcome of a war. Studies show that during the Second World War, many judges had internalised this concept of 'home front'. They saw themselves as an independent stabilising factor, whose task was to stabilise the 'home front' by making decisions which would take the inflexible legislation found in the code in new normative directions. This independent role, which (as will be seen) arose during the First World War, later manifested itself in the Weimar Republic with a judiciary asserting itself against legislative and executive power.

Judges developing the case law in wartime were confronted with a legislature which was in practice unable to implement its objectives through legislation, since rapidly changing socio-economic conditions made attempts at regulation appear either dysfunctional or too late. This led to the judiciary adopting an approach which may be described as 'thinking obedience'.[2] This involved an independent elaboration of the concepts set down in legislation, which reflected a continuing strong self-confidence among those with judicial powers when facing the German legislator.

2 Philipp Heck, *Begriffsbildung und Interessenjurisprudenz* (Mohr Siebeck, 1932) 107.

II. REVIEW: THE LAW OF WARTIME ECONOMY DURING THE FIRST WORLD WAR

The impact of the First World War on private law in Germany has been researched in detail by a number of scholars.[3] Indeed, during the course of the war, contemporaries already noticed the changes which were taking place.[4] The age of governmental interventionism began in Germany with Bismarck's conservative turn in 1878 after a highly liberal, yet short phase after the 1860s, which was in any case limited to a few areas such as free trade.[5] The state tended increasingly to withdraw the economic order from the 'invisible hands'.[6] When the war started, the idea that civil law acted as a kind of defence model against the state was given up because of the exceptional circumstances. In light of the national crisis, it seemed only logical that, given the political situation, the executive should intervene in private law in almost every field.[7] Thus, 'what had slowly started in times of peace and had developed step by step, was outbid tenfold'.[8] In contrast to the Franco-Prussian War of 1870, law was consequently

3 Gerhard Kegel, Hans Rupp and Konrad Zweigert, *Die Einwirkung des Krieges auf Verträge in der Rechtsprechung Deutschlands, Frankreichs, Englands und der Vereinigten Staaten von Amerika* (De Gruyter, 1941) 41–151; Heinrich Dörner, 'Erster Weltkrieg und Privatrecht' (1986) 17 *Rechtstheorie* 385; Sven R Eiffler, 'Die "Feuertaufe" des BGB: Das Vertragsrecht des Bürgerlichen Gesetzbuchs und das Kriegswirtschaftsrecht des 1. Weltkriegs' (1998) 20 *Zeitschrift für Neuere Rechtsgeschichte* 238; Fritz Ritner, 'Neueste Privatrechtsgeschichte und Wirtschaftsrechtsgeschichte' (1991) 13 *Zeitschrift für Neuere Rechtsgeschichte* 173; Knut Wolfgang Nörr, 'Auf dem Wege zu einer Kategorie der Wirtschaftsverfassung. Wirtschaftliche Ordnungsvorstellungen im juristischen Denken vor und nach dem Ersten Weltkrieg' in Knut Wolfgang Nörr *et al* (eds), *Geisteswissenschaften zwischen Kaiserreich und Republik* (Steiner, 1994) 423; Michael Stolleis, *Geschichte des Öffentlichen Rechts*, vol 3: *Staats- und Verwaltungsrechtswissenschaft in Republik und Diktatur 1914-1945* (CH Beck, 1999) 65ff; Ernst Rudolf Huber, *Deutsche Verfassungsgeschichte*, vol 5: *Weltkrieg, Revolution und Reichserneuerung 1914-1919* (Kohlhammer, 1977); Gerd Brüggemeier, *Entwicklung des Rechts im organisierten Kapitalismus*, vol 1: *Von der Gründerzeit bis zur Weimarer Republik* (Syndikat, 1977) 84ff.

4 Heinrich Lehmann, *Die Kriegsbeschlagnahme als Mittel der Organisation der Rohstoff- und Lebensmittelversorgung* (Gustav Fischer, 1916); Oskar Wilhelm, *Der Einfluss des Krieges auf die Privatverträge* (J Schweitzer, 1916); Georg Buch, *Der Krieg und die Vertragsfreiheit* (Korn, 1918); Richard Kahn, *Rechtsbegriffe der Kriegswirtschaft. Ein Versuch der Grundlegung des Kriegswirtschaftsrechts* (J Schweitzer, 1918) 128ff; in detail: Ernst Heymann, *Die Rechtsformen der militärischen Kriegswirtschaft als Grundlage des neuen deutschen Industrierechts* (Elwert, 1921); influential: Hans Carl Nipperdey, *Kontrahierungszwang und diktierter Vertrag* (G Fischer, 1920).

