

Pietro Schirò

## **From the school of legal socialism to the *social jurist* movement in Europe: the misguided label of *Juristen-Sozialismus* in Germany, France and Italy<sup>1</sup>**

**ABSTRACT:** At the end of 19<sup>th</sup> centuries, the European legal landscape was challenged by the social question. The rediscovery of the social dimension of reality led to the birth of a various movement of jurists who argued for the socialisation of the law as a means of the resolving the social question. This European tendency is known as *Juristen-Sozialismus* in Germany, *Socialisme juridique* in France and *Socialismo giuridico* in Italy. However the label legal socialism is false as it can be said to have led to the oblivion of many of the theories produced by jurists of this movement. To describe the theses process of socialisation of European law, this article proposes a movement of private social law.

**KEYWORDS:** Legal Socialism, socialization of law, mouvement of social jurists, Anton Menger.

**INDEX:** 1. The Historical Context of the Social Movement of Law – 2. Origin of a False Label: Legal Socialism – 3. The Movement of Social Private Jurists in Europe – 4. Beyond *Socialismo Giuridico*. The Italian Experience of the Movement of Private Social Law – 5. Conclusion.

---

<sup>1</sup> This contribution is the result of my work as a Visiting Researcher at the Max-Planck-Institut für europäische Rechtsgeschichte in Frankfurt am Main, it is the first result of a wider research on legal socialism and in particularly on Italian and European Movement of private and criminal Social Law, research which is the subject of my PhD at the University of Verona.

## 1. *The Historical Context of the Social Movement of Law*

What is legal socialism?<sup>2</sup> Where did it begin? How is it expressed in Germany, France and Italy?

This article aims to answer these questions and seeks to outline and propose relevant arguments and hypotheses. This work goes beyond the historiographical definition of legal socialism, a label that has imposed itself since Anton Menger's thesis on *Juristen-Sozialismus*, particularly in Italy and France; rather, this article seeks to affirm the existence of a European legal movement that is defined as a social law movement. It is shown to be necessary to abandon the ambiguity produced by the adjective *socialist* to describe a movement that is far removed from the socialist political thesis.

To understand the genesis of this movement, the socio-economic context that led to the socialisation of European law must first be understood. During the nineteenth century, an extraordinary transformation of the face of Europe took place in a short time period. Significant changes occurred on several fronts, including scientific, economic, social and cultural. From the 1860s, there was a movement away from the *Ancien Régime* and towards secularism. New movements developed in all fields of knowledge that were oriented towards the rediscovery of the individual as a social being.

The era of sociality was marked by theories of social Darwinism, Spencer's evolutionism, Marx's communism and Comte's sociology<sup>3</sup>. Society as the object of analysis was conceived of as a living organism; therefore, all the laws linked to organic factors also applied to social phenomena. Industrialisation also changed the face of society, leading it towards an increasingly communal and *class-based* structure. Individualism and formal legal equality – the two main paradigms of post-French Revolution Europe – were shattered by the irresistible impact of the social<sup>4</sup>.

---

<sup>2</sup> In this paper, I refer to legal socialism as a historiographical category. Legal socialism is a non-literal translation of the term *Juristen-Sozialismus*, a historiographic category that takes the name of *Socialismo giuridico* in Italy and *Socialisme juridique* in France.

<sup>3</sup> For further detail on the birth and development of nineteenth-century ideas and sciences, particularly positivism, see the collection of essays contained in E. R. Papa (ed.), *Il positivismo e la cultura italiana*, Milano 1985; the third volume of the collection: «Il pensiero politico idee teorie e dottrine», by G. Pasquino, entitled *Ottocento e Novecento*, Torino 1999. Also the book L. Cavazzoli - C. G. Lacaia (ed.) *Riforme e istituzioni fra otto e Novecento*, Manduria-Bari-Roma 2002; Last: M. Degl'innocenti, *La cultura delle riforme tra Otto e Novecento*, Torino, 2003.

<sup>4</sup> On the subject: F. Mazzearella, *Darwinismo, storicismo, socialità. «La nuova tendenza» di Giuseppe Vadalà-Papale*, in «Quaderni Fiorentini per la storia del pensiero giuridico moderno», XLI (2012), pp. 583-626.

