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CLASSICAL SOCIAL THEORY AND IDEAS OF RESPONSIBILITY AND THE STATE IN FRANCE AND GERMANY

Abstract

Social theory can aid comparative legal studies by revealing currents of social ideas in which law develops. A comparison of major contributions to French and German social theory between the mid-nineteenth and the early twentieth century presents striking contrasts in understandings of the nature of legal responsibility and the function of the state. It shows two different movements of thought: one elaborating a view of law mainly as a technology of government overseeing and co-ordinating individual interests; the other emphasising the law's importance in nurturing social solidarity and facilitating collective responsibility.

Keywords

Comte – Von Stein – Tönnies – Weber – Gierke – solidarism – Durkheim – Duguit – individualism – collective responsibility – solidarity – functions of law – modern state

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I. INTRODUCTION

Can the study of social theory provide a background for comparative inquiries about changing legal ideas? This article explores this issue by asking how key contributions to social theory in France and Germany, from the mid-nineteenth to the early twentieth century, influenced, supported, or reflected changing legal ideas about individual and social responsibility. To limit the scope of inquiry here the focus is on ideas about the state's role, especially with regard to public service and social provision, and about the importance (reflected in legal debates and law reform) of social, collective or state responsibility confronting *laissez-faire* individualism.

Social theory can be defined as the systematic, empirically-oriented study of the "social" (the recurring forms, or patterned features, of interactions and relations between people) in terms of its historical variation, and its variation between different societies. Why might this theory be significant in considering legal debates around responsibility and the role of the state? There is little evidence that social theory has directly influenced legal reform, but, in the period addressed by this article, there was certainly cross-influence between jurists and social theorists.

The social theorist Max Weber, for example, interacted extensively with leading German jurists of his day¹. Similarly, Émile Durkheim's sociology, which dominated French social thought in the early decades of the twentieth century, powerfully influenced the work of important jurists such as Léon Duguit, Emmanuel Lévy and Paul Huvelin – the latter two actually being part of Durkheim's team of collaborators². But philosophy was a more important theoretical influence on jurists in this period, as for example in the Kantian and Hegelian bases of juristic legal theory especially in Germany. Social theorists have often written with the aim of promoting change or influencing public debate, but distances

¹ See S. P. Turner, R. A. Factor, *Max Weber: The Lawyer as Social Thinker*, London, New York: Routledge 1994; P. Honigsheim, *On Max Weber*, London: Collier-Macmillan Limited 1968, pp. 68-75; J. Radkau, *Max Weber: A Biography*, Cambridge: Polity Press 2009, pp. 258-9, 261-6; and, generally, M. Weber, *Max Weber: A Biography*, New York, London, Sydney, Toronto: John Wiley and Sons 1975.

² R. Cotterrell, *Living Law: Studies in Legal and Social Theory*, Aldershot: Ashgate 2008, chs. 6 and 7; R. Cotterrell, *Émile Durkheim: Law in a Moral Domain*, Edinburgh: Edinburgh University Press 1999, chap. 3.

between social theory and legal practice are considerable. Evidence of direct influence is likely to be rare. Far more significant is the point that by studying the different standpoints of lawyers, law reformers and social theorists it may be possible to integrate perspectives on a shared legal and social history.

Social theory, at least in its most prominent forms, reflects something of the generally felt problems, assumptions, aspirations and contradictions of its time. Typically, it seeks insight into the nature and sources of contemporary social conditions, and their possible future. It aims to capture the prevailing sense of movement in social life, and society's self-understandings. Legal thought also, in various ways, reflects these matters, but through the prism of professional and political priorities³. Perhaps, then, social theory can reveal a broad context of social experience in which legal issues arise, but its focus will be on the social as a whole, and on law and the state only insofar as they are aspects of, or shaping influences on, the social.

The themes focused on in this article are (i) the development of conceptions of law as a modern technical *instrument of government*, available to protect or arbitrate between citizens' interests; and (ii) the development of ideas of law as existing to nurture and define *social solidarity* and *collective responsibility*. Both themes characterise main currents in social theory from the mid-nineteenth to the early twentieth century. A focus on them highlights very different emphases in French and German theory in this period. Indeed, the tension between these emphases may be especially revealing with respect to changing perceptions of responsibility and of the role of the state.

II. PIONEER SOCIOLOGY: LAW AS OBSTACLE AND SOLUTION

Sociology (a term coined by the French philosopher Auguste Comte in 1839) is said to have been "born in a state of hostility to law"⁴. This

³ R. Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*, 2nd edn., Oxford: Oxford University Press 2003.

⁴ N. S. Timasheff, *An Introduction to the Sociology of Law*, Cambridge: Harvard University Committee on Research in the Social Sciences 1939, p. 45.

hostility is clearly revealed in Comte's work which saw the progress of human thought as passing through theological and metaphysical stages to enter (at different times in the different sciences) a final, modern stage in which positivist thought – focusing only on observable facts and discarding metaphysics – would triumph in all fields. According to Comte's prediction, all positivist sciences will "converge on sociology, because the whole hierarchy of being culminates in the human species"⁵, the life of which must be rationally guided by a science of the social.

So, sociology, not law, is to define the responsibilities of the citizen. It will reveal the mechanisms by which the social order sustains itself and the part that everyone must play in sustaining these mechanisms. Duty flows directly from the social functions that sociology explains. Law retains no role in this scientifically regulated world because it purports to address, without scientific understanding but through "the vague and turbulent discussion of rights"⁶, conflicts that the positivist science of society will remove. Law is "a metaphysical vestige (...) absurd as well as immoral" and positivism "causes the idea of law to disappear irretrievably"⁷.

In Comte's thought both conservatism (resignation to the existing order of society) and an idea of progress (the possibility of continuous rational reform) loom large, both being removed from the field of human will and located now in an impersonal science. So it is easy to see why Comte's sociology treats ideas of will and responsibility in legal thought as its enemy: Comtean responsibility does not originate in the individual's acts and motivations, but is fixed by the nature of society. It is established not juridically, but by scientific laws that govern social cohesion and set its requirements.

In this context governmental authority must be a unifying force. Comte saw that modern, large-scale societies required extensive occupational specialisation. But in contrast to the view that Durkheim would later take, he thought that the increasing division of labour could undermine social

⁵ R. Aron, *Main Currents of Sociological Thought*, vol. 1, London: Weidenfeld & Nicolson 1965, pp. 101-2.

