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GOETHE AS LAWYER AND STATESMAN

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There was an age during which the study of Roman law and canon law flourished in the great law schools in Italy. The part which they played in Continental jurisprudence is a matter of general knowledge. Goethe, it has been said, is "the heir of all the ages."¹ The fact that jurists brought up in the spirit of those legal systems can be found on both sides of his ancestry is not so widely known.

His maternal great great grandfather was Johann Wolfgang Textor (1638-1701). He was a Professor of Law in Heidelberg who in 1680 published, among others, a book on the then international law under the title *Synopsis of the Law of Nations*. He was also famous for his enormous memory, a quality which certainly distinguishes men of genius. Johann Wolfgang Textor witnessed the destruction of Heidelberg by the armies of Louis XIV, an event which compelled him to move to Frankfurt, where he became the corporation counsel of the city.² Thus, as if to compensate the world for the destruction of the Heidelberg castle, one of the greatest monuments of German Renaissance, France, as it were, formed a link in the causal chain that produced Goethe.

Johann Wolfgang Textor's son, Christian Heinrich Textor, was likewise a lawyer. His son, who was to become Goethe's grandfather, was Johann Wolfgang Textor who graduated in 1715 with a Doctor Juris degree from the University in Altdorf (near Nuremberg) and was later the *Schultheiss* in Frankfurt

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1. See quotation in M. Montgomery in the Oxford Univ. Press edition of FAUST (World Classic 380) p. XVII.

2. III/1 LANDSBERG (in STINTZING) GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT 42, *Noten* 22 ff. (1898).

on the Main. *Schultheiss* was the title for the highest judicial magistrate in Frankfurt, who was simultaneously the head of that Court which under the name *Schoppenstuhl* was given prominence in Goethe's drama *Götz von Berlichingen*. The Schultheiss' son, the brother therefore of Goethe's mother, Katharina Elizabeth (1731-1808), was also a lawyer, as was Goethe's brother-in-law, Schlosser.

His father, Johann Kaspar Goethe, the *Kaiserliche Rat* (imperial counsel) had studied law at Strassburg; he did not hail, as did the mother, from a family of lawyers, but he was always interested in law, although he did not practice it until his son commenced law practice in Frankfurt. This son, the great poet, studied law in Leipzig from 1765-1768, after his father had made him enthusiastic over the beauty of the Roman law by introducing him to Georg Adam Struve's *Jurisprudentia Romano-germanica forensis*.³ After an interruption caused by a serious illness, he registered at the University in Strassburg, then a French university, in April 1770. During the first half year of his study there, he showed an unusual interest in law. The more he studied it, the more he seemed to enjoy it. In a letter to Fräulein Susanne Katharina von Klettenberg, the "fair saint" (*Schöne Seele*), dated Aug. 26, 1770, he said:

I come to like law. The matter with law is the same as it is with the beer of Merseburg; first one feels a horror, but when one has drunk that beer one week, one can't live without it.⁴

Also, his notebook of student years, which he called "Ephemerides," shows that he read a large number of law books in those days, such as Anton Schulting's (1659-1734) *Jurisprudentia antejustiniana*, as well as books on canon law and the history of the Church, and Christian Thomasius' *Cautelae circa praecognita jurisprudentiae* (1710), Samuel Stryk, *De actionibus forensibus etc.* (1696), and Augustin Leyser's works.⁵

In the fall of the same year he met Friederika Brion in Sesenheim and with his great love for her the love for the law books vanished. Owing to the aid of a so-called *Repetent* (tutor) he passed his examination and was, in July 1771, graduated with

3. J. MEISSNER, *GOETHE ALS JURIST* (Berlin, 1885) 6.

4. J. MEISSNER, *op. cit.* *supra* note 3, at 9.

5. *Ibid.*

the degree of a *licencié de droit*.⁶ He never obtained a Doctor of Law degree, but the license, a degree approximately between our LL.B. and LL.M., was a sufficient basis for his admission to the bar in his native city, where he was sworn in on Aug. 31, 1771.⁷ With an interruption when he served as a so-called *Praktikant* with the Court of the Imperial Chamber in Wetzlar,⁸ he practiced law for five years.

He was 26 years old when in 1776 the ruler of the Dukedom of Saxon-Weimar asked him to enter into the public service of his country. He became immediately one of the three members of the Privy Council (*Geheimer Rat*) which governed the State. During the next ten years his administrative activities extended to each and every branch of government. He wrote opinions in diverse fields of law, and on matters related to the Church and to education. He took a leading hand in the improvement of the tax law in the Dukedom, especially as to the methods of collection of taxes. The method of accounting and budgeting was likewise changed according to his ideas. He drafted a respectable number of statutes related to a variety of fields, a sampling of which includes employment contracts concerning housemaids, mining law, insolvency law, and a law for the discharge of feudal burdens and the compensation therefor. He showed a great interest in the inspection of the mining and the textile industry, as well as in the supervision of the highways. Finally he even took over the presidency of the War Commission. Upon his return from Italy in 1788, after a sojourn of nearly two years, he curtailed his activities as a member of the Privy Council and in the various administrative branches mentioned before, but he burdened himself with other administrative duties, particularly those which concerned the theater of the Court, the museums, the library in Weimar and the State University (in Jena). In 1809 a new office was created, that of the direction of the state institutions of the arts and sciences. It was a matter of course that Goethe was assigned this office, which presented him with the opportunity of keeping alive the fame of Weimar as

6. J. W. GOETHE, POETRY AND TRUTH FROM MY LIFE (DICHTUNG UND WAHRHEIT) (Engl. transl. by R. O. Moon, London, 1932) 314, 316.