The initial rediscovery of the social only marginally involved the jurists. The «immovable jurists»<sup>5</sup>,

who were tied to the exegetical tradition of law and opposed the contamination and socialisation of the legal system, were flanked by the «restless jurists»<sup>6</sup>, who perceived the crisis of law and understood the need for socialisation to satisfy the new demands of society. They argued that laws must follow the people's needs that come from below and reflect the image and likeness of the society that created them in order to govern.

Groups of jurists from various schools and with different tendencies can be identified: Darwinists, positivists, anti-individualists, solidarityists, Spenceran evolutionists, republican democrats and radicals can all be included in the social private jurists movement. All these jurists shared the anxiety driven by sociocentrism, possessed a strong sociological spirit and understood the need to socialise the law. They were spokespeople for the new sociocentric needs and proposed redesigning the law on the basis of new social needs, denouncing the inequality and imbalances that pervaded the legal system and proposing the emergence of a new right. All sought to replace the demand for substantive legal equality affirmed by the French Revolution, with a demand for social equality that could lead to new demands for justice. These authors have been labelled as socialist jurists. In fact, theses on the socialisation of the law, the interest and protection of the poorer classes, equal rights and the promotion of social legislative reforms have been described as socialist. This juxtaposition with socialism generated a label that Paolo Grossi defines as «useless and false»<sup>7</sup> as it fails to facilitate a true comprehension of

<sup>5</sup> Cimbali writes: «si agitano pure, spargendo dappertutto grida di allarme e di spavento, gli immobilisti delle scienze». Cimbali defines as immobile those scientists of his time who are hostile to the new sciences and to the socialization of law, to these «fanatici adoranti del passato»are opposed «gli innovatori negli ordini scientifico-sociali». E. Cimbali, *Obbligazioni civili complemento e funzione della vita sociale, prolusione letta il 25 gennaio 1887 nella Università di Messina*, (1887) now in *Opere Complete*, Torino 1900, pp. 297-321: 318 e 320. See A. Di Majo, *Enrico Cimbali e le idee del Socialismo giuridico*, in «Quaderni Fiorentini», III/IV (1974-75), pp. 384-429. Also: F. Mazzarella, *Dialoghi a distanza in tema di socialità e storicità del diritto*, in «Quaderni Fiorentini», XLIV (2015), pp. 381-423.

<sup>6</sup> Paul Cuche observes a certain uneasiness of the scientists, and in particular of the jurists of the late nineteenth century towards the crisis of criminal law judged unable to regulate the society that is called to govern. He claims to belong to the Juristes Inquiets, whose concern is evidenced in the ability to perceive the crisis of law, which needs to take into account the results of the new social sciences in order to fully meet the new demands of society. For more about the *Juristes Inquiets* see: Marie-Claire Belleau, *Les juristes inquiets: classicisme juridique et critique du droit au début du XXe siècle en France*, in «Les Cahiers de droit», XL, 3 (1999), pp. 507-544. This same concern is perceived by many European scientists including doctors such as Cesare Lombroso, in this sense see: D. Velo Dalbrenta, *La scienza Inquieta. Saggio sull'Antropologia criminale di Cesare Lombroso*, Padova 2004; and more generally: A.-J. Arnaud, *Les juristes face à la société du XIXe siècle à nos jours*, Paris 1975.

<sup>7</sup> Grossi writes: «il cosiddetto socialismo giuridico, evocato ed invocato da molti in questi nostri ultimi venti anni come categoria storiograficamente appagante e munita di un grosso valore

this very heterogeneous movement. This label produced a simplification throughout European historiography that resulted in the obfuscation of many theories on solidarity and the socialisation of the law as belonging to a political current. In addition, it has condemned the various and multiform reflections of the jurists to a single monolith or expression of a single ideology, which has led some of these original theses into oblivion.

The most suitable adjective for describing the general trend involving many jurists at the end of the century is not socialist but is instead *social*. Social in its most authentic sense (i.e., not individual) refers to a series of theories concerning a complex society made up of different subjects and endowed with rights that must be protected by law. The doctrines of the jurists were «social», not socialist, and all followed «a triumphant principle of sociality»<sup>8</sup> rather than socialism.