⁶ A. Comte, *Cours de philosophie positive* (1830-42), vol. 6, Paris: J. B. Bailli  re et fils 1869, pp. 651-2, [as quoted in:] Timasheff, supra note 6, p. 45.

⁷ A. Comte [quoted in:] G. Gurwitch, *Sociology of Law*, London: Routledge & Kegan Paul, Trench, Trubner & Co 1947, p. 12.

cohesion, decomposing society "into a multitude of unconnected corporations which scarcely seem to belong to the same species"; governmental power must "contain and so far as possible arrest this fatal disposition to the fundamental dispersion of ideas, sentiments and interests"; it would have to "intervene appropriately in the daily performance of all the various functions of the social economy, to sustain continuously the idea of the whole and the sentiment of common solidarity"⁸.

Thus, at the beginning of modern sociology, Comte calls for government intervention in aid of solidarity - a theme that would resonate through much later French thought. But law is not seen as important to this intervention; it is merely an arena of irrational conflict where rights are fought over without knowledge of their wider social context. A challenge is thrown down - if a somewhat unclear one, given Comte's ultimately vague views on the future of the state and on appropriate structures of government⁹ - to rethink issues of social responsibility outside the framework of the rights and duties of private law.

At much the same time as Comte wrote, Lorenz von Stein contributed foundations for sociological thought in Germany. Von Stein's work is now virtually ignored but in 1850¹⁰ he set out a general theory of social development that 'laid the cornerstone of what we today call "historical sociology"¹¹ and is "the first German sociology"¹². Influenced initially by Hegel's philosophy of history, Von Stein replaced such philosophical

⁸ A. Comte, *Cours de philosophie positive*, vol. 4, Paris: J. B. Bailli  re et fils 1864, pp. 429, 430-1, [as quoted in:] S. Lukes, *Emile Durkheim: His Life and Work*, Harmondsworth: Penguin 1973, pp. 141, 142.

⁹ H. E. Barnes, *The Social and Political Philosophy of Auguste Comte*, [in:] H. E. Barnes, *An Introduction to the History of Sociology*, Chicago: University of Chicago Press 1948, pp. 81-109. For the apparent change over time in Comte's ideas on the organisation and radical decentralisation of governmental functions see e.g. R. Vernon, *Auguste Comte and the Withering-Away of the State*, Journal of the History of Ideas 1984, vol. 45, p. 549.

¹⁰ L. v. Stein, *The History of the Social Movement in France, 1789-1850*, Totowa, New Jersey: Bedminster Press 1964.

¹¹ K. Mengelberg, *Lorenz von Stein and his Contribution to Historical Sociology*, Journal of the History of Ideas 1961, vol. 22, pp. 267, 268.

¹² H. Marcuse, *Reason and Revolution: Hegel and the Rise of Social Theory*, London: Routledge and Kegan Paul 1955, p. 375.

speculation with a “science of society”, an empirical inquiry into processes by which social life had developed into the form of modern industrial organisation.

The principles of the *Declaration des droits de l'homme et du citoyen*, Von Stein declared, are the “first basic law of the new society”¹³ brought into being by the French Revolution of 1789. They express fundamental laws “structurally separate from state and government” and rooted in society itself¹⁴. These principles are not primarily political but social – “the constitution of society”¹⁵ rather than of the state. They do not depend on a particular form of state, must be seen as antecedent to state action, and can be asserted, if necessary, against it. Thus, natural (scientific) “laws” of society’s development are the real motor of modern European history.

What are these scientific (sociological) “laws”? The Declaration of the Rights of Man asserted a principle of equality before the law, which gives free rein to the pursuit of self-interest and enables established privileges and statuses to be challenged. Thereafter, acquired property becomes the foundation of social order and organisation. “For the liberated individual (...) property became the natural and indeed primary means of shaping his own worth and individuality”¹⁶ and the concrete expression of abstract, universal liberty. These conditions support ‘economic society’ based on free acquisition. This, in turn, becomes “industrial society”, based on capital accumulation which is made possible by the mechanisation of production.

The contradictions of this society are expressed in the contrast between universal abstract freedom (in theory) and differential access to property (in practice). Hence the conflict of social classes (which are defined by this differential access) arises as the proletariat becomes conscious of its situation. The result is the threat of violence, civil war and the self-destruction of society. And this result is produced by the nature of the social – not by the nature of politics, law, or the state.

¹³ Von Stein, *Geschichte der sozialen Bewegung in Frankreich von 1789 bis auf unserer Tage*, vol. 1, München: Drei Masken Verlag 1921, p. 209, [as quoted in:] E.-W. Böckenförde, *State, Society and Liberty: Studies in Political Theory and Constitutional Law*, New York: Berg 1991, p. 121.

¹⁴ Böckenförde, *supra* note 13, p. 121.

¹⁵ Ibid., p. 126.

¹⁶ Ibid., p. 127.

If many of these ideas sound familiar it is, of course, because they are so close in outline to Marx's analysis of the historical trajectory of capitalist society. But they were presented by Von Stein before Marx had set out his mature theories. There is clear evidence that Marx had read Von Stein's work, perhaps drawing much from it¹⁷ while condemning it for its bourgeois defence of the state and the established order. Unlike Marx, Von Stein sought to save industrial society from itself, enlisting the state as central to this rescue operation. But his warnings of social unrest were largely ignored in the growing optimism in Germany, from the mid-nineteenth century, for national unity and a national state¹⁸.

Despite the utter disparity in their fame today, Von Stein is more significant in the context of this article than Marx because, as Ernst-Wolfgang Böckenförde has argued¹⁹, he can be seen as a proponent in 1850 of the social or welfare state and of a science of society to serve it. He combines a partially Hegelian idealisation of the state with sociological realism. The state's function is to guarantee liberty and property, and in principle it is above class antagonisms as "the community acting as a personality"²⁰. But this is an ethical ideal, "merely an abstraction"²¹. The state, in reality, serves the interests of the ruling classes, or becomes absolutist and remote, losing support in society. Its only possibility of retaining its authority and regulatory power is to enlist the support of wide social groupings by guaranteeing the practical (not just formal) liberty of all, and facilitating their participation in economic and social life especially through the creation of extensive opportunities for property acquisition.

