

RE-READING THE COLLECTIVE PROPERTY ISSUE. A GENEALOGY OF ‘THE SOCIAL’.

FABIANA BETTINI**

TABLE OF CONTENTS

I. PRELIMINARY REMARKS

II. A PREMISE ON METHODOLOGY

III. THE GERMAN SIDE OF THE ‘SOCIAL REBELLION’: *GESAMMTE HAND* IN
OTTO VON GIERKE’S SOCIAL LEGAL THOUGHT

IV. THE FRENCH SIDE OF THE ‘SOCIAL REBELLION’: COLLECTIVE PROPERTY
IN FRENCH SOCIAL JURISTS’ LEGAL THOUGHT

V. CONCLUDING REMARKS. SOME SUGGESTIONS FOR A NEW CRITICAL
READING OF THE COLLECTIVE PROPERTY ISSUE

* Ph.D. Candidate, Comparative Private Law and European Private Law, University of Macerata.

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I. PRELIMINARY REMARKS

This paper offers some preliminary suggestions for critically rethinking the issue of collective property. These suggestions are part of a broader investigation into the legal debate which took place among German and French jurists in the period from the mid-nineteenth century to the first two decades of the twentieth century, and whose echo spread, to a certain extent, among Italian jurists at the beginning of the twentieth century. Part of this legal debate has significantly focused on the rediscovery of a specific legal institution, *Gesammte Hand*.

Gesammte Hand is a form of collective property that began to reemerge from the Germanic customary law in the middle of the nineteenth century, thanks to the works of some German jurists particularly interested in the social and collective dimension of the legal phenomenon. In the last decades of the nineteenth century Otto Von Gierke's works revived *Gesammte Hand* with more persistence than anybody else before, in order to bring it back to the centre of the German legal debate and with the ultimate goal of adding a greater emphasis on the social dimension of law in the nascent German Civil Code. The thought underlying my project is that, at the threshold of the twentieth century, some French jurists were influenced by the Germanist side of the Historical School which, sensitive to social issues, first reacted against the notion of individual property and, particularly through Gierke's ideas, focused on the customs of ancient Germanic people in claiming that the true Germanic model of property was collective property.

Although the "initial innovators" of Social Legal Thought were German, the main representatives of the Social were French.¹ According to a new belief in law as a social

¹ These insights are from Kennedy, Duncan, "Three Globalizations of Law and Legal Thought: 1850-2000", *The New Law and Economic Development. A critical appraisal*, David Trubek, Alvaro Santos (eds.), Cambridge, 2006, 37.

science evolving in response to changing social needs, French Social jurists recognized a new tendency in French legal discourse towards the emergence of the so-called *propriété en main commune*. This model of collective property is different both from the *indivision* and the *personnalité morale* because it is no longer managed according to the mechanisms of the individualistic model of property, but rather through collective mechanisms. The analysis of this legal institution, along with an inquiry into the reasons for its revival in the Germanic legal debate and its utilization by French jurists at the beginning of the twentieth century, allows us to highlight the key points of what I shall call the ‘Social Rebellion’ against the individualistic conceptualization of private property.

As a final preliminary thought, my interest in studying collective property has been reinforced by the contemporary debate around the ‘commons’ and the belief that focusing attention on a specific stage of the legal debate about collective property could contribute to a better understanding of the concepts of ‘common’ and ‘collective’. The idea is to face the issue by adopting a historical and comparative perspective, which could help to treat the problem of the ‘commons’ not only as a purely political issue but as embracing instead a more complex perspective, in order to examine the way in which the problem of collective property, usually presented as something pertaining to the past rather than contemporary, is discussed today within the intellectual framework.