None of the jurists theses concerned the class struggle, peasants revolutions, the application of a state ready to deny private property in the dictatorship of the proletariat; however, particular sensitivities towards the integration of the social sciences into law were in evidence. In sum, the theses of these authors did not contain a great deal of socialism.

This article proposes that the false socialist perspective should be abandoned in favour of the recognition of a heterogeneous movement of social private jurists that developed in Germany, France and Italy and spread throughout the continent. This movement syncretically unites the theses of Anton Menger (1841-1906) and Otto von Gierke (1841-1921), Giuseppe Salvioli (1857-1928) and Giuseppe Vadalà-Papale (1854-1921), Emmanuel Lévy (1871-1944) and André Mater (1877-1964): jurists who do not belong to legal socialism, but who understood the social dimension of private law.

## 2. *Origin of a False Label: Legal Socialism*

Erst wenn die sozialistischen Ideen aus den endlosen volkswirtschaftlichen und philanthropischen Erörterungen, welche den Hauptinhalt der sozialistischen Literatur bilden, losgeschl. und in nüchterne Rechtsbegriffe verwandelt sind, werden die praktischen Staatsmänner zu erkennen im Stande sein, wie weit die

---

definitorio per il suo apparire a tutta prima come un monolite, è invece indicazione sofferente, come vedremo tra breve, di tale eterogeneità da restare storiograficamente inutile e falsante». Cfr. P. Grossi, «*La scienza del diritto privato*». *Una rivista-progetto nella Firenze di fine secolo (1893-1896)*, Milano 1988, p. 16.

<sup>8</sup> The words are by Enrico Cimbali, who speaks of a «principio trionfante di socialità» (see E. Cimbali, *La nuova fase del diritto civile nei rapporti economici e sociali con proposte di riforma della legislazione civile vigente* (1885), now in Id., *Opere complete*, Torino 1900, p. 40).

geltende Rechtsordnung im Interesse der leidenden Volksklassen umzubilden ist. In dieser juristischen Bearbeitung des Sozialismus erblicke ich die wichtigste Aufgabe der Rechtsphilosophie unserer Zeit; ihre richtige Lösung wird wesentlich dazu beitragen, dass sich die unerlässlichen Änderungen unserer Rechtsordnung im Wege einer friedlichen Reform vollziehen<sup>9</sup>

The words above belong to Anton Menger<sup>10</sup>, a jurist widely recognised as the father of European legal socialism. To dispel any doubt, it should first be noted that Menger does not use the phrase legal socialism or *Juristen-Sozialismus* in any of his writings. He and many other jurists do not accept such labels, but rather refer to «juristischen Bearbeitung des Sozialismus» (i.e. an elaboration of socialism in legal terms). Menger begins *Das Recht auf den vollen Arbeitsertrag* by stating that «Die vorliegende Schrift verfolgt den Zweck, die Grundideen des Sozialismus vom juristischen Standpunkt aus zu bearbeiten». In fact, Menger attempts to reread the socialist phenomenon within the philosophy of law, convinced that transforming socialist ideas into legal concepts could enable social reform to be achieved, leading to a new legal system. However, he points out that such a process would take time:

Aber die notwendigen Änderungen werden im Wege einer langen historischen Entwicklung erfolgen, ähnlich wie unsere heutige Gesellschaftsordnung das Feudalsystem im Laufe der Jahrhunderte so zersetzt und zerstört hat, bis es schliesslich nur eines Anstosses bedurfte, um dasselbe vollständig zu beiseitigen<sup>11</sup>.

The school of *socialismo giuridico* in Italy, the French *socialisme juridique* and *Juristen-Sozialismus* in Germany developed from these German premises. Many of Menger's theses were affirmed by Italian jurists, such as Gian Pietro Chironi (1855-1918), Enrico Cimbali (1855-1887), and Giuseppe Vadalà-Papale, and in the early 1980s, they were *ex post* brought back into legal socialism.

The term legal socialism is not created by Menger, but is a non-literal translation of the phrase *Juristen-Sozialismus*, which first appeared in Germany in 1887 in an article written by Friedrich Engels (1820-1895) and Karl

<sup>9</sup> A. Menger, *Das Recht auf den vollen Arbeitsertrag in geschichtlicher Darstellung*, Stuttgart 1886, p. III.