¹⁷ J. Singelmann, P. Singelmann, *Lorenz von Stein and the Paradigmatic Bifurcation of Social Theory in the Nineteenth Century*, British Journal of Sociology 1986, vol. 37, pp. 431, 447; Marcuse, supra note 12, p. 374. As Werner Cahnman puts it, "Marx's sociology is therefore as Steinian as his economics is Ricardian". See W. Cahnman, *Book review: Lorenz von Stein: The History of the Social Movement in France, 1789-1850; Translated by Kaethe Mengelberg*, American Journal of Sociology 1966, vol. 71, p. 746.

¹⁸ Böckenförde, supra note 13, pp. 117-18.

¹⁹ Ibid. in chap. 6.

²⁰ Von Stein, supra note 13, p. 16, [as quoted in:] Singelmann, Singelmann, supra note 17, p. 436. See also Mengelberg, supra note 11, p. 269; Marcuse, supra note 12, p. 381.

²¹ Von Stein, supra note 13, p. 49, [as quoted in:] Mengelberg, supra note 11, p. 269; and see Singelmann, Singelmann, supra note 17, pp. 437-8.

As Böckenförde remarks, “The logic of this idea, once grasped, took Lorenz von Stein beyond liberalism as early as 1850”²². Indeed, it led him, in his later work on “administrative science” (*Verwaltungswissenschaft*), to develop what now appear as foundations of the modern discipline of public administration²³; seeking to devise ideas and techniques for use in the management of the social by the state²⁴.

Comte and Von Stein presented ideas about law, state and responsibility that reappear in new guises in later social theory up to the early twentieth century. Among these is the idea in Comte’s work that responsibility should be seen as the consequence not of the individual’s will and acts, but of social conditions. Von Stein, again like many later theorists, sees the state as responsible for creating adequate conditions for individual participation in social and economic life. And, for both writers, governmental regulatory tasks are not to be set politically or determined by the form that the state or governing power takes in a certain time and place. They are to be set by what “society” demands of this power – a matter which social theory, not juristic analysis, must reveal. The displacement of the jurists²⁵ would allow the emergence of practical administrative sciences; sciences of social management, which Comte envisaged in theory and Von Stein devoted his career to developing. One way or another, the private assertion of rights or of claims of responsibility would be subordinated to a scientifically-directed regulation of the social.

²² Böckenförde, *supra* note 13, p. 133.

²³ C. Thornhill, *The Domain of Public Administration*, Journal of Public Administration 2006, vol. 41, pp. 793, 794.

²⁴ M. R. Rutgers, *Can the Study of Public Administration Do Without a Concept of the State? Reflections on the Work of Lorenz von Stein*, Administration & Society 1994, vol. 26, p. 395.

²⁵ In this perspective social science overwhelms juristic science. Unsurprisingly, from the juristic side, the complaint was made that Von Stein’s “conception of society shows the modern tendency unduly to extend its meaning, and to include [in it] the functions of government and law and national economics”: F. Berolzheimer, *The World’s Legal Philosophies*, Boston: Boston Book Company 1912, p. 327. Comte’s subsuming of law and government in the social attracted the same criticism: *ibid.*, pp. 311-12. Yet some jurists made similar claims for the precedence of the social: Otto von Gierke wrote (in his *Natural Law and the Theory of Society, 1500 to 1800*, Cambridge: Cambridge University Press 1950, p. 224) that “We shall no longer ask whether the state is prior to law, or law is prior to the state. We shall regard them both as inherent functions of the common life which is inseparable from the idea of man”. But such general juristic speculations (part of lawyers’ “internal” debates) posed no threat to lawyers’ preserves, unlike the creation of entirely new research fields of sociology or social theory to study law and government historically as social phenomena.

III. SOCIOLOGICAL PESSIMISM: INDIVIDUALISM AND BUREAUCRACY AS INEVITABLE

Von Stein's urgent advocacy of state action is strikingly at odds with the seemingly resigned, almost fatalistic outlook of some influential later German social theory, especially that of Ferdinand Tönnies and Max Weber. In their best-known theoretical works neither of these late nineteenth and early twentieth century writers sees modern society as oriented to developing social or collective responsibility, though both recognise some counter-tendencies to the dominant privatised lines of development. Tönnies expresses nostalgia for decaying social forms – the village and the close-knit kin group – in which common responsibility is natural and needs no formal embodiment in law. But he sees the dominant kinds of modern social organisation as entirely different. There are perhaps, at best, pockets of economic life, such as co-operative movements, where something more than the atomistic individual existence characteristic of modern society might be created²⁶.

Weber, correspondingly, analyses what he sees as cold, morally empty forms of modern routine; the bureaucratised, rule-bound organisation of the social. Again, the main focus is on individuals pursuing their own projects, fixing their responsibilities primarily in terms of contract and private law. When Weber observes new political or legal developments that challenge this individualistic universe with its formal, technical law, his response is ambivalent. Thus, both theorists, in the main, portray a world of individual responsibility and of the legal and social conditions that sustain it, and harbour grave doubts as to whether anything different can be built.

Tönnies' book *Gemeinschaft und Gesellschaft*, first published in 1887, attracted immediate attention, if some initial criticism for its "tone of pessimistic resignation"²⁷ and it has remained influential to the present

²⁶ F. Tönnies, *Community and Association*, London: Routledge & Kegan Paul 1955, pp. 227-8.

²⁷ H. Liebersohn, *Fate and Utopia in German Sociology 1870-1923*, Cambridge, Massachusetts: MIT Press 1988, pp. 11-12. It has, however, been argued that, after the publication of his 1887

day. His dichotomy of *Gemeinschaft* (community) and *Gesellschaft* (association), which he uses to identify the transition to modern society, is paralleled by comparable dichotomies in social theory (especially Durkheim's contrasting of mechanical and organic solidarity, discussed below). *Gemeinschaft* is a social bond or community of kinship intimacy ("blood"), closeness in a shared environment ("locality"), ideas held in common ("mind") or, often, all of these²⁸. In it, the main identity of individuals is as part of a communal unity. Built on similarity of experience, thought and feeling, *Gemeinschaft* can flourish only in relatively small-scale social networks and so is becoming irrelevant to the large-scale networks of modern life; its place being usurped by *Gesellschaft*, the opposing social form.