5 Michael Stolleis, 'Die Entstehung des Interventionsstaates und das öffentliche Recht' (1989) 11 *Zeitschrift für Neuere Rechtsgeschichte* 129.

6 Concerning wartime economy, see Gerald D Feldman, 'Der organisierte Kapitalismus während der Kriegs- und Inflationsjahre 1914–1923' in Heinrich August Winkler (ed), *Organisierter Kapitalismus. Voraussetzungen und Anfänge* (Vandenhoeck und Ruprecht, 1974) 150; Regina Roth, *Staat und Wirtschaft im Ersten Weltkrieg. Kriegsgesellschaften als kriegswirtschaftliche Steuerungselemente* (Duncker & Humblot, 1997); see Brüggemeier (n 3) 85.

7 This happened with hardly any resistance; see Stolleis (n 3) 66.

8 Justus Wilhelm Hedemann, *Das bürgerliche Recht und die neue Zeit* (G Fischer, 1919) 6.

used as an instrument of warfare after 1914. Seventeen laws and regulations were enacted at the outbreak of war, which made contemporaries speak of a 'legal mobilisation'.[9] Crucial fundamental rights were suspended during the war.[10] Following a well-established tradition, constitutional theory interpreted this as a manifestation of the danger faced by the state (*inter arma enim silent leges*: 'in times of war, the law falls silent').[11] By the end of 1914, it had become clear that the war could not be won by a quick, decisive battle. Now, it was increasingly conceived of as a 'war of opposing economies'.[12] Walter Rathenau and Wichard von Möllendorff developed the concept of *Gemeinwirtschaft* ('the collectivised economy').[13] The aim of this plan, which arose from economic interests, was to make the economy serve the interests of warfare in a mixed system of public and private law. The idea of entrepreneurship in particular was supposed to be preserved. The Reich sought to organise the economy through a total of 825 regulations enacted during the war, based on the Enabling Act,[14] the so-called *Diktaturparagraph* ('paragraph of dictatorship').[15] Associations were founded, either consisting of the industry itself, such as the Kriegs-Garn und Tuchverband e.v. ('war-yarn and cloth association'), or acting as state-controlled companies in the legal form of a GmbH or AG. Public agencies were set up in major banks in order to control them. Furthermore, public authorities were established which influenced the economy directly. There were huge interventions in private law in the areas of arms production, the energy industry, the financial sector, rationing of labour, production of goods and the food industry. The Reich made use of expropriation and factory occupation, confiscation, allocation, price-fixing, obligation to contract, use constraints, public distribution of goods, bans on dismissal and compulsory work.

From my perspective in this essay, the essential element of these developments is that they demonstrate the priority given to the state throughout. The state enforced support; it used the resources of the people and the economy in order to be victorious in the material battles of the First World War. At the same time, the notion of private interests giving way to state needs appear to be contradicted by the examples given at the outset of this article. Why should the judiciary of a belligerent nation allow routine compensation for damage for

9 So said the introduction to the following decrees by the editors Hugo Neumann and Heinrich Dittenberger (1914) 43 *Juristische Wochenschrift* 786.

10 Gerhard Anschütz, 'Der Kriegszustand' (1914) 1 *Deutsche Strafrechts-Zeitung* col 451; see Huber (n 3) 37, 44ff.

11 See Stolleis (n 3) 59.

12 Erich Kaufmann, *Bismarcks Erbe in der Reichsverfassung* (J Springer, 1917) 1.

13 Concerning the debates at the beginning: Pascal Weimer, *Die Gemeinwirtschaft in der Anfangszeit der Weimarer Republik* (Nomos, 2002) 38ff.

14 Cf Michael Frehse, *Ermächtigungsgesetzgebung im Deutschen Reich 1914–1933* (Centaurus Pfaffenweiler, 1985) 12ff.

15 Eugen Schiffer, 'Die Diktatur des Bundesrates' (1915) XX *Deutsche Juristen-Zeitung* col 1158, 1159.

its citizens? Is it not typical during such times of crisis for the citizens to make sacrifices for the state?

