DIETER GRIMM «VERFASSUNG UND PRIVATRECHT IM 19. JAHRHUNDERT. DIE FORMATIONSPHASE» (JUS PUBLICUM VOL. 269), MOHR SIEBECK, TÜBINGEN 2017, ISBN 978-3-16-155557-2

Joachim Kummer, Berlin

For the most part of the 19th, 20th and 21st century private law and constitutional law were and still are thought to be separate areas of law. This distinction however, as Dieter Grimm shows in his recent publication «Constitution and Private Law in the 19th century – The formational period», is not an ahistorical or legal «fact», but rather the result of a complex process which took place between 1789 and 1820.

Dieter Grimm's work has a history of its own: Finished in 1979 as his habilitation, it is the first part of a planned, but never realized, two-part series on the relationship between constitutional and private law. Only in 2017 Dieter Grimm decided to publish the first part. A second part, as he stated, will not be published. The book therefore is unfinished and already over forty years old which is even more impressive because it can still be considered a standard work on the history of constitutional and private law.

In the introduction, the author points out that the distinction between private and public law was thought to be self-evident for most of the legal literature of 19th century France and Germany (pp. 8 – 11, 17 – 20). Private law was conceived as autonomous and apolitical, grounded in natural law or the theories of the historical school (pp. 21 – 22). If at all, the state and its constitution had the function of stabilizing private law (pp. 22, 26 – 28). This distinction, however, is historically not grounded and stands in contrast with the visible, albeit short-lived, material interdependence of constitutional and private law at the start of the French Revolution of 1789.

The first chapter thus covers this period and the subsequent Napoleonic reign (1789 – 1799). In the early stages of the revolution, the planned French Constitution and private law were thought to be intertwined. The constitution had the authority, not only to organize and limit governmental powers, but also to realize the idea of social reorganization and emancipation of the third estate from the feudal order (pp. 39 – 40). This necessitated a reform of private law according to constitutional principles such as personal and

economic freedom, legal egality as well as a social and political stratification which corresponded with the material wealth of each citizen (pp. 50 – 61). Both private and constitutional law served the same revolutionary ideas and were thought to be equal parts of the same political program (p. 68). The revolutionary events and constitutional legislation were thus always accompanied by civil legislation. This political unity lead to efforts and discussions on how to harmonize private law with the new constitutional and anti-feudal principles. The discussion included e.g. questions on legal equality and slavery, property law, family-law, law of inheritance and commercial law. (pp. 69 – 82). However, the unity between constitutional and private law did not last long and was ultimately lost in 1799 with the emergence of the Napoleonic era (pp. 82 – 84), leading to a split of constitutional and private law. While the «Code civil», enacted by Napoleon in 1804, was based on modern principles of a bourgeois society, the neo-absolutistic government of Napoleon did not adhere to revolutionary or modern principles at all (p. 84). The property owning third estate still welcomed this split as it was longing for economic and social stability (pp. 82, 84). The price was a trade-off between private and political freedom. The revolutionary principles were realized only in form of a private law society and not on a constitutional level (p. 88).

The second chapter focusses on the reforms of the member states of the Confederation of the Rhine («Rheinbund») and Austria. Identical to France, the member states of the Confederation of the Rhine, especially Baden and Bavaria, tried to transform its social and legal structure according to modern principles of legal freedom and equality (pp. 95 – 102). Again, the reforms encompassed both constitutional and private legislation (p. 97). But whereas the transformation France relied on the economic power and confidence of the third estate (p. 49), the reforms in Bavaria and Baden were carried by the idea of state sovereignty and a ministerial bureaucracy (pp. 92 – 93). Unlike France, the formation of a bourgeois society in these states presupposed the abolition of legal privileges of the nobility (pp. 96, 99 – 102). The reforms, however, were not as radical as in France because feudal privileges did survive in Bavaria and Baden (p. 103). Consequentially, projects such as the transplantation of the «Code civil» into Bavaria and Baden, advocated by Napoleon himself, was problematic since the «Code civil» relied on a not yet established bourgeois society (p. 104). This led to the question if the «Code civil» had to be modified to fit into the social structure or (in a broader sense) constitution of the member states of the Confederation of the Rhine or vice versa (pp. 104 – 108). In the end, the transplantation was only partly successful, also because Napoleon lost interest in it (pp. 109 – 116).