Gesellschaft is a social bond based on calculation or rational will, in which individuals remain "essentially separated in spite of all uniting factors (...) and there exists a tension against all others"²⁹. The typical and fundamental bond of *Gesellschaft* is contract, and its perfect legal embodiment is the joint stock company³⁰. Responsibility arises from deliberate undertakings or the need to protect the individual in the life of the association. But *Gesellschaft* requires powerful state support in a way that *Gemeinschaft* does not. While the latter is a natural unity, the former is an artificial one: "individuals remain in isolation and veiled hostility toward each other so that only fear of clever retaliation restrains them from attacking one another"³¹. State power exercised through law is needed to sustain *Gesellschaft*.

Ultimately, Tönnies, like Von Stein, portrays modern capitalist society as unstable, dependent on state law for stability and needing increasingly extensive state intervention to achieve this. Yet what the state will enforce

book, Tönnies' outlook gradually became more optimistic. This led him to a sustained search for opportunities to recover, perhaps in new forms, aspects of *Gemeinschaft* in modern conditions, or to transform *Gesellschaft* structures productively. See A. Mitzman, *Tönnies and German Society, 1887-1914: From Cultural Pessimism to Celebration of the Volksgemeinschaft*, Journal of the History of Ideas 1971, vol. 32, p. 507, and C. Adair-Toteff, *Ferdinand Tönnies: Utopian Visionary*, Sociological Theory 1995, vol. 13, p. 58.

²⁸ Tönnies, *supra* note 26, p. 48.

²⁹ *Ibid.*, p. 74.

³⁰ *Ibid.*, pp. 225-7, 264.

³¹ *Ibid.*, p. 262.

are the calculated, measured, private law responsibilities of isolated individuals, not the conditions for mutually-supportive interaction typical of integrated communities.

If Tönnies' most influential work expresses a longing for a pre-capitalist world no longer possible, Max Weber's rejects all utopias and shows a resignation to modern political, economic and social conditions that are, in his view, unlikely to change fundamentally. The longest section of his magnum opus *Economy and Society* is titled "Economy and Law (Sociology of Law)"³². Much of it discusses historical processes of rationalisation of law, presenting these partly as a matter of comparative doctrinal legal history and partly in relation to political, economic and other changes.

For Weber, rational law is rule-governed law and the bases of law's rational strength and its authority as a rule-system, may be formal or substantive. Substantively rational law is determined and legitimated by the principles of an ideological system other than law itself – for example, ethics, religion or political values. For a time, natural law doctrines in the West provided a general input of substantive rationality into law, and gave law's authority a basis in values or beliefs. But one of Weber's most important claims is that, in modern conditions, "the axioms of natural law have lost all capacity to provide the fundamental basis of a legal system (...). The disappearance of the old natural law conceptions has destroyed all possibility of providing the law with a metaphysical dignity by virtue of its immanent qualities. In the great majority of its most important provisions, it has been unmasked all too visibly, indeed, as the product or the technical means of a compromise between conflicting interests"³³.

Many factors influence the substantive content of modern law, but, for Weber, its integrity and authority as a rule-system have become primarily a matter of its *technical usefulness* in compromising conflicting interests and of its *formal rationality* in which "definitely fixed legal concepts in the form

³² M. Weber, *Economy and Society: An Outline of Interpretive Sociology*, Berkeley, CA: University of California Press 1978, pp. 641-900.

³³ Ibid., pp. 874-5.

of highly abstract rules are formulated and applied”³⁴. Legal thought, insofar as it is formally rational, tends to become a logical calculus of rules. While formal logical legal rationality never exists in a pure form, it is nevertheless a crucial, dominant characteristic of modern law. This formality allows the “integration of all analytically derived legal propositions” into an “internally consistent, and, at least in theory, gapless system of rules”³⁵.

The importance of modern law’s tendency to formal rationality is that it removes the need for any consistent reference to “external” moral or political sources to validate this law. Modern law, for Weber, is a largely self-sustaining normative structure validated by its technical sophistication and overall usefulness in regulating the interplay of private interests. Beyond that, most importantly, it is the servant and support of the modern state. Its formal logic of rules defines authority impersonally and so underpins modern bureaucracy and capitalistic business organisation, as well as the idea of the rule-governed state (*Rechtsstaat*), with its everyday administrative operations very much like those of a machine largely removed from human volition.

What is portrayed here most significantly is the morally-impregnable, fortress-like character of the modern state, seemingly free to do good or evil without challenges to its legitimacy from moral or political critics or from the social convulsions that Von Stein had feared. Weber was aware, like Tönnies, of the dissatisfactions of his time with capitalist society, served by seemingly morally cold law and relentless state power. But he devotes only a few pages to what he calls “The Anti-Formalistic Tendencies of Modern Legal Development”³⁶, offering brief comments on juristic and political developments at the beginning of the twentieth century that challenged legal formalism’s dominance and effects. These included: the growth of legal principles of “good faith and fair dealing”; demands for “social law” linked to “the emergence of the modern class problem”³⁷; and the revival of Catholic natural law doctrines and various critical juristic movements in Germany.

³⁴ Ibid., p. 657.

³⁵ Ibid., p. 656.

³⁶ Ibid., pp. 882-9.

³⁷ Ibid., p. 886.

Weber sees all of these as fated to be ineffectual when viewed in the wider perspective of the processes of rationalisation that have entrenched modern economic, legal and political forms. Like Tönnies in *Gemeinschaft und Gesellschaft*, he has little confidence in the possibilities of significant change in these forms. "Weber could not conceive of any genuine alternative to the capitalist economic system"³⁸ or of any radical reorientation of the private law serving it. Bureaucracy and economic routine increasingly made life seem like an "iron cage"³⁹, but attempts to create a socialist order would merely produce, less efficiently, more bureaucracy and formal rules. Again like Tönnies, Weber was far from discounting the need for reform, but this would be in the context of "an inevitable and prolonged capitalist era"⁴⁰. And what may have concerned him far more than legal individualism's deafness to calls for a social law of collective responsibility was the ultimately poor adaptability of formal legal reasoning to the means-ends calculations of economic entrepreneurs⁴¹.