III. CHANGES IN PERSPECTIVE: JURISDICTION IN THE FIRST WORLD WAR

In the initial cases, it was the courts that decided in favour of the citizens and to the detriment of the state, rather than executive or the legislature. This is in itself noteworthy, for it is not normal to expect a political division between judicial and executive powers in times of war. In order to understand why this was so, I would like to shift attention away from the law-giving state to the law-abiding courts in the First World War. Historians who have traced the change in the approach of the judiciary caused by the war have noted two developments in particular which occurred during the years 1914 to 1918. First, a gradual suppression of freedom of contract under the social body has been identified. Franz Wieacker called it 'relativisation of civil rights by its social function'.[16] In the words of Michael Hughes, the judges 'abandoned the laissez faire basis of contracts and made them a means for guaranteeing vague, socially based conceptions of equity'.[17] One frequently mentioned example of this tendency is the increasing intervention made into contractual risk distribution, which can be seen in the development of principles such as 'economic inability' and the breakthrough of the *clausula rebus sic stantibus* ('things thus standing') in the *Wegfall der Geschäftsgrundlage* ('doctrine of frustration').[18] A second change often identified in this context is in the reasoning used by the courts. Judges made increasing use of §§ 138, 826, 157 and 242 BGB (German civil code), the so-called general clauses, which were useful because of their lack of precision. The judges used those legal margins in order to decide cases free of legal requirements and regulatory compliance. In this regard, this method is referred to as a materialisation of the civil law, in the Weberian sense.[19] The English historian David

16 Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* (Vandenhoeck und Ruprecht, 1967) 538.

17 Michael L Hughes, 'Private Equity, Social Inequity: German Judges React to Inflation 1914–1924' (1983) 16 *Central European History* 76, 82.

18 Cf Rudolf Meyer-Prizl, *§§ 313–314*, *Historisch-kritischer Kommentar zum BGB* vol 2 (2007) paras 18ff.

19 See the difference between formal and material in Max Weber, *Grundriss der Sozialökonomie. III. Abteilung: Wirtschaft und Gesellschaft* (Mohr Siebeck, 1922) 396; warnings about upcomming materialisation in Max Weber, 'Review of Phillip Lotmar, *Der Arbeitsvertrag nach dem Privatrecht des deutschen Reiches, Vol 1*' (1902) 17 *Archiv für soziale Gesetzgebung* 723. On the different meanings of materialisation in the German debate see Claus-Wilhelm Canaris, 'Wandlungen des Schuldvertragsrechts—Tendenzen zu seiner "Materialisierung"' (2000) 200 *Archiv für die civilistische Praxis* 276.

Southern speaks of a 'shift from reason to morality'.[20]

In addition, I would like to emphasise another aspect of this development: in the First World War, a broader notion of justice took over the task of developing the law and tried to do so without any positive legal basis, but in favour of the state. This approach can be seen as a reaction to the imminent de-legitimation of the state and the associated state regulatory law. To illustrate this, it is necessary to take a closer look at the context of the wartime judiciary, especially the Supreme Court of the German Reich—the Reichsgericht. A particularly telling example can be found in the court's approach to contracts, since contemporaries continued to see intervention in existing agreements particularly as the central problem faced by the civil law in times of war.[21] The courts had to consider governmental intervention policy from the beginning. The state initiated price regulations as early as 1914. As it set prices, so the market tried to bypass these regulations. Thus, goods were withheld from the official market and were sold instead on the black market, via illicit trading.[22] In response, the state initiated an unprecedented slippery slope of interventionism in order to suppress the continuing bypassing of the regulations. The associated criminal penalties pressured courts into reacting fast, specifically in their case law. For instance, the ceiling system was limited to articles of everyday use, which had to be distinguished from those of indispensable need.[23] At the same time, courts had to decide if goods such as books, geographical maps, cognac and beer were included under the intervention law.[24] Soon, the Reichsgericht developed open and independent economic political strategies and, in doing so, it ran ahead of the legislating body.

In 1916, the Reichsgericht had to decide whether to declare void a contract which exceeded the maximum price, as appeared to be required by § 134 BGB (which stated that a legal transaction which violated a statutory prohibition was void, unless the statute led to a different conclusion). The Second Civil Chamber of the Reichsgericht dissociated itself from this application of logic and underlined its authority as the final decision-making body concerning economic and political issues. It held that the maximum price provisions were

> in fact legal rules and, therefore, laws of the German civil code; yet they differ from most laws as they do not aim at the realization of central ideas of law, but at an eco-

20 David B Southern, 'The Impact of Inflation: Inflation, the Courts and Revaluation' in Richard Bessel and Edgar J Feuchtwanger (eds), *Social Change and Political Development in Weimar Germany* (Croom Helm, 1981) 55, 59.

21 Early analyses in Lehmann (n 4); Wilhelm (n 4); Buch (n 4).

22 Martin H Geyer, *Verkehrte Welt. Revolution, Inflation und Moderne: München 1914–1924* (Vandenhoeck und Ruprecht, 1998) 42.