7. J. MEISSNER, *op. cit. supra* note 3, at 21.

8. See GOETHE, *op. cit. supra* note 6 on the *Reichskammergericht* (Supreme Court of the Empire) p. 461 ff.

the center of art and science, a fame for which his works had laid the foundation.⁹

Thus engaged in administrative work throughout his life, he had more opportunities than many lawyers of approaching manifold problems from the public law perspective. When the Law School of the University of Jena congratulated him upon his completion of half a century's connection with Weimar and Jena, he answered that his legal work and the principles and attitudes acquired therein had never left him in the lurch in his multifarious activities in later life and thus provided him with guidance not only for the conduct of his business, but also for the judgment of general popular conduct and attitudes.¹⁰

We know the twenty-eight cases handled by him as an advocate.¹¹ It is interesting to note that he never argued a matrimonial or a criminal case. Most of his cases concerned business transactions or surrogate work. He showed highest esteem and admiration for his brothers in the profession when they were convinced of the justice of their cases and devoted all of their energies to the representations of clients. He followed these men in his own professional work. Yet, his pleadings and briefs were at times lacking in objectivity and insulting in tone. In his first case, he represented a son who claimed partnership with his father, against the latter who challenged the validity of the partnership upon the grounds of his having been misled by Goethe's client. Goethe won, but his brief was so fiery and impassioned that his opponent reciprocated in kind. The result was that the Court exercised its contempt power against both advocates with these words: "*Advocati causae* of both sides are herewith reprimanded for the use of improper language likely to increase the existing bitterness between the parties, who have been irritated enough without that."¹² But Goethe did not feel

9. For details see Fritz Hartung, *Goethe als Staatsmann*, 9 JAHRBUCHER DER GOETHEGESELLSCHAFT 297 (1922); for cancellation of feudal burdens see WIERUSZOWSKI, *GOETHE ALS RECHTSANWALT* 5 (1909).

10. See the letter in J. MEISSNER, *op. cit. supra* note 3, at 21.

11. For an analysis of these cases see 1 RUDOLF STAMMLER, *DEUTSCHES RECHTSLEBEN* No. XXX: *Von Goethe bearbeitete Rechtsangelegenheiten* (1932) p. 397 ff. For his first pleadings in the Heckel case, see A. WIERUSZOWSKI, *GOETHE ALS RECHTSANWALT* (1909) 20 ff. The records of all causes treated by the attorney Goethe were discovered by G. L. Kriegk, about one hundred years after their pendency. See the latter's *DEUTSCHE KULTURBILDER AUS DEM ACHTZEHNTEN JAHRHUNDERT, NEBST EINEM ANHANG: GOETHE ALS RECHTSANWALT* (1874) p. 263-517.

12. J. MEISSNER, *op. cit. supra* note 3, at 31.

that his conduct was wrong.¹³ Decades later he still thought that an advocate must fight dauntlessly for a just cause. We might quote his words:

Mathematics, like dialectic, is an instrument of our inner higher perception; when practiced, mathematics is an art, such as eloquence. For both, form is the essential thing; the content is a matter of indifference. Whether mathematics computes pennies or guineas, whether eloquence defends what is right or what is wrong, is unessential. The thing which counts, however, is the kind of man who carries on such an occupation or is devoted to such an art. *A vigorous advocate of a just cause and a keen mathematician searching the firmament, both are equally god-like.*¹⁴

Due to Goethe's unusually imaginative mind, his pleadings were more inspired than those of rank and file attorneys. Per-spicious and acute, he was also conscientiously aggressive. He says in his *Aphorisms in Prose*: "He who intends to defend the wrong has every reason to tread softly, but he who feels that he has a righteous cause must put down his foot; a polite law has no meaning at all."¹⁵ What one likes so much in Goethe as an attorney is the combination of the greatest devotion to the client's cause, of courage and energy, and a passion for sincerity and for truth. In this respect he really met the requirement of a genius as formulated by himself: "The first and last thing that is required of a genius is love of the truth."¹⁶

II

All this, if aided even by the fact that Goethe was well-versed in Roman and canon law, in constitutional law and in administrative law, in other words, that he had studied *Juristerei mit heissem Bemüh'n*,¹⁷ would not be sufficient to put his name on record as that of a great legal thinker; and yet the creativeness of the genius, so transparent in his poetical and dramatic master-

13. WIERUSZOWSKI, *op. cit. supra* note 9, at 27.

14. *Sprüche in Prosa* in 3 GOETHE SÄMTLICHE WERKE 236 (Cotta, 1853) 300.

15. *Id.* at 315.

16. MAXIMS AND REFLECTIONS (MAXIMEN UND REFLEXIONEN) (English edition by Bailey Saunders, New York, 1893) No. 336, p. 133.

17. First four verses in First Part of FAUST (translated by Bayard Taylor):

I've studied now Philosophy
And Jurisprudence, Medicine,—
And even, alas! Theology,—
From end to end, with labour keen;

pieces, can also be seen in his jurisprudential ideas. "*Ihm hat das Schicksal einen Geist gegeben, der ungebündigt immer vorwärts dringt.*"¹⁸ Surely one cannot find it in law books or articles because he did not publish any. The unfortunate fate which befell his inaugural thesis, *De Legislatoribus*, will later be touched on. Also, his *Positiones Iuris* which constituted the basis for his final examination, present only a skeleton of very interesting legal problems.¹⁹ We will refer to some of them in due course, but the great ideas about law and jurisprudence which have lasting values are spread all through his great works and writings from Goetz over Wilhelm Meister to Faust and are laid down in minor writings such as the *Aphorisms in Prose* and *Rhymed Maxims* and in his letters, and in his talks with Chancellor Müller, with Eckermann and others.

His universality and imaginative genius let him divine by intuition in a flash what another scholar would hardly discover, despite the exercise of immense industry, after years and years of study. It has been said that Goethe's intuitive discoveries in the field of natural sciences, such as the morphology of plants or the finding of the intermaxillary bone in the skull of homo sapiens, could be explained by the predominance of the visual in him. This is a poor and faulty generalization. The intuition of genius showed him both the problem and its solution, as in natural science, so in legal science. "*Nur was der Augenblick erschafft, das kann er nützen.*"²⁰ As he himself used to say, "*In wenigen Stunden hat Gott das Rechte gefunden.*"²¹

Of course, he was aware that intuition alone cannot substitute for an elaborate juristic study and preparation. It was with respect to law that he in his autobiography called *Fiction and*

18. FAUST, Part I, Scene IV, verses 326-7. In translation (note 17 *supra*), the verses read:

Fate such a bold, untrammelled spirit gave him,
As forward, onward, ever must endure.