As social theorists, Tönnies and Weber have powerfully influenced general understandings of the legal and social changes that occurred in their era. There is, however, little evidence that they themselves contributed significantly to those changes. Rather, they wrote in ways that enable us now to gain a better perspective on influences that did operate. Affinities might easily be found, for example, between Tönnies' evocation of pre-modern *Gemeinschaft* life and the jurist Otto von Gierke's erudite reconstruction of the communal forms of *Genossenschaft* (association) in old Germanic law⁴². Gierke's scholarly presentation of the legal past reflected

³⁸ W. J. Mommsen, *Max Weber and German Politics 1890-1920*, Chicago: University of Chicago Press 1984, p. 104.

³⁹ M. Weber, *The Protestant Ethic and the Spirit of Capitalism*, London: G. Allen & Unwin 1930, p. 181.

⁴⁰ Weber [quoted in:] Mommsen, supra note 38, p. 105.

⁴¹ See Weber, supra note 32, p. 885.

⁴² See e.g. O. v. Gierke, *Associations and Law: The Classical and Early Christian Stages*, Toronto, Buffalo: University of Toronto Press 1977; idem, *Community in Historical Perspective*, Cambridge: Cambridge University Press 1990; idem, *Natural Law*, supra note 25; idem, *Political Theories of the Middle Age*, Cambridge: Cambridge University Press 1900; idem, *The Development of Political Theory*, New York: H. Fertig 1966.

an emotional sense of “loss of community” directly comparable with that of Tönnies, and Gierke’s rich, romantic evocation of half-forgotten characteristics of Germanic law powerfully influenced debates that shaped the content of the new German Civil Code of 1900⁴³. Ultimately, neither Gierke nor Tönnies appear merely as reactionaries seeking to recover a golden past. Both of them eventually attacked the individualism of modern law for facilitating the exploitation of the socially disadvantaged⁴⁴.

Gierke’s great influence was mainly due to his juristic skill in presenting aspects of the reforms he advocated as being deeply rooted in national legal tradition. His efforts may have contributed to an outcome in which, while the Civil Code largely expressed Romanist legal individualism, it became accepted that legislation reflecting different (social) principles was needed to supplement it⁴⁵. Tönnies and Weber, both admirers of Gierke’s juristic scholarship, saw his organic imagery of socio-legal development as lacking adequate empirical foundation and being insufficiently informed about social (especially economic) forces of change⁴⁶. Gierke’s ideas were tailored to the political and juristic debates of his time and provided rhetorical ammunition for these in a way that Weber’s and Tönnies’ did not⁴⁷.

Yet Weber’s and Tönnies’ characterisations of legal and social history still retain a significant presence in scholarly debate, while Gierke’s have ceased to do so. Weber, in particular, was able to see more clearly than either Gierke or Tönnies, the capacity of modern law as an instrument of government, free of tradition and fixed moral points. Most importantly, he recognised the state’s power to direct this instrument in hitherto

⁴³ M. John, *Politics and the Law in Late Nineteenth-Century Germany: The Origins of the Civil Code*, Oxford: Clarendon Press 1989, chap. 5.

⁴⁴ Ibid., pp. 109-11; Mitzman, *supra* note 27.

⁴⁵ M. F. John, *The Politics of Legal Unity in Germany, 1870-1897*, *Historical Journal* 1985, vol. 28, pp. 28, 341.

⁴⁶ Mommsen, *supra* note 38, p. 11; W. J. Cahnman, R. Heberle (eds), *Ferdinand Tönnies on Sociology: Pure, Applied and Empirical*, Chicago: University of Chicago Press 1971, pp. 22, 32-33; A. Brand, *Against Romanticism: Max Weber and the Historical School of Law*, *Australian Journal of Law and Society* 1982, vol. 1, p. 94.

⁴⁷ Cf. A. Black, *Editor’s Introduction* to Gierke, *Community*, *supra* note 42, pp. xiv, xxx: “Gierke furnishes a splendid example of the kind of thinking against which (...) Weber (...) reacted (...); he was the type case of what Weber called «the professor carrying the marshal’s baton of the statesman or reformer in his knapsack»”.

inconceivable ways, yet to do so in the framework of a capitalist social order that legal reform would not significantly disturb. But Weber's message was addressed to "science" and the long term, not to "politics" and the legal debates of the moment⁴⁸.

IV. SOCIOLOGICAL OPTIMISM: SOLIDARITY AND SOCIAL RESPONSIBILITY

French social theory, developed during the first half century of the Third Republic (from 1871 to the early decades of the twentieth century), offers a striking contrast to dominant strands of German pessimism or ambivalence about possibilities for major social change, and also to German portrayals of the state's central significance, as guarantor of the social and as the sovereign source of all law. My concern here is merely to illustrate this difference by reference to some leading contributions to French theory in this period.

Informing them are (i) the continuing influence of Comte's conviction that social science could point to ultimate values on which modern society should be founded; (ii) echoes of Jean-Jacques Rousseau's idea of sovereignty not as the possession of a state apparatus but as the crystallising in legal form of a popular "general will" - "so that the natural relations [of social life] are always in agreement with the laws on every point, and law only serves (...) to assure, accompany and rectify them"⁴⁹; (iii) the legacy of the Declaration of the Rights of Man; and, finally, (iv) a widespread awareness (especially after military defeat in 1871, the bitter experience of the Paris Commune in that year, and economic unrest from the 1880s) of an urgent need for French national unity and a social solidarity capable of bridging class divides.

The last of these themes clearly informs the "solidarism" of Charles Secrétan, Alfred Fouilliée and Léon Bourgeois spanning the period from the

⁴⁸ Cf. M. Weber, *Politics as a Vocation and Science as a Vocation*, [in:] H. H. Gerth, C. W. Mills (eds), *From Max Weber: Essays in Sociology*, London: Routledge & Kegan Paul 1948, especially, pp. 115-17, 150-3.

⁴⁹ J.-J. Rousseau, *The Social Contract and Discourses*, London: Dent 1973, p. 205.

mid-nineteenth century to the early decades of the twentieth. It reflected a need to circumvent and defuse the perceived threat of working class agitation associated with socialism and radical syndicalism, and to do so without recourse to authoritarian solutions. It sought to counter traditional conservative Catholic paternalism with a genuine reformism focused, *inter alia*, on changing conceptions of social responsibility and social entitlement. Solidarism is less a social theory than a political-moral philosophy, significant here not just for its general influence as “a kind of official philosophy for the Third Republic”⁵⁰ but as an important part of the climate of thought in which Durkheim’s social theory developed⁵¹.