23 See Eiffler (n 3) 247.

24 *RGSt* 51, 285, 349; 52, 4; 53, 120.

> nomic purpose. That is why, for its understanding and its use, the economic purpose has to be taken into consideration.[25]

In the end, the court suspected that, if contracts were held void because they exceeded the maximum price, the 'distribution of urgently needed food would not be supported, but would be stopped for the moment [which would be] against the obvious purpose of the laws'.[26] With that, the court responded to the call of jurists who had been demanding that 'any pettiness' in interpreting the law since the outbreak of war should be given up.[27] James Breit, a lawyer from Dresden, said that 'the answer to the numerous questions, which the wording of the laws leave unclear, cannot be found' using 'juridical constructions'. Rather, the judge had to turn away 'from the completely obsolete aids of the orthodox methods of legal finding', and instead aim at an appropriate arrangement of the unique legal institutions before him, but with particular reference to 'economic necessities' and the 'balancing of the conflicting interests'.[28]

In this way, the Reichsgericht began to intervene in the economy. It was already apparent at the time the court made this decision that the government's actions would not be able to solve the problems of food supply. There had already been problems caused by an increase in food prices in the winter of 1915/16.[29] On 1 May 1916, eighteen days before the Reichsgericht's decision, the food ration card for meat had been introduced, which led to a significant rationing of meat. This resulted in a downward spiral: the maximum price provision eventually led to a fall in production[30] at the same time that the entente's blockade prevented sufficient quantities of food being imported.[31] Parallel to the cut in supply, the illegal food trade on the black market increased.[32] The necessity of provisioning oneself with food at a very high price accentuated the contrasting experiences of different sections of the population. The fact that the financial losses caused by the war were distributed very unequally through the population became increasingly problematic. While many workers in industry were able to increase their income considerably, many other occupational groups, such as salaried employees and public officials, received pay rises

25 *RGZ* 88, 251 (II) on 19 May 1951.
26 *RGZ* 88, 252.
27 Theodor Kipp, 'Gläubiger und Schuldner im Kriege' (1914) XIX *Deutsche Juristen-Zeitung* col 1024; see Dörner (n 3) 391.
28 James Breit, 'Der Umfang des Rechtsmoratoriums' (1915) 44 *Juristische Wochenschrift* 161, 162.
29 See Geyer (n 22) 41.
30 Cf Carl-Ludwig Holtfrerich, *Die deutsche Inflation 1914–1923. Ursachen und Folgen in internationaler Perspektive* (De Gruyter, 1980) 83.
31 Cf Marion C Siney, *The Allied Blockade of Germany 1914–1916* (University of Michigan Press, 1957).
32 Munich is given as an example in Geyer (n 22) 40ff.

which did not even match inflation.[33] By the end of 1917, smuggling and the black market were a large and still-growing part of daily life. On average, half of the consumer goods that people bought were illegally obtained.[34] The official authorities noticed that this kind of behaviour was increasingly tolerated. Even the municipalities covered their needs using the black market, while security guards plundered the food supplies they were meant to guard. Meanwhile, there were increasingly insistent protests from the general population on the issue of hunger, which showed that the people were no longer willing to obey the public sanctions and countenance the state's intention of total control.

In this context, lawyers began to discuss the de-legitimation of the state as a spread of positive law versus natural law. In 1916, Otto von Gierke warned about a 'richness of self-hunting and contradicting regulations', which would contradict the 'revolting sense of justice' and the 'people's consciousness of justice'. It would, he argued, result in a diminishing 'reputation of the public legal system'.[35] The conflict 'between the positive law and the idea of law', which was identified by Otto von Gierke and which set the tone for the Weimar debate, began during the war.[36] Thus, the state was blamed for the erosion of ethical self-regulation, which was fundamental to traditional thinking in the science of private law. In 1917, Max Weber spoke about 'opportunity and robbery chances, which were greatly increased by the war',[37] and 'the snatching at those accidental opportunities which bubble through all pores of this bureaucratic system'.[38] He lamented the resulting erosion of an 'ethic of professional duty and honour',[39] and with it the 'loss of any standards in differences and scruples concerning business ethics'.[40]

The ideas that informed these intellectual developments were also reflected in the expanded control of the violation of *boni mores* ('good morals') under § 138 BGB, with which the Reichsgericht countered the bemoaned problems of 'war extortion' from 1916.[41] In that year, Theodor Kipp stressed that 'war stirred

33 Numbers are given in Geyer (n 22) 43.

34 A concise analysis of this can be found in Boris Barth, *Dolchstoßlegenden und politische Disintegration. Das Trauma der deutschen Niederlage im Ersten Weltkrieg* (Droste, 2003) 13ff, 26ff.