II. A PREMISE ON METHODOLOGY

This project addresses the issue of collective property by adopting the methodological approach of ‘genealogy’. Genealogy does not refer to the search for the origins of an idea, and has nothing to do with going back in time and tracing the origins of an idea to the present in order to follow its evolution. Genealogy is instead a method which allows us to understand that a modern idea is “constituted by the confluence of a variety of

earlier ideas, each of which was transformed at its moment of combination with another idea”.²

The impulse for carrying out an analysis of the collective property debate using the genealogical method has been found in Nietzsche’s polemical writing, “The Genealogy of Morals”,³ as studied in detail by Michel Foucault in his essay “Nietzsche, Genealogy, History”.⁴ Nietzsche is very critical towards his contemporaries and their technique of carrying out research into the origins of an idea or an institution in order to find a purpose which could justify the concept and therefore to place it at the origin of the problem. According to Nietzsche, this technique of identifying the purpose of an institution with its origin is totally wrong. Every purpose that can be referred to an institution is simply a demonstration of the fact that, over time, this institution has been reinterpreted and manipulated by more powerful entities, so that its previous meaning and purpose have been overshadowed or completely replaced. Purposes can tell us nothing about the origin of a particular idea or institution other than the fact that its history is an unbroken chain of signs that reveals a succession of interpretations, resistances, metamorphosis and counter-actions.⁵

Starting to investigate Nietzsche’s understanding of genealogy, Foucault asserts that genealogy is in strong opposition to the search for origins and he clarifies more carefully the relationship between origins and purposes, stating that genealogy “rejects the meta-historical deployment of ideal significations and indefinite teleologies”; on the contrary, genealogy is all about

² For the idea of legal genealogy used as a methodological tool see Kennedy, Duncan, “Savigny’s Family/Patrimony Distinction and Its Place in the Global Genealogy of Classical Legal Thought”, 56 *Am. J. Comp. L.* 811, 831-832 (2010).

³ Nietzsche, Friedrich, “Genealogia della morale. Uno scritto polemico”, Milano, 2013.

⁴ Foucault, Michel, “Nietzsche, Genealogy, History”, *Language, Counter-memory, Practice: Selected Essays and Interviews*, Donald F. Bouchard (ed.), Ithaca, 1977.

⁵ Nietzsche, Friedrich, *Ibidem*, at 66-67.

“record[ing] the singularity of events outside of any monotonous finality; it must seek them in the most unpromising places, in what we tend to feel is without history- in sentiments, love, conscience, instincts; it must be sensitive to their recurrence, not in order to trace the gradual curve of their evolution, but to isolate the different scenes where they engaged in different roles. Finally, genealogy must define even those instances when they are absent, the moment when they remained unrealized”.⁶

Although it seems that Foucault places the method of genealogical research beyond history, almost professing the futility of resorting to it, history is intended as a repository of knowledge. So, if the genealogist listens to history, he finds that “there is something altogether different behind things: not a timeless and essential secret, but the secret that they have no essence or that their essence was fabricated piecemeal fashion from alien forms”.⁷

The use of the genealogical method, defined in the manner of Nietzsche and Foucault, leads us to understand that a modern idea is always the result of the confluence of a plurality of overlapping ideas, each one transformed by its contact with the others: “what is found at the historical beginning of things is not the inviolable identity of their origin;

⁶ Foucault, Michel, *Ibidem*, at 76.

⁷ Foucault, Michel, *Ibidem*, at 78. At this point, Foucault raises the question of what is the true subject of genealogy. The answer is found through a survey on the meaning of the words *Herkunft* and *Ursprung*, both used by Nietzsche in his texts and which are usually translated with the word ‘origin’. If we try to consider these words in their deepest meaning, Foucault argues, we realize that the *Herkunft* is able to record the object of the genealogical method much better than *Ursprung*: *Herkunft* means stock or ‘descent’, the ancient affiliation to a group, sustained by the bonds of blood, tradition, or social class. Yet, instead of highlighting the common traits of a category, the investigation into ‘descent’ permits “the discovery, under the unique aspect of a trait or concept, of the myriad events through which - thanks to which, against which- they were formed”. Foucault again clarifies that the task of the genealogical method is not to go back in time to restore the unbroken continuity of a series of events or to show that the past is still alive in the present; following the descent, on the contrary, “is to maintain passing events in their dispersion; it is to identify the accidents, the minute deviations – or conversely, the complete reversals- the errors, the false appraisals, and the faulty calculations that gave birth to those things that continue to exist and have value for us”.

it is the dissension of other things. It is disparity”.⁸ ‘Disparity’ implies that, within a given historical period, there is always more than what the prevailing reconstruction can prove; the predominance of an idea is always contingent, never necessitated, it is always the result of a phenomenon of contamination with ideas which, even if at some points in time have remained underground, have been always present.