<sup>10</sup> Anton Menger (1841-1906) is a legal philosopher and economist of Austrian nationality and is remembered for his legal theses on socialism. Among his main works: *Das Recht auf den vollen Arbeitsertrag in geschichtlicher Darstellung* (1886); *Das bürgerliche Recht und die besitzlosen Volksklassen* (1890); *Der neuen Staatslehre* (1903). To deepen: N. Reich, *Anton Menger und die demokratische Rechtslehre*, in «Recht und Politik», VIII (1972), pp. 93-101; D. v. Westernhagen, *Anton Menger (1841-1906). Sozialist, Naturrechtler, Weltverbesserer*, in J. Seifert - T. Blanke (Hrsg.) *Streitbare Juristen. Eine andere Tradition*, Baden-Baden 1988, pp. 81-91.

<sup>11</sup> A. Menger, *Das Recht auf den vollen Arbeitsertrag*, cit., p. 164.

Kautsky (1854-1938) on the *Die Neue Zeit*<sup>12</sup>. Meanwhile, Menger's *Das Recht auf den vollen Arbeitsertrag* was published the previous year:

Nun gibt es aber auch sogenannte wissenschaftliche Juristen, die aus der Juristerei einen eigenen Beruf machen. Bisher hatten sich diese Herrn zu vornehm gehalten, sich mit der theoretischen Seite der Arbeiterbewegung einzulassen. Wir müssen es also großen Dank wissen, wenn endlich einmal ein wirklicher Professor der Rechte, Herr Dr. Anton Menger, sich herablässt, die Geschichte des Sozialismus vom "rechtsphilosophischen" Standpunkt dogmatisch näher zu beleuchten<sup>13</sup>.

The article is entitled *Juristen-Sozialismus*, which literally translates as *socialism of the jurists*, and took a negative and disparaging approach, levelling harsh criticism at Menger's legal theory. In the article, the Marxists defined Menger as a «Streber und Karrieristen» arrivist. They were thus attacking a belief they perceived as an enemy of Marxist revolutionary socialism – a bourgeois attempt by a jurist to apply socialism through legal reforms – when the law, in their opinion, was nothing more than the expression of a dominant class – the tyranny of one class over another. Menger's essay formed part of a long-running dispute between revolutionary Marxism and reformist socialism, which may have fuelled the Marxists' criticism. The article written by Engels and Kautsky was, therefore, conceived of as a response to Menger's criticism of Marx's theories, which he considered too economic and historicist and guilty of having plagiarised and distorted the thoughts of William Thompson (1785-1833), Charles Hall (1745-1829) e William Godwin (1756-1836)<sup>14</sup>. It began with a series of harsh words against the Austrian jurist, and his article is judged negatively because «ihr Zweck ist der, Marx herunterzureißen». Moreover, the two authors observe that for Menger the theses of political economy are only «bloße verbrämungen», adding in a sarcastic tone that

Nun handelt es sich in den "sozialistischen Ideen" gerade um volkswirtschaftliche Verhältnisse, vor allem um das Verhältnis zwischen Lohnarbeit und Kapital, und da sind volkswirtschaftliche Erörterungen, so scheint es, doch wohl etwas mehr als bloße loszuschälende "Verbrämungen". Auch ist die Ökonomie eine sogenannte Wissenschaft und obendrein ein wenig wissenschaftlicher als die Rechtsphilosophie, weil sie sich mit Tatsachen

<sup>12</sup> The article can be easily found in the original language on the internet, however, we would like to point out the short essay F. Engels, K. Kautsky, *Il socialismo giuridico. Traduzione, introduzione, postfazione e note bio-bibliografiche di E. Maestri* (ed.), Napoli 2015. For the citations on the following pages compare K. Marx - F. Engels, *Werke*, 5. Auflage, Berlin 1975, pp. 491-509: 491.

<sup>13</sup> F. Engels, K. Kautsky, *Juristen-Sozialismus*, in «Die Neue Zeit. Revue des geistigen und öffentlichen Lebens», 2 (1887), pp. 49-62, today in K. Marx - F. Engels, *Werke*, cit.