35 Cf Otto von Gierke, 'Recht und Sittlichkeit' (1916/17) VI *Logos* 211, 257.

36 See Stolleis (n 5).

37 Max Weber, *Wahlrecht und Demokratie in Deutschland* (Fortschritt, 1918) 9; on this Stolleis (n 5) 145.

38 See Weber (n 37) 10.

39 *Ibid*, 10.

40 *Ibid*, 10.

41 On this see Hans-Peter Haferkamp, *§ 138, Historisch-kritischer Kommentar zum BGB vol 1* (2003), para 14; outstanding concerning social-historical implications: Martin H Geyer, 'Die Sprache des Rechts, die Sprache des Antisemitismus: "Wucher" und soziale Ordnungsvorstellungen im Kaiserreich und der Weimarer Republik' in Christoph Dipper, Lutz Klinkhammer and Alexander Nützenadel (eds), *Festschrift für Wolfgang Schieder* (Duncker & Humblot, 2000) 413.

the moral conscience extremely and imposed duties on each single person by taking into consideration others and the big picture, which were not considered in times of peace or which did not become clear to us'.[42] His call[43] to fight wartime extortion in an active way was seized upon by the Reichsgericht. The court skipped the restrictive preconditions of the elements concerning extortion in § 138 II BGB: that is, it relinquished the proof of the 'exploitation of the predicament, the lack of experience or power of judgement or the considerable weakness of will'. In 1916, for the first time, the existence of surplus profit, which was harmful to the community, was enough to vitiate the transaction: 'Whoever takes advantage of the war and the situation of economic difficulties so-caused to gain advantage of others' disadvantages, which otherwise would not have been acquired, acts in a way *contra bonos mores*'.[44] The Reichsgericht pleaded the inner unity of the war society. In 1917 it said: 'Striving for a surplus profit in times of war, whether it is at the expense of the individual or of the community, is to be branded as a breach *contra bonos mores*, especially concerning the requirements of war.'[45] In particular, events that were supposed to harm the German Reich, with its massive war requirements, went beyond the scope of everything that 'is compatible with the decency of a proper and just way of thinking'.[46] The Reichsgericht regulated ethical obligations in favour of public welfare in order to support the Reich's war efforts. Initially, this was applied to usury in respect of everyday goods,[47] but the 'indecent exploitation of the general difficulties of the money and job market … made by the economy-shaking war' was also enough to constitute immoral usury.[48] The Reichsgericht increasingly considered itself the institution that had to fix the wartime economy, because the state had failed to do so. The way the court saw itself became evident in the use of the general clauses, which symbolised an unvarnished recourse to moral principles which were established not by the law, but by the court itself.[49] The use of *bona fides* or *bonos mores* as a judicial pressure-relief valve was not new at all—the legal sense of these concepts was well rooted in

42 Theodor Kipp, 'Die guten Sitten im Kriege' (1916) 21 *Deutsche Juristen-Zeitung* col 466.

43 Cf in particular Kipp, *ibid*, cols 466, 471; see also Albert Pagel, 'Prozessieren wider Treu und Glauben' (1916) 2 *Der Rechtsgang* 213; Hugo Heinemann, 'Wirtschaftliche Kriegsmaßnahmen im Lichte der Regierungsdenkschriften' (1916) 21 *Deutsche Juristen-Zeitung* cols 77ff, 80; Heinrich Lehmann, *Wucher und Wucherbekämpfung in Krieg und Frieden* (A Deichert, 1917).

44 See Supreme Court, '§ 138 Nr 2' (1916) *Warneyers Jahrbuch*.

45 Supreme Court (3rd civil court) (11 July 1917) *RGZ* 90 402.

46 Supreme Court (3rd civil court) (21 May 1918) *RGZ* 93 208.

47 This was the major problem (cf Geyer (n 22) 198); there were 27,000 lawsuits pending in the entire Reich in 1920 concerning usury in the retail trade.

48 For the first time *RGZ* (11 July 1917-III 394/16) 90, 400ff (brokerage for the agency of war supplies); in agreement *RGZ* (6 May 1918-VI 450/17) 93, 27ff.