III. THE GERMAN SIDE OF THE ‘SOCIAL REBELLION’: *GESAMMTE HAND* IN OTTO VON GIERKE’S SOCIAL LEGAL THOUGHT

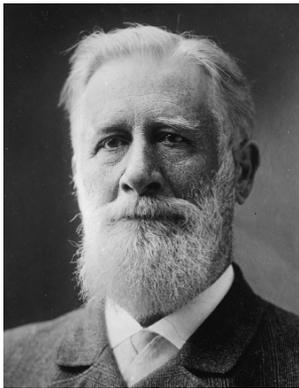
Gesammte Hand begins to reemerge in the mid-nineteenth century German legal debate directly from the medieval customary law of the Germanic people, thanks to the work of some jurists belonging to the Germanist side of the Historical School.

This legal institution was conceived of as a primitive form of collective property whose origins were authentically and purely Germanic. In very general terms, *Gesammte Hand* is an asset belonging in common to all the members of the group. This basic definition, however, does not help to understand what its inner structure and its functioning mechanisms are. *Gesammte Hand* does not permit any distinction in ideal shares which exclusively belong to each member of the group and, likewise, there is no place for any fiction to allow the property to refer to a new abstract entity, different from the individuals composing the group. *Gesammte Hand* refuses both the ideal distinction in shares and the idea of the solidarity of everyone towards the whole. It follows that while individuals do not lose their individuality by taking part in the group, at the same time they are the owners of the thing only if they are considered as a group.

The origin of this institution can be found in the need to regulate the use of property within restricted households, consisting of a limited number of subjects. At its origins,

⁸ Foucault, Michel, *Ibidem*, at 79.

collective property was closely linked to the pre-existence of a group of persons, and the expression ‘*Gesammte Hand*’ clearly recalls these origins. The expression, which is usually translated in French with *propriété en main commune*, symbolized the handshake between the members of the family, representing the visible and solemn sign of the principle of jointed action. In order to exercise their property rights, household’s members had to



form a single body by holding their hands together, thereby acting *communi manu*, *mit gesammter Hand*. Later, this symbol disappeared from the practice but its meaning remained, and with it the name *Gesammte Hand*. If it is true that the original impetus for the rediscovery of *Gesammte Hand* can be found in the controversy between Romanists and Germanists within the

Historical School, Otto von Gierke was the first to devote full attention to the study of this institution some decades later. Otto Von Gierke (1841-1921) was a Prussian-born jurist who studied in Berlin and taught there from 1887 onwards as a historian and a legal theorist, with an ever-growing reputation.⁹ Historians describe Gierke as a complex figure, whose complexity stems in part from his living in Germany between the nineteenth and twentieth centuries, in an age that was both late-romantic and social-realist. It is probably for this reason that Gierke, the first German jurist who overtly recognized the social role of law and strongly opposed the Romanistic Pandectism, never gave up with the romanticism and the “defensive nationalism” inherited from Georg Beseler and the other Germanists.¹⁰

⁹ O. Von Gierke’s most important works are: “Das Deutsches Genossenschaftsrecht” (The German Law of Fellowship), written in four volumes between 1868 and 1913, and “Handbuch des deutschen Privatrechts” (German Private Law), written in three volumes between 1895 and 1917. Important speeches delivered in universities are: “Die Soziale Aufgabe des Privatrechts” (The Role of Private Law in Society), Berlin, 1889, and “Das Wesen der menschlichen Verbände” (The nature of Human Groupings), Berlin, 1902.

¹⁰ Wieacker, Franz, “A History of Private Law in Europe (with particular reference to Germany)”, Oxford, 1995, at 358.