The solidarists saw justice as governed by the need for social solidarity⁵²: “The justice of egoism is not justice”⁵³ and – significantly – the state is *not* the primary agent of solidarity since it can create a kind of unity only through constraint. Justice is to be realised in free, egalitarian associations with the “associationist principle” penetrating property relations. “Participation in profits and in the management of enterprises will transform all industries into vast production cooperatives (...). The free cooperative association is (...) the future”, wrote Secrétan in 1889⁵⁴; the state is not superior to other associations. Its right to exist comes from the fact that it is needed to enforce law, but law (*droit*) arises outside it, and rights express the sharing of liberty.

Free association is an inalienable right. All voluntary associations are founded on contract and contract is the basis of all solidarity. Society, for Fouillée, is a “contractual organism (...) freely desired and consented to”⁵⁵. Associations can and must flourish independently of the state which,

⁵⁰ C. Bouglé, *Le solidarisme*, Paris: M. Giard 1924, p. 7.

⁵¹ Cf. Lukes, *supra* note 8, pp. 350-4.

⁵² The following summary draws especially on G. Gurvitch, *L'idée du Droit Social: Notion et système du droit social. Histoire doctrinale depuis le 17e siècle jusqu'à la fin du 19e siècle*, Paris: Librairie de Recueil Sirey 1932, pp. 567-89; see also J. E. S. Hayward, *Solidarity: The Social History of an Idea in Nineteenth-Century France*, International Review of Social History 1959, vol. 4, p. 261.

⁵³ C. Secrétan, *Philosophie de la liberté*, vol. 2, Paris: A. Durand 1865, p. 471, [as quoted in:] Gurvitch, *supra* note 52, p. 572.

⁵⁴ C. Secrétan, *Études sociales*, Paris: F. Alcan 1889, pp. 176, 178, [as quoted in:] Gurvitch, *supra* note 52, p. 574.

⁵⁵ A. Fouillée, *La science sociale contemporaine*, Paris: Hachette et cie 1910, [quoted in:] Gurvitch, *supra* note 52, p. 577.

in itself, "is not flexible enough to steer economic life"⁵⁶. Justice, for Fouillée, "is the obligation to give each person what is due to him by reason of his function in the living totality and his solidarity with the whole society"⁵⁷. Léon Bourgeois introduced the idea of a "social debt" owed by and to all of society's interdependent members, reflecting natural conditions of solidarity, and of a "social quasi-contract" of membership in society – "quasi" because based on what parties would have wanted had they been able to consent in advance to the regime of law under which they would live⁵⁸.

In this way solidarism created a rhetoric of social unity across class divides – offered to dispel memories of a defeated (in 1871) and compromised state that had often appeared to betray revolutionary hopes of liberty, equality and fraternity. It sought to replace these memories with promises of a new social contract involving a sense of the responsibility of social elites to recognise workers' entitlement to decent living conditions in return for their productivity.

Georges Gurvitch, writing in the early 1930s, criticised solidarism's inconsistencies, especially its commitment to legal individualism (signalled by the basing of all analysis on contractual relations of individuals) despite its concern to transcend individualism as a foundation of social organisation⁵⁹. Solidarism proposed that rights and responsibilities should be *socially* determined by the conditions of association. Yet it saw these conditions as originating in a real or "quasi" expression of *individual* wills, founding a contract. Solidarism developed no social theory to explain the content or significance of solidarity as an idea. Ultimately, Fouillée admitted that solidarity was an ideal⁶⁰, not a social fact.

⁵⁶ Fouillée [quoted in:] Gurvitch, supra note 52, p. 580.

⁵⁷ A. Fouillée, *La démocratie politique et sociale en France*, Paris: F. Alcan 1923, p. 18, [as quoted in:] Gurvitch, supra note 52, p. 580. See generally, J. E. S. Hayward, 'Solidarity' and the Reformist Sociology of Alfred Fouillée, *American Journal of Economics and Sociology* 1963, vol. 22, pp. 205, 303.

⁵⁸ See M. Borgetto, *La doctrine solidariste de Léon Bourgeois: une nouvelle définition des rapports entre le politique, le social et le droit*, [in:] C. M. Herrera (ed.), *Les juristes face au politique: Le droit, la gauche, la doctrine sous la IIIe République*, Paris: Kimé 2003, pp. 35-56; Gurvitch, supra note 52, pp. 582-5; and, generally, S. Audier, *Léon Bourgeois: fonder la solidarité*, Paris: Michalon 2007.

⁵⁹ Gurvitch, supra note 52, pp. 575, 589; and see Borgetto, supra note 58, pp. 51-52.

⁶⁰ Gurvitch, supra note 52, p. 579.

It was left to Émile Durkheim – sharing the solidarists’ desire for a society aware of the conditions of its own moral cohesion – to provide a social theory to explain the nature and forms of solidarity. In his *De la division du travail social*, published in 1893 but originating in lectures in 1887-8, he identified two kinds of social solidarity: mechanical – based on shared values, experience and understandings uniting individuals or groups; and organic – based on the interdependence of individuals or groups having functionally differentiated roles⁶¹.

If the solidarists saw solidarity as an ideal, Durkheim argued (against Comte) that it could exist as a natural condition of complex societies having a highly developed division of labour. In these societies, functional differentiation creates conditions of interdependence. But he argued also that social cohesion in modern society is not a natural consequence of the free play of individual interests. A moral framework enshrined in law is needed to guarantee it. The cohesion of society is not based on contracts because contracts need non-contractual conditions of existence⁶². The moral phenomenon of organic solidarity, arising directly from the *social fact* of interdependence, provides these conditions.