49 Hans-Peter Haferkamp, *§ 242*, *Historisch-kritischer Kommentar zum BGB vol 2* (2007) para 68; Hans-Peter Haferkamp, *§ 138*, *Historisch-kritischer Kommentar zum BGB vol 1* (2003) paras 9ff.

the *ius commune* ('common law'). What was new about it was the fact that the Reichsgericht learned to have regular recourse to these instruments in a political crisis. 'Crisis' became a phenomenon in daily life, especially in the court's jurisdiction regarding revaluation during the Weimar Republic. The conflict between the legislative concept and judicial justice in individual cases became part of judicial normality.[50]

IV. ETHICAL CRISIS AND THE HOME FRONT

In a judgment of 4 June 1918, the Reichsgericht made a remarkable statement in deciding a case of extortion: 'In a situation of national danger, the plaintiff wilfully stabbed the ambition of saving the fatherland in the back just for his own profit.'[51] With this image, the judiciary's appeals to national took on a military hue. In 1916, Hindenburg demanded a dramatic increase in defence production for the continuation of the war. His 'Hindenburg programme' led to compulsory labour and secured priority for the army over all resources.[52] Hindenburg thereby created an opposition between the war front and the home front. The idea was perpetuated among senior military commanders that the homeland was not adequately supporting the front.[53] In 1917, General Seekt asked: 'Why are we still fighting? The homeland stabbed us in the back and, therefore, the war is lost.'[54] It was this contemporary controversial image that the Reichsgericht used as an argument in 1918.

In fact, the idea had deep roots. The idea of a betrayal by the 'inner front', reflecting a division of the nation in crisis, had been a German fear since the Thirty Years War. This idea was particularly prevalent in the nineteenth century. In 1844, when writing about the Wars of Unification against Napoleon, Eichendorff rhapsodised about the triumph over the 'inner enemy' because Germany 'recognised itself' in this war.[55] One year earlier, a member of the

50 See Hans-Peter Haferkamp, 'Bona Fides, Good Faith, Aequitas and Politics in 20th Century Germany' in Ives Mausen and Boudewijn Sirks (eds), *Aequitas* (Montpellier, forthcoming 2015).

51 RG (II) 4 June 1918, *RGZ* 93, 107. The senate here agreed with an argument of the superior Court of Justice in Berlin at the previous instance.

52 On this Gerald D Feldman, *Armee, Industrie und Arbeiterschaft in Deutschland 1914 bis 1918* (JHW Dietz, 1985) 133ff.

53 See Barth (n 34) 13.

54 On this see Wilhelm Deist, 'Der militärische Zusammenbruch des Kaiserreichs. Zur Realität der "Dolchstoßlegende"' in Wilhelm Deist, *Militär, Staat und Gesellschaft. Studien zur preußisch-deutschen Militärgeschichte* (R Oldenbourg, 1991) 232.

55 Joseph Freiherr von Eichendorff, 'Die Wiederherstellung des Schlosses der deutschen Ordensritter zu Marienburg' (here quoted in a shortened popular edition) in Joseph Freiherr von Eichendorff, *Die Marienburg* (KR Langewiesche, 1941) 22.

Bavarian Estates of Parliament had pointed out this inner logic: 'We heard so often about the power of the German people. Yes, these are strong people, and will be so forever; nonetheless, the inner enemy has to be driven out if we want to be powerful against every external enemy.'[56] Otto von Gierke pointed out these references in 1915 as being decisive in war: 'Even the most brilliant triumphs by weapons cannot lead us to reach our goal in war if the entire nation does not keep up the spirit of decisiveness, of willingness to make sacrifices and of state loyalty in unity.'[57] As the Mehrheitsozialdemokratische Partei (MSDP) claimed a peace without annexes and indemnifications in 1917, Gierke logically suspected—like many other conservative intellectuals[58]—a 'terrifying danger' for inner unity in Germany.[59] For Gierke, it was the fault of the social democrats that 'unity was broken and the inner fight became unavoidable'.[60] In 1919, when the war had been lost, it was obvious to Otto von Gierke who had lost it: 'The crowd's decline of concern for the credo of the fatherland! The excess of oblivion of honour, unfaithfulness and contempt of law!'[61] Gierke thus drew on the so-called stab-in-the-back legend, which was stirred up especially by Hindenburg at the end of the war. In 1919, it was Hindenburg who shaped the metaphor by alluding to a similar remark of an English General: 'The German Army has been stabbed from behind.'[62] This metaphor, being generally known as a highly impressive metaphor in Weimar, is the central connecting link to bring the judicature in the civil law of both the First and the Second World Wars into a common discussion.

V. CIVIL JUDICATURE DURING THE SECOND WORLD WAR

> We National Socialists once came from the war, the war experience shaped our intellectual world, and in times of war, it will, if necessary, prove itself.