19. A complete publication is contained in J. MEISSNER *op. cit. supra* note 3, at 48-52.

20. FAUST, Part I, Scene I, verse 332. In translation (author's):
Only what the moment creates, it puts to task.

21. SPRÜCHE IN REIMEN (RHYMED MAXIMS) (In the edition cited in note 14 *supra*, no. 2 p. 3.) In the author's translation:
Within a few hours' might,
God made everything right.

Truth From My Life said: "To treat a special matter one has to devote to it a special and long-continued industry."²²

There were essentially *four* great legal problems which thus engaged his master mind throughout his life. The first one deals with the legal relation between State and Religion. Goethe necessarily approached this problem from a different angle than would be natural to us. We are familiar with the idea that all *religions* which have followers in the State should be given the same legal status and that the State should take the same inter-confessional attitude towards all religions—the so-called principle of parity, and also with the idea of the *separation* of the State and religions. For the young Goethe the legal situation with respect to State and Church in Germany was quite different: in the Middle Ages the Holy Roman Empire on the one hand and the Church on the other formed the two sole aspects of the universal State. A heretic, therefore, had no legal status; he was outlawed. The Reformation did not change the unity aspect of State and Church, but it reversed the relation between the two powers. No longer was the concept of the Church the equivalent of the Roman Catholic Church. There were other churches besides it; and the modern State claimed for itself the power to determine which religion should be that confessed in the State. As a result of the Reformational struggles and wars, the so-called Peace between the religious parties signed at Augsburg in 1555 granted the sovereign princes and the free cities in Germany the authority to choose their religion themselves as sovereigns and to ordain the religion to which their subjects had to adhere (*cuius regio, eius religio*). Only the so-called "Estates of the Holy Roman Empire," not the miserable "rabble," had full freedom of belief and religion. The Peace of Westphalia did not change this principle. It only extended this freedom, however restricted, to the Princes and cities, as well as to the Reformed Church. People living under a clerical sovereign such as an archbishop or an abbot were protected only insofar as they had adopted another religion prior to or in 1624, the so-called "normal year." Consequently, cruel as it was for the Archbishop of Salzburg to expel the Protestants from the domain of his archbishopric in 1732, the action was legal. How greatly and

22. J. W. GOETHE, POETRY AND TRUTH FROM MY LIFE (DICHTUNG UND WAHRHEIT) (Engl. transl. by R. O. Moon, London, 1932) 413.

lastingly this expulsion aroused the indignation of the German people can be seen by the fact that more than half a century later it inspired Goethe to write the famous epic, *Hermann und Dorothea*.

In his *Maxims in Prose* he expressed the thought that "it was undeniable that in the Reformation the human mind tried to free itself." Simultaneously, he voiced the conviction that "the Reformation and the Renaissance were movements which had been favored in no small degree by the fact that men's hearts aimed at the return to a certain simple state of nature."

Even from these few words one may visualize the influence of Jean Jacques Rousseau who (as Goethe states in his *Fiction and Truth From My Life*) "had exercised a general influence throughout the whole cultured world." It was Rousseau who in his work *Du Contrat Social* had espoused the theory that the power given by that contract to the sovereign extends only to what is required in the universal interest of all. The sovereign, as Rousseau said, can call the citizens to account for their opinions, but only as those opinions affect the commonweal. The State has an interest, according to Rousseau, in the religious dogmas only to the extent to which they are related to the moral conduct and to the civil obligations which the members of different religious creeds owe one to another. The State is interested in the existence of a *merely civic religion* and the sovereign has the authority to enact the tenets of this civil religion, not as dogmas of a creed, but as principles of reason and as opinions derived from them, upon the practical use of which the existence of society depends.

Similarly, in his draft of an inaugural thesis, Goethe advanced the idea that the State by its legislative power should determine a worship in accordance with which the clergy must teach and must adjust its conduct. But aside from this universal worship, all religions should have full freedom and everybody should have freedom of belief and thought.

The title of the thesis *De Legislatoribus* indicates the foundation on which it rests, for the State is the holder of legislative power. Looking back decades later at his attempt of a legal approach to such a delicate problem, he excused himself by referring to the fact that his "youthful mind" was enraptured

by such an approach.²³ The point of departure was for him that all great religions have been introduced by political leaders such as emperors and kings, "army generals and other mighty men."²⁴

No wonder that Goethe's thesis created a sensation within the ivory tower called the University; it shocked the faculty, which refused to accept the thesis. For what reason? In a letter a Strassburg citizen named Stoeber said that the faculty did it *ex capite religionis ac prudentiae*. The young Goethe must have aroused the Philistines, for in the same letter Stoeber calls him "nuts."²⁵

Goethe had later probably abandoned the ideas of a "civic religion," but other concepts related to the problem of education in the light of an inter-connection between education and religion continued to hold a grip on his mind throughout the decades that followed the Strassburg interlude. Among the works in which these ideas are expressed, *Wilhelm Meister's Travels* must be mentioned first. It is one of the great repositories of Goethe's socio-political ideas, particularly in those parts which are called "Lenardo's Diary" (*Tagebuch*). Georg Brandes compares Goethe's ideas therein with those which underlie *Plato's Republic*. Goethe was nearly 60 years old when he began the writing on *Wilhelm Meister's Travels* and he was 80 when he had completed it. His enormous experience in public administration can be seen from his discussions of the cotton manufacture and textile industry in Switzerland and from his description of the fate with which the artisans are faced by the invention of such job-saving devices as machines. Long before Karl Marx and Friedrich Engels discussed the situation of the working class in England, Goethe showed his great interest in this and other social problems. He thought that the only alternative left to the workers, if they refused to accept the inevitable and to adjust themselves to becoming industrial workers handling machines, was emigration into the then still open colonies. It is in this light that his idea of "Wanderbund" must be considered. In the same work he describes the "Pädagogische Provinz" [Educational Province], the institutions of which shall teach the boys a religion which is no longer based on fear, but is founded upon

23. *Id.* at 414.