In contrast, the legal reforms of enlightened-absolutistic Austria did not aim at establishing a bourgeois society (pp. 117 – 118). Even though a civil code adhering to legal equality and freedom was realized in 1811 (the «ABGB»), it was not part of a political transformation into bourgeois society, but rather the project of enlightened absolutism (pp. 128 – 129).

The third chapter takes a closer look on the Prussian Reform Movement. Here the impulse for a modernization came from the military defeat against the Napoleonic army and the subsequent financial crisis for Prussia (p. 138). Comparable with the events in Bavaria or Baden these reforms were not supported by the (only marginal) third estate, let alone the nobility. Its advocates were a higher-ranking but small group inside the state ministerial bureaucracy which were influenced by the works of Immanuel Kant and Adam Smith (pp. 136 – 137). They set out to modernize the still feudal state and society of Prussia (p. 138) by liberalizing e.g. the ownership of land or commercial law (pp. 157 – 164). Again, at least in the beginning, the reforms also included the enactment of the written constitution. Both private law and constitutional reform however did not run parallel: The reforms prioritized the legal modernization of society. The enactment of a constitution on the other hand was merely the final step of the reform (p. 140). But since the reform had no lasting support from the nobility, the peasantry, the (barely existing) third estate nor the Prussian King, its success was precarious at best (pp. 138 – 139). Its momentum came from the existential threat Prussia faced after the loss against Napoleon (pp. 146 – 147) and was therefore lost after the foreign threat was diminished with Napoleons defeat in 1815 (p. 150). The beginning of the conservative roll-back in the late 1810s then put all constitutional efforts to a halt (pp. 155 – 156, 164), causing a setback for the reforms of private law (pp. 164, 179). In commercial law the reforms were stopped half-way (pp. 164 – 169). Meanwhile, important feudal privileges persisted, e.g. monopolies in commercial brewing (p. 169). The implementation of legal reforms was more successful in the Prussian territories left of the Rhine where the social and economic structure was more akin to French bourgeois society. As the prospects of a written constitution were diminished, the liberal private law of the Rhineland became, as the author puts it, a substitute for the constitution (pp. 172 – 179). The constitutional project, however, was abandoned, thus decoupling constitutional law and private law (p. 182). For the author this is exemplified by the emergence of the German Historical School of Jurisprudence led by Carl Friedrich von Savigny. Its theory not only rejected a civil law code but also a written constitution and established the notion of an apolitical and autonomous private law (pp. 182 – 185).

The fourth and last chapter returns to the states of Bavaria, Baden and Wurttemberg and their respective constitutions of 1818 and 1819. The written constitutions were a reaction to territorial gains, a reformist state bureaucracy and the threat of being overpowered by the recently established German Confederation in 1815 (pp. 187 – 190). Other than in revolutio-nary France, the constitution did not protect the achieved bourgeois society but was an act of monarchical self-preservation (pp. 190 – 191) secured by the so-called monar-chical principle (pp. 191 – 194). A look on the interdependence of the fundamental rights guaranteed by the constitution and private law reveals that those rights were, compared to France, only limited and did not aim at transforming the civil society beyond the already achieved liberalization (pp. 196 – 201). The book closes with the electoral process of the first and second chambers which – according to the author – determined the prospects of a private law legislation significantly (pp. 204 – 213).

All in all, the investigation by Dieter Grimm is still greatly rewarding for anyone interested in the historical relationship of constitutional law and private law during the early 19th century. It shows that the distinction between constitutional and private law did establish itself through a complex political process. It also proves that this distinction is far from self-evident, a fact that – at least in Germany – came to attention only in the second half of the 20th century.

Joachim Kummer, Berlin