Thus Adolf Hitler, in his speech at the Berlin Sportpalast in 1939, shortly after the outbreak of the Second World War, evoked his First World War experience

56 'Protokoll der XLI. Öffentlichen Sitzung der bayerischen Ständeversammlung vom 25. April 1843' in *Verhandlungen der Kammer der Abgeordneten der Stände-Versammlung des Königsreichs Bayern im Jahr 1843*, vol 6 (Munich, 1843) 230.

57 Otto V Gierke, *Der deutsche Volksgeist im Kriege* (Springer, 1915) 10.

58 Steffen Bruendel, *Volksgemeinschaft oder Volksstaat. Die "Ideen von 1914" und die Neuordnung Deutschlands im Ersten Weltkrieg* (Akademie Verlag, 2003) 191ff.

59 Otto V Gierke, *Unsere Friedensziele* (Springer, 1917) 8.

60 *Ibid*, 2.

61 Otto V Gierke, *Der germanische Staatsgedanke* (Weidmannsche Buchhandlung, 1919) 4.

62 On this see Gerd Krumerich, 'Dolchstoßlegende' in Gerhard Hirschfeld, Gerd Krumerich and Irina Renz (eds), *Enzyklopädie Erster Weltkrieg* (Schöningh, 2003) 444, 445.

as the starting point for all his contemporary war plans.[63] Hitler showed from the very beginning, according to Ian Kershaw, a 'pathologic fixation' on the domestic political collapse at the end of the First World War.[64] All his thoughts about the composition of a war society had their origin in the fear of a second stab-in-the-back, in other words, treason caused by an unstable home front.[65] This manifested itself in the radical persecution of Jews and the political left wing, who were deemed responsible for the collapse.[66] Particular emphasis was also placed on women and adolescents, who were blamed for having played a decisive role in the destabilisation of the home front.[67]

In these circumstances, it is of particular interest that the political leadership of the Second World War did not believe that the unity of the home front could be enforced only by political repression. In some problem areas, it was considered indispensable to ensure the satisfaction of the population by public services.[68] First of all, this applied to the question of supply, which had been the main reason for people's discontent during the First World War.[69] In this regard, the radical exploitation of the occupied territories was aimed at ensuring supply on the home front. Accompanying this, the leadership tried to pay at least financial compensation for war damages on the home front. This was the function of the Kriegsschädenämter ('offices of war damage'), the duty of which was to compensate for war damage in a non-bureaucratic way.

The function of the courts also changed in this interplay. A special action was established—the so-called *Vertragshilfeverfahren* ('contract assistance action')—

63 I would like to thank Hans-Peter Ullmann for this note. Max Domarus, *Hitler. Reden und Proklamationen 1932–1945*, vol II/1: *1939–1940* (Sueddeutscher Verlag, 1973) 1395, 1397. Unfortunately, for Hitler's government only Domarus's source edition is available, which is deserving but not unproblematic due to several extracts taken from the 'Völkischer Beobachter'. For the following speech, the text is taken from the DNB. On the position of the First World War in Hitler's speeches see also Gerhard Hirschfeld, 'Der Führer spricht vom Krieg: Der Erste Weltkrieg in den Reden Adolf Hitlers' in Gerd Krumeich, Anke Hoffstadt and Arndt Weinrich (eds), *Nationalsozialismus und Erster Weltkrieg* (Klartext, 2010) 35.

64 Ian Kershaw, *Das Ende. Kampf bis in den Untergang. NS-Deutschland 1944/45* (DVA, 2011) 40; one example among many others is the statement of Hitler describing the First World War as 'the biggest and most unforgettable time of my earthly life' (Adolf Hitler, *Mein Kampf*, vol 1: *Eine Abrechnung* (Zentralverlag der NSDAP, 1934) 179).

65 Bruno Thoß, 'Die Zeit der Weltkriege—Epochen als Erfahrungseinheit' in Bruno Thoß and Hans-Ulrich Volkmann (eds), *Erster Weltkrieg—Zweiter Weltkrieg. Ein Vergleich* (Schöningh, 2002) 7, 14; see Krumeich, Hoffstadt and Weinrich (n 63) 285.

66 Ulrich Herbert, 'Was haben die Nationalsozialisten aus dem Ersten Weltkrieg gelernt?' in Krumeich, Hoffstadt and Weinrich (n 63) 21.

67 Michael Löffelsender, *Strafjustiz an der Heimatfront. Die strafrechtliche Verfolgung von Frauen und Jugendlichen im Oberlandesgerichtsbezirk Köln 1939–1945* (Mohr Siebeck, 2012) 27ff, *passim*.