24. *Id.* at 414-5.

25. J. MEISSNER, *op. cit.* *supra* note 3, at 15 (publishing the whole letter).

“reverence.” Such a religion derived from reverence should present a unity of the principles of the three basic religions which he calls the Ethical, the Philosophical, and the Christian, respectively. Once more in the same work Goethe’s ideas on the theme of religion turn up in connection with activities of the “Wanderbund” [league of wanderers]. Reverence should be taught, he thought, as to every divine service, for as he stated, the “Credo” includes all religions.²⁶

III

The humanitarian ideas which were so dear to his heart and feeling influenced, of course, his approach to a second large field of law. It was *criminal* law. In his autobiography he says that in the period of history during which he grew up and studied law the great humanitarian ideas began to spread.²⁷ Goethe was a child when the first sovereign in modern times, Frederick the Great in Prussia, abolished the torture. And four years before Goethe enrolled in the Law School of its University, Alsace had followed the Prussian model. One would expect that Goethe would reject the idea of capital punishment, but strangely enough the older Goethe held no opinion on that issue other than that entertained by Goethe as a younger man. One of his theses (No. 53), in 1771, read: *Poenae capitales non abrogandae*: [Capital punishment should not be abolished].²⁸ About 60 years later he remarked:

If one could abolish death, we certainly would not object to it; but it will be difficult to abolish death sentences. If society renounces its power of execution, people will immediately take the law in their own hands, blood revenge (vendetta) will rap at the door.²⁹

Interestingly enough, present Germany has abolished death sentences in the Bonn Charter. It is to be hoped that the Germans did so not because they disagreed with Goethe, but because they have come to disagree with Hitler.

26. WILHELM MEISTERS WANDERJAHRE, book II c. 9, in GOETHE’S WERKE (ed. Duntzer, 1898) 881-2. It is there in connection with his idea of a *Weltbund* (World Federation) that Goethe argues for the recognition of all forms of government along with that of all forms of religion.

27. J. W. GOETHE, AUS MEINEM LEBEN (SÄMTLICHE WERKE, ed. by K. Heinemann, vol. 13, p. 30).

28. MEISSNER, *op. cit. supra* note 3, at 52.

29. GOETHE, *op. cit. supra* note 14, at 220.

IV

Fascinating also is Goethe's approach to a third problem puzzling Bench and Bar ever since the emergence of written law. This is the problem of its *interpretation*. He remarks: "If a man sets out to study all the laws, he will have no time left to violate them."³⁰ The German word "Polizei" [police] signified in Goethe's days public administration, including legislation, since the executive simultaneously functioned as the law-giver.³¹ Consequently, the word "Polizei" was used to indicate the contrast to law as adjudicated. It was Goethe who supplied us with the sharpest analysis of and distinction between the objective of these two great branches. This is what he said (in his *Maxims and Reflections*):

The law seeks for what is due, legislation and administration for what is proper. The law weighs and furnishes decision, legislation and administration supervise and command. The law deals with individuals, legislation and administration deal with society.³²

One will hardly find in the legal literature of two hemispheres a more acute and precise description of the difference between application of law and the making of it.

Fully aware from his study of law and from his administrative practice throughout half a century, of the significance of legislation, he never failed to warn against hairsplitting or word fetishism. For this reason, he makes the devil teach the student (in the first part of *Faust*) "on the whole, stick to words."³³ And in the first scene with his "Famulus Wagner" the great contest is described between Faust's striving towards the highest ideals and the "dry" Philistine represented by Wagner who identifies words with values.

<i>Es trägt Verstand und rechter Sinn</i>	With little art, clear wit and sense
<i>Mit wenig Kunst sich sel- ber vor:</i>	Suggest their own delivery
<i>Und wenn's Euch Ernst ist was zu sagen,</i>	And if thou'rt moved to speak in earnest,
<i>Ist's nötig, Worten nachzu- jagen?</i>	What need, that after words thou yearnest? ³⁴

30. GOETHE, *MAXIMS AND REFLECTIONS*, *op. cit. supra* note 16, No. 168.

31. Cf. STIER-SOMLO *Polizei* in 4 WÖRTERBUCH DER RECHTSWISSENSCHAFT 519, 522.

32. GOETHE, *op. cit. supra* note 14, at 157.

33. FAUST, Part I, Scene IV, line 461.

34. *Id.* at Part I, Scene I, lines 197-200.

It is fascinating to see how Goethe's famous contemporary, Jeremy Bentham, expressed cognate ideas in his *Theory of Legislation*: "The language of error is always obscure and indefinite. An abundance of words serves to cover a paucity and the falsity of ideas. And language of truth is uniform and simple."³⁵ Forty years before, Goethe had written down as No. 50 among his theses (and I translate some of the Latin in which it is written): "Statutes should be formulated so as to be terse in words and rich in reason."³⁶

Because of the limited capacity of human beings to express their conceptions through the medium of language, the power exercised by the persons who have the authority to say what other people's words mean is great. Goethe applied this to theology as well as legislation. In *Götz*³⁷ he contrasts the glosses written about the legion of learned opinions collated in the *Corpus Juris Romani* with the few statutes written in simple language which were handled in the Schoppenstuhl in his native city, Frankfurt.³⁸ In *Faust* it is the devil who advises:

<i>Im Ganzen haltet Euch an Worte!</i>	On words let your attention centre!
<i>Dann geht Ihr durch die sichre Pforte</i>	Then through the safest gate you'll enter
<i>Zum Tempel der Gewiss- heit ein.</i>	The temple halls of Certainty.