Gierke's work summarizes the most important results of the efforts of nineteenth-century German thought towards "the idea of social law".¹¹ Gierke's basic theme was the reality of the group personality as a social and legal entity, independent of state recognition and concession.¹² In Gierke's theory, the fundamental distinction was between *Sozialrecht* and *Individualrecht*. The latter, which is concerned with the claims of individuals, was stressed at the exclusive expense of the former in the Romanistic tradition, which was prevalent in Germany and predominant in the first draft of the new German Civil Code. As a proof of this negative trend, Gierke brought the example of the old Germanic conception of *Gesammte Hand*, which pervaded the old Germanic community – the *Genossenschaft* - before the reception of Roman law overgrew it.¹³ The collapse of the original unity of associations gave rise, in Gierke's view, to two evils: the total power of the modern state, foreshadowed by the absolutist state and actualized in the French Revolution, and individualism, foreshadowed by the Enlightenment and actualized in the bourgeois society of the Industrial Revolution.¹⁴ Gierke's formula to fight both these evils was to recognize the 'organicism' of human associations which, in his opinion, permeated the entire life of society.

My reflection focuses on Gierke's social and 'organicistic' ideas as applied to the field of collective property and, more particularly, on the analysis of *Gesammte Hand*. Gierke was the first to advocate more decisively in favor of collective property. According to him, *Gesammte Hand* was a primitive model of joint property, dating back to the ancient German customary law, which was initially applied only in small families but soon went beyond its boundaries to become the true model of German collective property. So conceived, *Gesammte Hand* could refer to any group of individuals acting collectively. In

¹¹ Gurvitch, Georges, "L'idée du droit social. Notion et système du Droit Social. Histoire doctrinale depuis le XVIIe siècle jusqu'à la fin du XIXe siècle", Paris, 1932, 535 onwards.

¹² These insights are from Friedmann, Wolfgang, "Legal Theory", New York, 1967, at 236.

¹³ Friedmann, Wolfgang, *Ibidem*, at 236.

¹⁴ Wieacker, Franz, *Ibidem*, at 359.

other words, Gierke was supporting the idea that *Gesammte Hand* was the one and only possible form of German property; consequently, he used it as a tool to launch his attack against Pandectism and influence the drafting of the German Civil Code so as to orient it in a more social direction.

The analysis of *Gesammte Hand* could cast new light on Gierke's social legal thought and stimulate a critical insight: *Gesammte Hand*, while presented as a breakthrough from the Pandectists' formalistic and dogmatic approach, seems to be *ad hoc* restored from a sort of mythical past made only of collectivism and still overloaded with doctrinal formulas. Here the thought is that Gierke, while rejecting the Pandectists' substantively individualistic approach in relation to private property, did however adopt a systematic and dogmatic method that was very similar to the one he was severely criticizing.

IV. THE FRENCH SIDE OF THE 'SOCIAL REBELLION': COLLECTIVE PROPERTY IN FRENCH SOCIAL JURISTS' LEGAL THOUGHT

On the basis of such considerations, the project now focuses on how the echo of ideas pertaining to the German collective property debate spread into France at the beginning of the twentieth century, and the extent to which French jurists were influenced by the writings of German jurists who were more sensitive to social issues and, more particularly, by Otto Von Gierke's rediscovery of *Gesammte Hand*.

In France, the period beginning with the French Revolution of 1789 saw the rising centrality of property law, which manifestly appeared at the core of the entire systematizing project at the moment of the pivotal enactment of the French Civil Code in 1804. The French Revolution and the enactment of the French Civil Code marked the transition from feudalism – *la féodalité* – to absolute property – *la propriété pleine ou parfaite*,

so giving rise to what historians have called the modern “age of property”.¹⁵ In other words, the French Revolution seemed to be essentially “a transformation of property”,¹⁶ which was described in the Napoleonic Code as “le droit de jouir et de disposer des choses de la manière la plus absolue”,¹⁷ the largest and most comprehensive *maîtrise* that an individual could exert on a thing, with exclusion of all the other individuals.

The notion of individual and absolute ownership became the key to understanding the whole system of property rights. Private property, the symbol of the bourgeoisie, was perceived as a guarantee for the exercising of citizens’ autonomy in every other sphere, the paradigm of every situations involving property. As an evidence of this, ‘collective property’ was relegated to a very marginal place in the Civil Code. On the one hand, the *indivision* was still modeled on the individualistic property paradigm and considered as an exceptional hypothesis clearly disfavored by the legal system¹⁸; on the other hand, only article 542 dealt (and deals) with *les biens communaux* providing that “les biens communaux sont ceux à la propriété ou au produit desquels les habitants d’une ou plusieurs communes ont un droit acquis”.¹⁹ Though the French legal system was anchored to the idea of property as *jouissance*, exclusion, disposition as consecrated in the Civil Code, some legal scholars have been more sensitive to social needs and encouraged the legal debate to refocus the attention on collective property.