Tönnies, Durkheim suggested, had rightly characterised *Gemeinschaft*, which is essentially mechanical solidarity, and rightly seen it as declining in modern industrial societies. But he was wrong to see these societies as inherently unstable and held from self-destructive conflict only by the state. What Tönnies ignored, in Durkheim’s view, was the bond of organic solidarity that arose from the specialisation of social and economic roles and functions in complex modern societies⁶³. Organic solidarity based on interdependence created cohesion, but needed to be supported by law. Contrary to Tönnies’ view, law is not required to compensate for a pervasive absence of solidarity as if this were an inevitable problem of modern society. Instead, law must guard against “abnormal forms”⁶⁴ of social organisation that may disrupt solidarity, such as the isolation,

⁶¹ É. Durkheim, *The Division of Labour in Society*, Basingstoke: Macmillan 1984.

⁶² Ibid., p. 162.

⁶³ É. Durkheim, *Communauté et société selon Tönnies*, 1889, [reprinted in:] É. Durkheim, *Textes, Tome 1: éléments d’une théorie sociale*, Paris: Éditions de Minuit 1975.

⁶⁴ Durkheim, supra note 61, bk 3.

repression or discriminatory treatment of particular social groups or classes, which will exclude them from society's networks of interdependence.

Durkheim's theory clearly signals a new view of responsibility⁶⁵. The meaning of responsibility is fixed by society, not by the expectations of individuals. Contracts, for example, are not merely private relations between the parties, but depend on regulation that society supplies. So their terms should reflect the requirements of solidarity. They should be "just contracts" that do not abuse unequal bargaining power⁶⁶. But what exactly are solidarity's requirements? In Durkheim's early writings the morality of modern society is presented as a kind of "governmental morality" of good social management. In a society of complex specialisation people must fulfil their specialised roles conscientiously. Society, through the state and law, imposes the requirement to do so – adequately to fulfil one's function, or that of one's social group. This idea of functionally-determined responsibility is close to Comte's.

Later, however, Durkheim's writings develop a different emphasis⁶⁷: the unifying morality of a highly differentiated society can only be one that emphasises the equal humanity of all its members, as individuals entitled to dignity and respect⁶⁸. Solidarity in modern society cannot be based on tradition, blind adherence to authority, or the mere interplay of private interests, but only on universal respect for others as individual human beings – an ultimate value that must pervade modern law (requiring, for example, humane treatment of offenders). This value-system of moral individualism (*le culte de l'individu*)⁶⁹ is presented by Durkheim as a direct derivation from social theory. He sees it as the only universal, unifying

⁶⁵ See J.-L. Génard, *Responsabilité et normativité dans l'école et la pensée de Durkheim*, [in:] P. Robert, F. Soubiran-Paillet, M. Van Der Kerchove (eds), *Normes, normes juridiques, normes pénales: Pour une sociologie des frontiers*, vol. 2, Paris: L'Harmattan 1997.

⁶⁶ É. Durkheim, *Professional Ethics and Civic Morals*, London: Routledge & Kegan Paul 1957, chap. 18; Durkheim, supra note 61, pp. 316-22; See, generally, C. J. Sirianni, *Justice and the Division of Labour: A Reconsideration of Durkheim's Division of Labour in Society*, Sociological Review 1984, vol. 32, p. 449.

⁶⁷ R. Cotterrell, *Émile Durkheim: Law in a Moral Domain*, Edinburgh: Edinburgh University Press 1999, chs. 7-9.

⁶⁸ É. Durkheim, *L'individualisme et les intellectuels*, 1898 [reprinted in:] É. Durkheim, *La science sociale et l'action*, Paris: Presses universitaires de France 1987.

⁶⁹ See É. Durkheim, *Leçons de sociologie*, Paris: Presses universitaires de France 1950, p. 199.

morality fully consistent with the nature of solidarity in complex societies. Hence, for Durkheim, a sociological understanding of the nature of solidarity makes it possible to specify the ultimate parameters of individual rights and responsibilities, to be determined not juristically or philosophically but by the conditions of complex, modern social life.

Durkheim's ideas were much discussed by jurists in France and beyond and are highly relevant in considering how legal responsibility might be reformed. Yet they cannot be said to have influenced legal debate in the direct way solidarism did. Solidarism postulated solidarity as an ideal, not as a sociological concept. As such, like Gierke's speculative appeal to history in Germany, solidarism in France offered an attractive rhetoric for political and legal debate (and had a major influence on legal reform campaigns in such areas as social welfare, health and safety, and industrial conditions.)⁷⁰ But it was not rooted in a sociology that, like Durkheim's, sought to explain the historical developments it proclaimed.

At the same time, Durkheimian social theory lacked wide, direct juristic influence partly because it did not provide an unambiguous rhetoric for law reform debates. Even among Durkheim's followers there were disagreements about conclusions to be drawn from theory. One of them, Paul Fauconnet, argued that modern legal ideas of responsibility, emphasising the subjective intentions of the individual wrongdoer, were "an immense impoverishment"⁷¹ because attributions of responsibility must be made to meet the needs of social solidarity as a whole, and could not be restricted by a subjective, "spiritualised" emphasis on any particular individual's state of mind.

The implication might be that Durkheim's outlook on the "naturalness" of solidarity in modern society (based on universal respect for the individual) and the need for legal intervention only to correct "abnormal" conditions was too complacent. A revolution in legal

⁷⁰ J. F. Stone, *The Search for Social Peace: Reform Legislation in France, 1890-1914*, Albany: State University of New York Press 1985.

⁷¹ P. Fauconnet, *La responsabilité. Étude de sociologie*, Paris: F. Alcan 1928, p. 350; cf. Cotterrell, supra note 67, pp. 107-8; J. Piaget, *The Moral Judgment of the Child*, Harmondsworth: Penguin 1977, pp. 315-28.

and social ideas might be needed. This was the conclusion of another Durkheimian, the jurist Paul Huvelin. Acknowledging Durkheim's sociological methods as fundamental, he nevertheless argued that organic solidarity is *not* a natural condition of modern societies (although interdependence is). So, law's directive, coercive power is vital to control the serious conflicts endemic in modern social life⁷².

V. CONCLUSION: COMPETING VISIONS OF LAW AND STATE

Durkheim's writings on the state⁷³ emphasise, in the tradition of Comte, government's role as an agent of society. They offer no insights such as Weber's into the state's bureaucratic structure or the legal foundations of its legitimacy. Since Durkheim and Weber never wrote about each other's work, the gulf in perceptions remains unbridged. That their social theories follow very different directions is clear, especially on matters of legal responsibility. For Durkheim, law and morality are always closely interrelated and legal responsibility must be shaped by the value system of moral individualism if it is to contribute to social solidarity. Even if some of his followers thought this approach might not go far enough to emphasise social bases of responsibility, they certainly agreed that responsibility is more than a matter between individuals, as portrayed in most modern legal conceptions of delict. Dictated by society for social ends, it is, by implication, capable of being adjusted into forms that best serve the needs of social solidarity.