A similar thought recurred in the *Zahme Xenien* [Mild Epigrams]:³⁹

<i>Im Auslegen seid frisch und munter!</i>	Interpret spryly, fresh and keen,
<i>Legt Ihr's nicht aus, so legt was unter.</i>	If not, read into what you mean.

35. JEREMY BENTHAM, *Theory of Legislation* c. 1 (last paragraph).

36. J. MEISSNER, *op. cit. supra* note 3, publishing the *Positiones* on p. 48 ff.

37. GÖTZ VON BERLICHINGEN MIT DER EISERNEN HAND, a drama, Act I, Scene 5, (1773).

38. The *Schöppenstuhl* at the time of GÖTZ VON BERLICHINGEN MIT DER EISERNEN HAND, *i.e.* in the first decades of the 16th Century, had little in common with the *Schöppenstühlen* or *Schöffenstühlen* in the decades and centuries afterwards. Upon the reception of the Roman Law, the incumbents of those courts became learned jurists such as Goethe's grandfather, Johann Wolfgang Textor. The most famous among the *Schöffenstühlen* was that of Leipzig, distinguished by the activities of one of the greatest legal scholars, Benedict Carpzov (1595-1666), the "real founder of German jurisprudence": I/2 STINTZING, *GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT* 62-64, 66ff, (1884).

39. ZAHME XENIEN, II, in 3 GOETHE SÄMTLICHE WERKE 54 (Cotta, 1853).

It is remarkable that the man who apprehended by intuition the laws of heredity and evolution in the realm of the physical world, equally visualized the enormous significance of historical evolution in the realm of legal science. From his earliest youth Goethe was greatly interested in history and this interest ran from the history of nature and the earth, fascinating the *geologist* Goethe, to the political history, the history of mankind, fascinating the jurist and statesman.

<i>Wer in der Weltgeschichte lebt</i>	Would he who knows world history
<i>Dem Augenblick sollt er sich richten,</i>	Desire to depend on mo- ment's fugitive impres- sion?
<i>Wer in die Zeiten schaut und strebt</i>	Observing ages' drifts, in action
<i>Nur der ist wert zu sprech- en und zu dichten.</i>	He will deserve leader's and poet's glory. ⁴⁰

The approach made him on the one hand suspicious of fashions in political science or in legal science. An event might be important for one day or for a short time, but completely irrelevant for human progress. This explains, also, his attitude averse to newspapers and journalism.⁴¹ He did not care too much for them because they make a mountain out of a molehill by playing up an event, sensational for the moment, but fading into insignificance if viewed under the aspect of political or legal evolution.

V

More than most lawyers Goethe was fascinated with the *evolutionary* element of law, an element which to him was explanatory of both the emergence of a rule and the discrepancy which in the course of time and its changes might develop between the rule and the occasions for applying it. What he found by a stroke of genius was then taken up by men who were great legal scholars, able to make it a basis for a whole school of legal thinking. Goethe preceded the "historical school of jurisprudence." He always conceived of law as an historical

40. *Id* at I, edition cited note 14 *supra*, at 37 (author's translation).

41. *E.g.*, *Id.* V, edition, cited note 14 *supra* at 93:

Das Zeitungs Geschwister
Wie mag sich's gestalten
Als um die Philister
Zum Narren zu halten?

product. As he says in the Orphic verses: "*geprägte Form, die lebend sich entwickelt*" [stamped, i.e. designed, form which, being alive, grows].⁴² The historical nature of law implies its evolutionary character. From its very nature, therefore, one can infer the necessity for its alteration and change along with the changing needs of the ages.

This idea, formed rudimentarily as early as in his student days in Strassburg,⁴³ and then further developed in *Götz* and *Faust*,⁴⁴ inspired him so strongly that it would keep recurring ever and ever again throughout his life. It is this concept and its formulation which in the opinion of the founder of the historical jurisprudence, Frederick Karl von Savigny, one of the greatest thinkers in the field of law, gives Goethe more than a mere niche in the hall of jurisprudence. There was never criticism expressed more sharply and more beautifully than in *Faust* of the deadening effect inherent in the cult of precedent or to use the Anglo-American legal term, of the principle of *stare decisis*.

*Es erben sich Gesetz und
Rechte,
Wie eine ew'ge Krankheit
fort,
Sie schleppen von Ge-
schlecht sich zum Ge-
schlechte,
Und rücken sacht von Ort
zu Ort,
Vernunft wird Unsinn,
Wohltat Plage,
Weh Dir, dass Du ein
Enkel bist!
Vom Rechte das mit uns
geboren ist,
Von dem ist leider nie die
Frage.*

All rights and laws are still
transmitted
Like an eternal sickness of
the race,—
From generation to gener-
ation fitted,

And sifted round from
place to place.
Reason becomes a sham,
Beneficence a worry:
Thou art a grandson, there-
fore woe to thee!
The Law born with us, ours
in verity,
This to consider, there's
alas! no hurry.⁴⁵

Savigny in the first volume of his *System of Modern Roman Law*, published in 1840, draws heavily upon Goethe, by fully

42. URWORTE ORPHISCH (*Dämon*) in 3 GOETHE, *op. cit. supra* note 14, at 38.

43. GOETHE, *op. cit. supra* note 6, at 314.

44. See footnotes 50 and 54 *infra*.

45. FAUST, Part I, Scene IV, lines 443-450 (Taylor's translation, with one correction).

quoting these undying verses.⁴⁶ As he says, Goethe's verses have the meaning that everywhere the administration of law, laid down in express norms, resists innovation; progress of law is for this reason either totally balked at or reduced to an insignificant scale. Savigny protests against an interpretation which would make Goethe's verses mean that Goethe advocated the rule of natural law, (the word taken in the philosophical sense) and argued against the rule of positive law.⁴⁷

And then Savigny goes on, paying the highest tribute to Goethe's genius also in the field of jurisprudence. "It is the privilege of the seer to create by his intuition what we others can produce only by the long and painful way of progress based upon gathering ideas and putting them together."⁴⁸

Goethe, interested in legal history and believing in evolution, was certainly not convinced that there is a law of nature which, immutable throughout the ages and universal throughout the nations, should replace the rule of positive law. Such was the opinion of the natural law movement which, however, in fact, read into natural law only what was really and genuinely Roman Law.