¹⁵ These insights are from Kelley, Donald R., and Smith, Bonnie G., “What was Property? Legal Dimension of the Social Question in France (1789-1848)”, 128 *Proceedings of the American Philosophical Society* 200, 203 (1984).

¹⁶ Using the words of Taine, “Whatever the grand words adorning the revolution, it was essentially a transformation of property; in that lay its internal support, its primary force and its historical meaning”: Taine, Hippolyte, “Les origines de la France contemporaine”, Paris, 1878.

¹⁷ See the French Civil Code, art. 544: “Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations”.

¹⁸ Art. 815 of the French Civil Code provides that “No one may be compelled to remain in undivided ownership and a partition may always be induced, unless it was delayed by judgment or agreement”.

¹⁹ French Civil Code, art. 542: “Common property is that to whose ownership or revenue the inhabitants or one or several communes have a vested right”.

Permeated with a new belief in law as a social science evolving in response to changing social needs, the works of French jurists, such as Saleilles and Josserand, recognized a new tendency in the French legal system towards the emergence of the so-called *propriété*



en main commune. Raymond Saleilles (1855-1912) was a French jurist, who taught civil law and comparative law in Paris from 1898 onwards. Co-founder of the *Société d'études législatives*, Saleilles organized the celebration of the first centenary of the French Civil Code in 1904, at the same time serving as a member of the Civil Code Reform Commission. A fervent

Catholic and in favor of legislative reforms regarding women and workers, Saleilles resembled both the French Republican laymen and the Catholic Socialists.²⁰ Inspired by Jhering's position towards Roman law, Saleilles most-known formula is “au-delà du Code Civil mais par le Code Civil”, which literally means “beyond the Civil Code but through the Civil Code”. The formula reveals that, while recognizing the importance of the Civil Code as an instrument of legal development (instead of an instrument of inertia and immobility), Saleilles advocated for a central role of legal scholars and legislation. In his view, legal doctrine had to be the avant-garde for the interpretation of the social phenomena, a sort of repository of the collective conscience, but it was the exclusive task of the legislator to implement the necessary legislative reforms.²¹

Gesammte Hand was first studied by Raymond Saleilles in his work on the *sociétés en commandite*, in which he argued that such *sociétés* should be understood according to the *propriété en main commune* scheme,²² and some years later he deepened the study of this legal

²⁰ Halpérin, Jean-Louis, “Raymond Saleilles”, *Dictionnaire historique des juristes français. XIIe-XXe siècle*, P. Arabeyre, J.-L. Halpérin, J. Krynen (eds.), Paris, 2007, at 694-696.

²¹ Saleilles, Raymond, “Introduction à l'étude du droit civil allemande”, Paris, 1904.

²² Saleilles, Raymond “Étude sur l'histoire de société en commandite”, *Annales de droit commercial*, vol. X, 1895, at 10-26, vol. XI, 1897, at 29-49.

institution in his twenty-five lessons on legal personality.²³ Saleilles's intuition later inspired the work of Louis Verdelot²⁴ and Pierre Masse.²⁵ Other doctoral dissertations, like those of François Guisan²⁶ and Joseph Ricol,²⁷ focused on the same subject. More than all the others, however, Josserand dealt with the problem of collective property in France, more directly following the path chosen by Otto von Gierke and the other Germanists.

Louis-Étienne Josserand (1868-1941) was a French jurist who took the chair of *droit civil* in 1898 at the law faculty of Lyon, where he became Dean in 1913. Josserand's personality is characterized by the constant search for a balance between innovation and tradition, between collective and individual interests. In spite of his moderate position, Josserand was convinced that law was the social science *par excellence*: “le droit, science sociale, ne saurait échapper, en aucune de ses parties, à la loi suprême de l'évolution; seule les législations mortes se reposent dans l'immobilité”²⁸. Rejecting both materialism and the abstract metaphysical conceptualization of law, Josserand believed that the law should evolve in accordance with social morality, that it should change in response to the changing image of society.²⁹

It was in particular through Josserand's article in the book celebrating the centenary of the French Civil Code, which is probably the less known of Josserand's works, that the notion of *Gesammte Hand* was for the first time studied in comparison with the *indivision*

²³ Saleilles, Raymond, “De la personnalité juridique. Histoire et théories”, Paris, 1922.