68 This should be undisputed; also it is not necessary to get into intensive argumention concerning controversially discussed theses of a 'dictatorship of courtesy' ('*Gefälligkeitsdiktatur*') by Götz Aly, *Hitlers Volksstaat: Raub, Rassenkrieg und nationaler Sozialismus* (S Fischer, 2005).

69 Birthe Kundrus, 'Loyal, weil satt. Die innere Front im Zweiten Weltkrieg' (1997) 36 *Mittelweg* 80, 82ff.

concerning the question, so important during the First World War, of deciding which of the contracting parties should assume the risks of war. With this action, the implications of the war on contracts could be handled very flexibly by the judge's consideration of equity. Looking at every individual circumstance of the parties to the contract, the judge was encouraged to make a decision adequate to each case.[70] Because these decisions were part of voluntary jurisdiction and were neither published nor documented,[71] public debates about the impact of the war on contractual law were avoided.

The situation was different in non-contractual civil law, for example in the tortious liability lawsuits between the Wehrmacht and the citizens described above. In these cases, an area of war-related crisis jurisdiction was left to the judicature. This explains the decisions concerning traffic accidents in this context. In the law of war damages, the Reich had pointed out that the population should be at least financially relieved of the burdens of the war.[72] The financial consequences of the war should be borne by the Reich. Car accidents involving members of the Wehrmacht did not, of course, belong to the law of war damages. However, the structural similarity was evident, because the increased danger to civilians caused by the replacement army was obviously war-related. Therefore, it was suggested that the army should recognise liability for the damage without complaint. However, such a Wehrmacht policy did not exist. As a result, the courts saw themselves as correcting what the state had left undone. They advanced the state's concept and corrected the state by following the state's intentions.[73] Therefore, they were assuming the very role of crisis interveners that they had developed during the First World War.

VI. FIRST WORLD WAR, 'HOME FRONT' AND THE JUDICIAL CULTURE IN GERMANY

According to the traditional view, it was in the era of the Weimar Republic and the crisis caused by inflation that the German judicature first acquired a new self-concept as an independent decision-making force, seen in its escalating use of general clauses and in partly open opposition to the legislature. However, it has been argued in this essay that we should look for this new self-conception even earlier, namely in the First World War. This period plays an important role in understanding the judges' conception of their role in Germany. Even then the

70 See Kegel (n 3) 155ff, 160.

71 Gerhard Kegel, *Die Abwicklung von Vorkriegsverträgen* (Mohr, 1948).

72 Dietmar Süß, *Tod aus der Luft. Kriegsgesellschaft und Luftkrieg in Deutschland und England* (Siedler, 2011) 174ff; see Thompson (n 1) 141ff.

73 See Thompson (n 1) 148 with the same result.

judicature faced a fundamental crisis of the legislative body. The legislator, on which the nation's hopes were pinned so firmly between 1871 and 1914, turned out to be unable to stabilise the supply crisis caused by the war. The state, at all times outdated by the economic realities, could not prevent the crisis on the now so-called 'home front'. The judges blamed the state for being jointly responsible for the erosion of intra-societal self-regulation measures and therefore became active themselves. The judges of the Reichsgericht accepted responsibility for thinking ahead about legislative intentions independently and—by means of more open statutory interpretation, but also by means of general clauses—for compensating for legislative defects. This idea, that the court ruling was a kind of repairer of legislative failures and therefore had a proper control task in mobilising state forces in times of war, was reactivated when the image of the weak 'home front' was again used in the face of economic crises in the Second World War. The notion of the crisis of the 'home front' therefore played a decisive role in the increasing case law in twentieth-century civil law. This development continued seamlessly after 1945, in the so-called renaissance of natural law, when the German Federal Supreme Court for the first time openly claimed for itself the power to determine the law independent of and beyond statute. Although this nearly uncontrolled case law was anchored to the Basic Constitutional Law after 1951 by the Federal Constitutional Court, the judiciary's self-confidence in its own abilities vis-à-vis a legislature which was perceived to be prone to error remained pervasive after the First World War. In the words of Professor Dr Günter Hirsch, former President of the German Federal Supreme Court:[74]

> Therefore the image of the judge as servant of the law does not correspond to the reality of our constitution anymore. Portrayed figuratively, in my opinion the image of a pianist and a composer expresses the ratio of judge and legislator the best. The judge interprets the guidelines, more or less in a virtuoso manner, he has freedom but is not allowed to distort the piece.[75]

Hence, the First World War and the subject of the 'home front' left their marks in a more significant way than is generally assumed in German legal thought.

74 Haferkamp (n 50).

75 Günter Hisch, 'Zwischenruf. Der Richter wird's schon' (2006) 39 *Zeitschrift für Rechtspolitik* 161.