How delightful is the scene in *Götz* between the Doctor Juris Olearius, who, born in Frankfurt on the Main, had the name Ohlmann before he went to the famous law school at Bologna, Italy, on the one side, and the abbot and raisonneur, Liebetaut, on the other.⁴⁹ The great doctor blames the people of Frankfurt for their hatred of the learned jurists and for their predilection for their *Schoppenstuhl*, a court composed of unlearned, but wise and experienced countrymen.⁵⁰ Doctor Olearius represents in the play the role of a champion of Roman law, a law which dominated the German law schools and, therefore, the administration of justice. The Roman law was taken as the *ratio scripta*, the "written reason." What did Olearius say about it? He said it is perfect, universal, and eternal, because it is immutable; but unwilling or willing, he had to admit that the simple *Schoppenstuhl* in Frankfurt was doing an excellent job

46. 1 SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 42 (1840, Berlin, bei Veit and Comp.).

47. *Ibid.*

48. *Ibid.*

49. *Götz von Berlichingen*, etc. note 37 *supra*, Act 1, Scene 5.

50. At *Götz's* time. See note 38 *supra*.

because these unlearned judges were able to adapt the past to the present, something which the learned courts failed in because they adhered to opinions laid down centuries before, if not earlier.

And at the end of his life, in the Second Part of *Faust*, when the condition was fulfilled upon which Faust's life was forfeited to the devil and the devil claimed his due, but could not get away with it, the devil condemned progress:

The body lies and if the spirit flee,
I'll show it speedily my blood-signed title,
But, ah! They've found such methods of requital
His souls the Devil must oft abstracted see!

.

In all things we must feel the spite!
Transmitted custom, ancient right,—
Nothing, indeed, can longer one confide in.⁵¹

Under Doctor Olearius the devil would have won; under Goethe's jurisprudence of evolution and adaptation of law to social changes, he lost. *Stare decisis* was once more disavowed and the devil was, therefore, the losing party.

VI

There is no doubt that Goethe's rejection of the natural law movement and aversion to an all-inclusive codification were influenced by the writings of Justus Moser, a writer on political subjects and on history.⁵² In his autobiography Goethe specifically refers to him as an "admirable and incomparable man" and compares him to Benjamin Franklin.⁵³ It was the *Patriotic Fantasies*, Moser's principal work, familiarity with which introduced Goethe so well to the tutor of the young princess of Weimar. The impression which Goethe's talks on Moser created ultimately facilitated his call to the Weimar's ducal court.⁵⁴

Moser's book convinced Goethe that a constitution may rest on the past and still be no obstacle for "movements and changes in things which cannot be hindered." As in his *Maxims and Reflec-*

51. FAUST, Part II, Act V, Scene V, line 102 *et seq.*

52. For Justus Moser, see III/1 LANDSBERG, GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT, 496 (1898).

53. GOETHE, *op. cit.* *supra* note 6 at 525-527.

54. *Id.* at 570.

tions he says, "history writing is a way of getting rid of the past."⁵⁵ How splendidly Goethe describes the eternal conflict between old and new. He says:

The battle between what is old, existing, and lasting with development, advancement and reformation is always the same. From all established practice arises pedantry; in order to be rid of the latter one destroys the former, and it takes some time before one becomes aware of the necessity to restore order again. The classical and the romantic, guild restrictions and freedom of trade, the tying up of big land estates and agrarian reforms through partitioning such estates: it is the eternal conflict which always generates a new one. A most enlightened government would do its best to moderate this conflict so as to find a balance without destruction of the one side or the other. But this is not possible for man, and God, it seems, does not want it either.⁵⁶

In this human inability to find the golden mean which should be the solution for that conflict, Goethe sees the explanation for violent political explosions called revolutions. He was 74 years old when he made the utterance to Eckermann, that not the people are to blame for the making of a great revolution, but the government.⁵⁷ Similar language was used by him (upon the first impressions he had of the French Revolution) in his *Venetian Epigrams* (No. 58, 59). He witnessed such great repercussions during his life and he was full of apprehension lest revolutions finally result in tyranny. The idea returns in those Epigrams (No. 54) and in the following verses:

<i>Ich habe gar nichts gegen die Menge</i>	I've nothing against the masses,
<i>Doch kommt sie einmal ins Gedränge,</i>	But, alas, once they're em- barrassed,
<i>So ruft sie, um den Teufel zu bannen</i>	They think they'll exorcise Satan
<i>Gewiss die Schelme, die Tyrrannen.</i>	If they call in the Bad One, Tyrant. ⁵⁸

What then is the best government? He asked the question in

55. MAXIMS AND REFLECTIONS (MAXIMEN UND REFLEXIONEN) (English edition by Bailey Saunders, New York, 1893) No. 336, p. 133, No. 80, p. 78.

56. GOETHE, *op. cit. supra* note 14 at 187 (translations by author).

57. Conversation on January 4, 1824, see HARTUNG, *op. cit. supra* note 9 at 313. See also GOETHE VENETIAN EPIGRAMS Nos. 58, 59 (1790) voicing the same idea, 34 years prior to that conversation.