²⁴ Verdelot, Pierre, “Du bien de famille en Allemagne et de la possibilité de son institution en France”, Paris, 1899.

²⁵ Masse, Louis, “Du caractère juridique de la communauté entre époux dans ses précédents historiques : thèse pour le doctorat”, Paris, 1902.

²⁶ Guisan, François, “La notion de *Gesammte Hand* ou de Conjonction appliquée à la société en nom collectif”, Lausanne, 1905.

²⁷ Ricol, Joseph, *La copropriété en main commune (Gesammte Hand) et son application possible au droit français*, Toulouse, 1907.

²⁸ Fillon, Catherine, “Louis-Étienne Josserand”, *Dictionnaire historique des juristes français. XIIe-XXe siècle*, P. Arabeyre, J.-L. Halpérin, J. Krynen (eds.), Paris, 2007, 429-431.

²⁹ Fillon, Catherine, *Ibidem*, at 430; Chazal, Jean-Pascal, “« Relire Josserand », oui mais... sans le trahir!”, *Recueil Dalloz*, 2003, 1777 onwards.

and the *personnalité morale*, the only two forms in which ‘collective ownership’ had ever been conceived until that time.³⁰ The idea of discovering the social dimension of the law of property was then re-addressed by Josserand, one year before his death, in a study published in the *Mélanges Sugiyama*, where he claimed that the process of transformation, which inevitably involved all legal institutions at the threshold of the twentieth century, was particularly evident in the context of property, which was “one of the most important pillars of the social temple”.³¹

Josserand’s critique was directed toward the Roman conception of *dominium*, which in his opinion was one of the most burdensome legacies left by Roman law to modern jurists. This conception was justifiable in the Roman period, due to the poverty of legal instruments and to the embryonic stage of development of collective property. The individualistic property régime understandably survived the turmoil caused by the French Revolution, which represented the triumph of individualism and was hostile to the recognition of any corporatist tendency within the legal system. At the threshold of the twentieth century, however, given that in every legal institution the jurists were rediscovering a social dimension, the application of the individualistic paradigm to private property became a complete non-sense³².

Josserand did not preach the advent of a ‘new legal order’; on the contrary, he recognized that a new trend was already taking place in the French legal system in order to correct the exaggerated individualism of property law, namely the emergence of forms of *propriété en main commune*. In order to describe it as a collective phenomenon, Josserand drew its

³⁰ Josserand, Louis, “Essai sur la propriété collective”, *Le Code civil, 1804-1904. Livre du centenaire*, Société d’Etudes Législatives (ed.), vol. 1, Paris, 1904.

³¹ Josserand, Louis, “Configuration du droit de propriété dans l’ordre juridique nouveau”, *Mélanges Juridiques dédiés à M. Le Professeur Sugiyama*, Association Japonaise des juristes de langue française (ed.), Tokio, 1940.

³² See Josserand, Louis, “Essai sur la propriété collective”, *Le Code civil, 1804-1904. Livre du centenaire*, Société d’Etudes Législatives (ed.), vol. 1, Paris, 1904, at 379.

external boundaries: the *propriété en main commune* lies in the middle between the *indivision* and the *personnalité morale*, but needs to be distinguished by both of them. On the one hand, the *indivision* is described as an individualistic and chaotic form of property, in which each share has full autonomy with regard to the others. Once acquired, the share becomes part of the asset of the owner, like any other rights, and thus he can alienate it, create new property rights on it and ask for partition at any moment, without the other members' consent. Due to its internal rules and in spite of the plurality of (joint) owners, this form of property is still managed in accordance with the individualistic scheme of *dominium*, very far from representing the interests of the group. On the other hand, in the *personnalité morale* the moral body is regarded as the synthesis of the members' wishes; in this way, the plurality is drastically reduced through a *fiction*, thanks to which the new born entity becomes the sole owner of the thing. Once again, the individualistic scheme persists.