Weber is silent on such matters, but one might presume to speak for him: Weberian responsibility is surely merely what law and state (rather than "society") decree it to be. In Weber's view, no consistent value-orientations shape modern law; only a mass of disparate policy influences give it substance. Legal responsibility is thus the outcome of law's primarily formal-rational and pragmatic prescriptions. Like law itself, it is a technical instrument to serve the needs of the state and to compromise conflicting private interests. Separated from moral intuitions,

⁷² On Huvelin's work see R. Cotterrell, *Living Law: Studies in Legal and Social Theory*, Aldershot: Ashgate 2008, chap. 7.

⁷³ Cotterrell, *supra* note 67, chs. 10 and 11.

legal responsibility is a transaction cost in private dealings or a device for governmental coercion.

The theories of Tönnies and Weber present an image of the largely settled law, state, and society of modern capitalism, especially as coloured by the experience of a new (German) political unity and centralised governmental power. By comparison, the ideas of the solidarists address the moral disquiet, increasingly widespread in France, about this modern social and politico-legal order in the late nineteenth and early twentieth century. Correspondingly, the Durkheimians focused on the need to direct law and political power to meet the requirements of solidarity. Unsurprisingly, among social theorists it was Durkheim who appealed most strongly to reform-minded French jurists in the period. But his ideas were useful to them mainly insofar as the sociological idea of solidarity could be turned into a philosophical justification for legal reform and a rhetorical tool in legal discourse.

By far the most important and influential appropriation of the concept of solidarity in this way was by the public lawyer Léon Duguit. A colleague of Durkheim for some years at the University of Bordeaux, he enthusiastically adopted the Durkheimian view that law is both an instrument and a reflection of social solidarity. Duguit argued, like the solidarists, that the source of law, understood in this "objective" way, is not the state but the conditions of life of the society in which law exists. As such it is "contingent on social fact (...) a spontaneous creation of social life"⁷⁴. In his later writings Duguit saw law as based in the consciousness of the mass of citizens who view it as necessary to maintain social solidarity.

Clearly, state law does not always correspond to this "objective" law⁷⁵ rooted in social fact. But, for Duguit, the authority of the former ultimately depends on its congruence with the latter and not on state sovereignty. Indeed, he rejected state sovereignty and claimed that the state has authority only when it acts to nurture solidarity. The state is subject to law – a social law dictated by the needs of solidarity. It must become a public service state, its treasury being "so to speak, a friendly society" for the

⁷⁴ C. Eisenmann, *Léon Duguit*, [in:] D. Sills (ed.), *International Encyclopedia of the Social Sciences*, vol. 4, New York: Macmillan 1968, pp. 305, 306.

⁷⁵ L. Duguit, *Objective Law*, Columbia Law Review 1920, vol. 20, p. 817; ibid. 1921, vol. 21, pp. 17, 126 and 242.

benefit of its citizens when they suffer harm in the ordinary course of social co-operation; in such circumstances “society as a whole should intervene to repair the consequences”⁷⁶.

Duguit assumes Durkheim’s view that law must serve social solidarity, but does so without engaging with the sociology that underpins this, and his legal politics is close to that of the solidarists. Other jurists, notably Maurice Hauriou, strongly criticised Duguit’s rejection, in his legal theory, of subjective rights (seen as expressions of individual will) in favour of his idea that law expresses objective social functions⁷⁷. But Duguit’s arguments had a huge impact on French legal thought⁷⁸. They entrenched in it an understanding that responsibility arises in society, out of social associations of various kinds, and that the state has a new role as an instrument of collective welfare: a role in which – in Durkheim’s conception, influenced by Comte and Rousseau – the state “thinks” solutions on behalf of society⁷⁹.

All this is far removed from Tönnies’ and especially Weber’s tendency to predict little long-term impact from demands for social law and social responsibility. Which of these visions was ultimately the more prescient? Perhaps only Von Stein, among the theorists considered here, sensed clearly both the unavoidable modern need for some kind of social or welfare state and also the sheer difficulty of establishing such a state on a stable basis, given the organisational history of Western state forms which Weber would explore. Yet in juristic contexts it was not difficult in the half-century after 1870 to adopt ideas about law’s foundations in society (rather than the state) and to use these to criticise individualistic orientations of legal thought and juristic fixations on state sovereignty.

The story of the main forms of social theory bearing on legal ideas of responsibility and the role of the state in this period seems, however, to be one of voices talking past each other. On one side was a recurring

⁷⁶ L. Duguit, *Souveraineté et liberté*, Paris: F. Alcan 1922, p. 168, [as quoted in:] J. E. S. Hayward, *Solidarist Syndicalism: Durkheim and Duguit*, Sociological Review 1960, vol. 8, pp. 185, 194.

⁷⁷ See e.g. M. Hauriou, *The Two Realisms*, [in:] A. Broderick (ed.), *The French Institutionalists: Maurice Hauriou, Georges Renard, Joseph T. Delos*, Cambridge, Mass.: Harvard University Press 1970, pp. 45-51.

⁷⁸ E. Pisier-Kouchner, *Le service public dans la théorie de l'état de Léon Duguit*, Paris: Librairie général de droit et de jurisprudence 1972.

⁷⁹ Cotterrell, supra note 67, chap. 10.

vision of a state that could – and must – be shaped to fulfil, as a central part of its task, an emerging expectation that responsibility would be shared *socially*, or determined by social need. Such a vision implied the necessity, if not the inevitability, of social legislation in many fields and a declining emphasis on private law solutions to issues of responsibility. On the other side were very different ideas that prefigured current neo-liberal scepticisms about any such wider responsibility. These ideas portrayed the modern state as allied with forms of atomistic *individualism* reflecting increasing social complexity. In such a perspective, the task of managing innumerable, endlessly varied conflicts of private interests appeared to be at the heart of that complexity. The implication was that an important part of the state's role would continue to be to provide reliable procedures and guarantees for private law claims of individual responsibility.