58. ZAHME XENIEN II, in GOETHE *op. cit. supra* note 14 at 52 (translated by author).

the *Maxims and Reflections* and answered: "The government which teaches self-government."⁵⁹

It seems that Justus Moser's ideas formed again the basic point of departure. The central idea was for Moser the activity of man within the small orbits of his family, the village, his brothers in the profession or occupation, all activities to be governed by his unselfish devotion to the purposes of these smaller units. In 1807, after the defeat of his and other German countries by Napoleon in the historical battle which was fought a few miles from Weimar, the Battle of Jena, Goethe wrote a dramatic "Prelude" for the opening of the new theater. In this "Prelude" he further develops his idea of self-government as the basis for state government. Translating the verses, they read:

<i>Wer dem Hause treffend vorsteht</i>	Who knows how to run a house
<i>Bildet sich und macht sich wert mit andern</i>	Takes good instruction and qualifies to share
<i>Dem gemeinen Wesen vor- zustehen</i>	With others in the govern- ment of the Community
<i>Er ist Patriot, und seine Tugend</i>	He is a patriot and his vir- tue
<i>Dringt hervor und bildet Ihresgleichen</i>	Makes him distinct and creates its equals
<i>Schliesst sich an die Reihen Gleichgesinnter</i>	Leading to a body of fol- lowers of equal virtue.
<i>Was die Städte baut</i>	That which founds the cities
<i>Was die Staaten gründet:</i>	That which founds na- tions:
<i>Bürgersinn.</i>	(is) Public spirit. ⁶⁰

Whether Goethe was aware that his ideas coincided with fundamental English conceptions of self-government we do not know. But, as a matter of fact, a few years before his death, he made characteristic remarks to Eckermann. He said that the English in general seem to get the better of many other people, and he went on: "I can't say whether this has something

59. MAXIMS AND REFLECTIONS (MAXIMEN UND REFLEXIONEN) (English edition by Bailey Saunders, New York, 1893) No. 336, p. 133, No. 225, p. 107.

60. *Vorspiel (Prelude)* 1807, in 11/1 GOETHE'S WERKE (ed. Roper, Berlin, by Hempel), p. 96 (author's translation).

to do with their race, or their soil, or the healthy form of their free education, or with their free political constitution."⁶¹

He loved the idea of building up a free, self-governing body politic from below, and not from the top as theoretically proposed by the Continental liberals in France and in Germany. Goethe voiced the idea of proceeding from the smallest to the greatest at innumerable times. I think it is most beautifully expressed in two verses:

<i>Willst Du ins Unendliche schreiten, Geh nur im Endlichen nach allen Seiten.</i>	If you want to stray into the Infinite Rove all four corners of the Definite.
--	--

It is not impossible that Goethe's ideas influenced the great political reformers in Prussia such as the Baron von Stein, Hardenberg, and Wilhelm von Humboldt.⁶² The fundamental idea for them was, to use the words of an Austrian liberal of that period of history, Count Stadion, "The free commonalty is the fundament of a free state."

VII

It is true Goethe was a royalist, but so are the English. Those great political writers who had some influence on Goethe's political ideas, as Jean Jacques Rousseau and Alexander von Humboldt, had no love for the representative form of democracy.⁶³ That a majority of representatives should by its lack of wisdom bring a country to the brink of war or economic unrest was a proposition with which Goethe would never agree.

Goethe's sovereign, the Grand Duke of Saxony-Weimar, was the only German sovereign who fulfilled the promise given by the rulers of the various German kingdoms, dukedoms, and principalities to their peoples during the Napoleonic domination. While the other potentates failed to live up to their promises of a constitution, Karl August of Saxony-Weimar issued a constitution in 1816. Goethe was not fond of this step. Later it seems

61. Conversation on March 12, 1828 in CONVERSATIONS OF GOETHE WITH ECKERMANN (London 1850, transl. by John Oxenford) 57.

62. See FRIEDRICH CHRISTOPH DAHLMANN, DIE POLITIK AUF DEN GRUND UND DAS MASS DER GEGEBENEN ZUSTÄNDE ZURÜCKGEFÜHRT (1835) 220.

63. See FRIEDRICH MEINECKE, WELTBÜRGERTUM UND NATIONALSTAAT (1915) 43.

that he was reconciled with the constitution. In a talk with Chancellor von Muller, 1822, he found words sympathetic to written constitutions.⁶⁴ At about the same time he wrote a poem which is entitled "Toast to the Assembly" (the *Landtag*), and this is what he said therein:

<i>Den guten Wirt beruft man zum Berater: Ein Jeder sei zu Hause Vater So wird der Fürst auch Landesvater sein.</i>	Elect good housekeepers to the Assembly: Each man be first in his house father Then a Ruler, too, grows father of his country. ⁶⁵
---	---

One sees again the importance placed by Goethe upon the family and the commonalty. This might explain the reason why Goethe was strictly opposed to divorces.

With respect to world policy, Goethe was a definite internationalist, absolutely adverse to any form of nationalism.⁶⁶ Only he could express his ideas to this effect in poetical language:

<i>Hat wälscher Hahn an seinem Kropf, Storch an dem Langhals Freude, Der Kessel schilt den Ofen- topf, Schwarz sind sie alle beide.</i>	The Gallic rooster boasts of its wattle, Joyfully shows its long neck our stork, The kettle calls black the pot, And black both are, are they not? ⁶⁷
---	---

And finally, speaking of himself, he said:

<i>Gott grüss Euch Brüder, Sämtliche Oner und Aner Ich bin Weltbewohner Bin Weimarerer.</i>	I greet you, brothers, Partisans of various "isms" and "slogans," As for me, I'm a world citizen As well as Weimarian. ⁶⁸
---	---

Balancing the attitude of this great pacifist and anti-nationalist against the high tide of nationalism which by and large swal-

64. See FRITZ HARTUNG, *op. cit. supra* note 9 for this conversation between Goethe and Muller which took place on November 6, 1822.

65. I GOETHE'S WERKE, note 63 *supra* at 446.

66. GEORG BRANDES, GOETHE 556 (2nd ed. 1922).

67. *Zahme Xenien* (Mild Epigrams) I, in GOETHE, *op. cit. supra* note 14, at 45 (translated by the author).