In Josserand's view, this binary and very simplistic systematization has led to the denial of genuine forms of collective property. In addition to these two mechanisms of management of 'common ownership', in fact, a third form of property should be recognized, a form of property *sans indivision et sans personnification*, which is the *propriété en main commune*. According to the collective property idea, the thing is not even ideally divided into parts; the different owners, if considered in isolation, have no rights over the thing nor could they, by means of disjointed acts, alienate or create new property rights on their individual share. The thing is held in common by the group, as it is a whole separate asset with a collective purpose; the one and only owner of the thing is the community itself.

Despite French jurists occupying different legal and political positions within 'the Social' and consequently pursuing different projects, they all admitted that these forms of

collective property, decidedly present in the customs of the ancient Germanic people but deliberately ignored by the French Civil Code, were in reality not historically unknown in France. Although collective property became a real issue in France mainly thanks to the renewed German interest in *Gesammte Hand*, French jurists strove to present it as an indigenous French institution - whose origins could be rediscovered in the ancient French customs and specifically in the *communautés taisibles*³³ - and they were always very careful not to make the entire operation look like a legal transplant.

The critical remark I formulated above with respect to the position of Gierke in Germany is also applicable to French Social jurists. Like their German counterparts, they sought to pursue their ideological agenda in the field of property law. Taking advantage of the rediscovery of *Gesammte Hand*, they supported the notion of collective property in order to replace the “cold individualism” typical of Roman law – and taken ideologically from the Civil Code as a declamation- with another set of values, more consistent with the needs of society.

V. CONCLUDING REMARKS. SOME SUGGESTIONS FOR A NEW CRITICAL READING OF THE COLLECTIVE PROPERTY ISSUE

The outlined framework suggests that the description of ‘the Social’ should not be simplified. It only makes sense to speak in terms of a ‘Social Rebellion’ if we are aware that in Germany and France ‘the Social’ has manifested itself in different ways, in

³³ *Les communautés taisibles*, or implied communities, have medieval origins. Their peculiar social structure is based on the exploitation of land by a community, more often a family. They are generally presented as being outside the scrutiny of the law, in the absence of any written agreement, and based on the community of goods, works and life. They are perpetuated through rules of inheritance that prevent the dissolution of the group. This short description is taken from Hartig, Irmgard, “La dissolution de communautés taisibles de la région thiernoise et le Code Civil”, *Annales Historiques de la Révolution française*, n. 240, avril-juin 1980, 205-215.

accordance with the great diversity of the socio-political and legal context.³⁴ Even within each of these countries ‘the Social’, far from being a monolithic phenomenon, must be regarded in its complexity. In France, for example, although both Saleilles and Josserand were interested in the *Gesammte Hand*, and Saleilles’ work was the first to give impetus to many other works on the subject, Saleilles’ social thought is more interested in the aspects of legal personality and associations, while that of Josserand one more directly follows the path opened by Gierke and the other Germanists.

Moreover, in this project I have taken for granted the description of Classical Legal Thought given by Social jurists, assuming that it has been mostly their own projection. In fact, the exasperated description of nineteenth-century legal classicism, depicted as a period dominated by formalism and dogmatism, in terms of its method, and individualism in terms of its substance, was ideal for proving that the Social jurists’ critique had deep roots in a past which had to be rejected, because it was no longer moving with the changing social needs. I am aware that this description is nothing more than a narrative and it functioned as an instrument for legitimizing their deconstruction of the legal system and its reconstruction on different grounds.

Keeping in mind these two caveats, some tentative conclusions can be formulated. First, as to the methodological dimension of the Social jurists’ projects, the critique led by Social jurists in France and Germany seems to be characterized not only by a tendency toward deconstruction. If some Social jurists, such as Jhering and Geny, more clearly criticized the systematizing and formalistic approach adopted and favored by Classical

³⁴ Probably one of the most important differences in the legal context concerns the impact of codification on the legal system: while the French faced the process of enactment and interpretation of the *Code Civil* at the beginning of the nineteenth century, in Germany the debate around codification started with the Savigny vs. Thibaut polemical controversy and reached its peak in the last decades of nineteenth century with the drafting of the German Civil Code and its enactment in 1900.

legal thinkers throughout the nineteenth century,³⁵ jurists such as Gierke and Josserand, equally considered as representatives of ‘the Social’, have not always been able to distance themselves from a formalistic and dogmatic approach. In fact, although these jurists disclaimed the idea of a quasi-ontological dimension of the system, like those created by the *École de l'exégèse* and Pandectism, and they urged to break its rigidity, their criticism never stretched beyond the legal system. Jurists must be able to read the transformation of their social reality, which is in continuous evolution, in order to let ‘drops of social oil’ penetrating the mechanisms of the law. The critique of formalism and dogmatism of the classical method is more theoretical than practical, and it should be read within the dialectic legislator-courts-scholars. In an effort to update a system that until then had been blind to changing social realities, Social jurists constantly tried to rebuild the system from within, with the ultimate goal of restoring the role of legal scholars as the avant-garde of any social change of law. The Social jurists’ debate over collective property perfectly demonstrates the point: their critique of the individualistic and absolute conceptualization of private property did not aim at the complete *bouleversement* of the existing legal order; instead their critique was directed towards the recognition, within the legal system, of the collective dimension of property law.

Secondly, as regards the substantive dimension of the Social Jurists’ projects, their critical efforts seem to be permeated with the desire to pursue an ideological agenda. As noted above, a crucial element of their projects was that, in choosing property law as one of the ideal battlefields for fighting against Classical Legal Thought, Social jurists used *Gesammte Hand* as an ideological tool in order to challenge the dogma of absolute and individual property, and to promote social and collective values as a valid substitute. The ‘Social

³⁵ Von Jhering, Rudolf, “Law as a Means to an End” (trans. Isaac Husik, The Lawbook Exchange), New Jersey, 1999; Geny, François, “Méthode d’interprétation et sources en droit privé positif”, Paris, 1899.

Rebellion’, considered in its substantive dimension, has led to nothing more than the mere replacement of one ideology (the individualistic conceptualization of property) with another (the collective property idea). Thirdly, even if Social jurists presented their system as being more modern because it was more inclined to take account of the needs of social change, at least in France, the aim of this entirely new systematization was not redistribution; rather, the collective property discourse was useful for understanding and justifying new modes of wealth accumulation, mostly through associations and corporations. The collective property ideology permeating ‘the Social’, far from being at the foundations of a new legal order without private property, was put at the service of capitalist purposes. Finally, this conflict between the methodological and substantive dimension of the Social jurists’ projects, rather than being understood as a contradiction internal to Social Legal Thought could and should be better described as a dialectical stage within the framework of a process of gradual transformation from the Classical mode of legal thought to the Social one.

Along with a more thorough investigation on how this ‘Social Rebellion’ took place differently in Germany and in France, the project will address two other aspects of the debate on collective property. The first of these concerns how and to what extent the ideas pertaining to the ‘collective property debate’ spread from Germany and France into Italy at the beginning of the twentieth century. Probably in Italy there was not a real ‘Social rebellion’ against the individualistic conceptualization of private property, a break strong enough to push jurists to abandon their traditional methodological categories and place themselves outside the systematization of the Civil Code.³⁶ In spite of this, some jurists have made an effort to recognize the presence of ‘traces’ of Germanic law in our

³⁶ For a brilliant analysis of the ‘social critiques toward the Civil Codes’ at the end of the nineteenth century, see Cazzetta, Giovanni, “Critiche sociali al Codice e crisi del modello ottocentesco di unità del diritto”, *Codici. Una riflessione di fine millennio*, Atti dell’incontro di studio, Firenze, 26-28 ottobre 2000, P. Cappellini, B. Sordi (eds.), Milano, at 309-348.

legal system and expressed interest in using the scheme of *Gesammte Hand* for a number of different purposes.³⁷ The second aspect puts forward a tentative explanation as to why jurists all over Europe have gradually abandoned the collective property idea, thus formulated, starting from the period between the two world wars, and analyzes which legal solutions they have turned towards in order to give relevance to the collective dimension of property law.

³⁷ Among others, Ferrara, Francesco, “Tracce della comunione di diritto germanico nel diritto italiano”, *Riv. Dir. Civ.*, n. I, 1909; Venezian, Giacomo, “Reliquie della proprietà collettiva”, *Opere giuridiche*, vol. II, Roma, 1919.