68. *Id.* at 88 (translated by author).

lowed the whole world, one may consent to Friedrich Nietzsche's conclusion. He said that:

Goethe, not only a good and great man, but a civilization by and of himself, remained only an incident without consequences in the history of the German nation and that the 19th Century cannot show in German politics any leaf taken from Goethe.⁶⁹

In his famous meeting with Napoleon I, Goethe agreed when Napoleon pointed out that politics is destiny. When the Germans in 1918 witnessed the truth of the wisdom expressed by two geniuses, the cry was raised: "Back to Weimar, to Goethe." But one may ask, since the spontaneous growth of a new nationalism in Germany, whether the Weimar Republic, despite the beautiful reminiscence conjured up by the name, was really animated in its conduct and guidance by the *genius loci*?

Nietzsche's bitter judgment can be extended to the whole of Europe. Goethe's voice was silenced and Europe slid down the road, so masterly described by Goethe's admirer and brother in Apollo, Franz Grillparzer:

Der Weg der neuern Bildung geht

Von Humanität durch Nationalität zur Bestialität.

Civilization is sliding downhill the entire course,

From humanism over nationalism to barbarism.⁷⁰

Goethe had a presentiment that the appeal of the people's rule carries with it an appeal to nationalistic instincts and, therefore, to rivalry and war.

Arnold J. Toynbee in his *A Study of History* reminds us that at the First French National Assembly a thinker of no less political vision than Mirabeau warned that a representative parliamentary body was likely to prove more bellicose than a monarch.⁷¹ And, indeed, shortly afterwards the idea of the total war was born. Toynbee reports how the levy (*levee*) *en masse* of a revolutionary France swept away the old regimes in Germany and prepared the way for the creation of the modern armies of Prussia which sealed the fate of Napoleon and finally led to her victory over Austria and France in 1866 and 1870.

69. *Menschliches, Allzu Menschliches II* (DER WANDERER UND SEIN SCHATTEN, written in 1879), 265 (in 4 NIETZSCHE'S WERKE, Leipzig 1906).

70. 3 FRANZ GRILLPARZER'S, SÄMTLICHE WERKE, (ed. by August Sauer, Verlatz, Cotta, 1892) 171. (Author's translation).

71. 5 A STUDY OF HISTORY, 150.

It is in this connection that he fully quotes from Goethe's study *Campagne in Frankreich*. Goethe's monarch participated in the first coalition whose army the first time came to grips with the army of the young French Republic, at Valmy. This was in the second half of September 1792. Goethe who accompanied his monarch in the campaign, watched the battle. It was only a cannonade. But Goethe's vision noticed more sharply than all the generals of the coalition together that the successful resistance of the French Army, outnumbered as it was by the coalition army, changed the course of history. He reports that before the beginning of the cannonade the whole camp was as one in the belief that the French rabble, dressed as soldiers, would be annihilated. But the hope of the coalition was smashed and in the evening deadly silence reigned in the bivouac. Finally Goethe was asked what he thought. His answer was: "Here and now a new epoch of world history arises, and you," he went on to say to the officers, "can say that you were present at this turning point."

The sense of history was united in Goethe with his international sympathies. The German Johann Gottfried Herder was called "the real father of the re-birth of the Slavic nationalities."⁷² Herder's influence on Goethe was great, particularly his ideas aimed at the education of the whole of mankind in the spirit of humanity. The ideology of historical jurisprudence, as created by Savigny,⁷³ met with this school of thought. In Goethe, following Herder, one observes enthusiasm for foreign, particularly Slavic, folklore, expressed above all in national songs, many of which he translated in German rhymes.

It sounds ironic to say that thus the Germans Herder and Goethe became the promoters of a strong Slavic national feeling which then, in the 19th Century, led to the emergence of Pan-Slavism throughout the Western Slavs, such as Czechs, Poles, Croates, Slovenes, and Serbs.⁷⁴

Conclusion

Inevitably, for Goethe the resurrection of national literatures was a symptom of the revival of the fight for *freedom*. The

⁷² Cf. ALFRED FISCHEL, DER PANSLAVISMUS BIS ZUM WELTKRIEG (1919) 57.

⁷³ *Id.* at 41, 45.

⁷⁴ *Id.* at 45.

heroic struggle of the Greeks for freedom from the Turkish yoke is reflected in the beautiful Euphorion scenes in the Second Part of *Faust*. Freedom has been the leit-motiv which pervades all of his poetry and prose. Even "Homunculus," the creature chemically made in a retort, one of the keenest among so many keen products of Goethe's inexhaustible imagination in *Faust*, endeavors to break the glass which bars his freedom.

Freedom worth fighting and dying for, means independence, autonomy of the individual in fighting his way for forming the life according to will. The governing forces within the State may be selfish and corrupt, the power to ban these evil spirits lies in the political education aimed at devotion to objectives common to all. Towards the end of the second part of *Faust* the contrast is focused by a brilliancy never reached elsewhere in literature. On the one side are the representatives of selfishness in the State, with the Emperor and the Archbishop as protagonists and then, very soon afterwards, we see Faust "old as the hills," when, the first time, he enjoys his activity by reclaiming land from the floods. He is striving, together with others "all united in common impulse" to insure possession of the land and happiness in doing so. As Faust said, he delights in his satisfaction "to stand on free soil among a people free."⁷⁵

For Faust, therefore for Goethe, freedom is an essential part of the right *Weltanschauung*, a way of looking at life and, being so, it must be lived every day and not only on some occasions. Never was this idea more clearly expressed than in the last words of the dying Faust:

*Das ist Der Weisheit letzter Schluss:
Nur der verdient sich Freiheit wie das Leben,
Der täglich sie erobern muss.*

The last result of wisdom stamps it true:
He only earns his freedom and existence,
Who daily conquers them anew.⁷⁶

75. FAUST, Part II, Act V, Scene VI, line 70. (Taylor's translation).

76. *Id.* at lines 64-67. (Taylor's translation).