<sup>14</sup> A. Menger, *Das Recht auf den vollen Arbeitsertrag*, cit., p. 50.

beschäftigt, nicht, wie die letztere, mit bloßen Vorstellungen. Aber das ist dem Juristen von Fach total gleichgültig. Die ökonomischen Untersuchungen stehen ihm auf derselben Stufe, wie die philanthropischen Deklamationen. Fiat justitia, pereat mundus. Dem Gesetz muß entsprochen werden, mag darüber auch die Welt zugrunde gehen<sup>15</sup>.

The angry tone in evidence did not encourage a healthy and scientifically fruitful comparison between the two different ideologies and lowered the level of debate between the authors, who engaged in personal attacks rather than in reflection of the topics covered.

The object of contention was, on close inspection, the function of law in society within the «sozialistischen Ideen». Marx's law for materialistic conception was conceived of as a superstructure of the economy: «das immer nur die ökonomischen Bedingungen einer bestimmten Gesellschaft widerspiegelt, nur in ganz sekundärer Weise in Betracht»<sup>16</sup>. Here, legal, political, philosophical and religious concepts develop from the way products are produced and exchanged. This vision is flanked by the different conceptions of law of the jurists, who instead argued for the importance of law in guiding and constituting the social and economic system. Laws enable the economic conditions of a country to be changed, and, above all, enable the power structures within a society to be altered by allowing one class to prevail over another. These ideas were not well-received by Marxists, and this clash of ideas led to the birth of German legal socialism that can be said to have contributed to the impoverishment of the debate.

In any case, Menger, regardless of the label attached to him, represented both the arrival and departure of a new movement simultaneously. He synthesised the vision of social law put forward by authors such as Johann Gottlieb Fichte (1762-1814), Ferdinand Lassalle (1825-1864), Stuart Mill (1806-1873) e Johann Karl Rodbertus (1805-1875), who criticised the contemporary legal system, arguing for the need to socialise it to eliminate inequality and unfairness. These authors subverted the idea of a right as an instrument of the ruling class used to oppress other classes and proposed more or less radical reforms of the legal and economic system. For example, in *Das System der erworbenen Rechte* published in 1861, Ferdinand Lassalle argued that the law is a necessary expression of the will of a society, from which individual rights arise later. The key term is «Solidarität in der Freiheit», meaning to share as many individual rights as possible to create freedom. The state was, therefore, conceived of as an organ of popular conscience, and on the basis of this voice of conscience, creates rights to guarantee freedom that

<sup>15</sup> F. Engels, K. Kautsky, *Juristen-Sozialismus*, cit., p. 495.

<sup>16</sup> *Ibidem*, p. 501.

are destined to be shared. These beliefs were shared by Menger, who identified the precise consequences that led to the social dimension of law and not to legal socialism.

Menger can be a socialist jurist only if a very broad definition of socialism is used, which is far removed from the political clash between Marxism and reformism that was present at the time. Menger's socialism *latu sensu* was based on the idea of a democratic state and labour laws, with the popular masses at the centre of the interests of the legal system. In *Volkstümlichen Arbeitsstaat*, Menger states that public interest must take precedence over private interests, and there must be a system in which every worker is fairly paid and in which the product of his work is fully recognised to ensure a dignified existence for all<sup>17</sup>. Individual rights can, therefore, only be designed on the basis of the common good and the well-being of the community. Hence, he argues that there is a need to redesign private law, particularly family law and property law. His system is based on the interests and selfishness of the individual who desires everything for himself and acts according to this egocentricity. The state intervenes by mitigating the effects of selfish individuals by proposing a new vision of private law in which the system is based on the freedom and well-being of the community and not the individual. The system proposes respect for new social rights and prevents exploitation and unfairness. In this way, the right becomes the guarantee of the many and not the privilege of the few. The system theorised by Menger is based on three fundamental rights:

- 1) das Recht auf den vollen Arbeitsertrag,
- 2) das Recht auf die Existenz,
- 3) das Recht auf Arbeit.

Only by guaranteeing respect for these three rights is it possible to apply the socialist social plan in which the well-educated masses can legitimately demand respect for their rights, thus freeing themselves from the bourgeois yoke and gaining control of the legal system.

This description of the three fundamental rights designed to realise private social law was sharply criticised from Engels and Kautsky, who considered the ideas of the socialist movement as being capable of being reduced to three mottos:

---

<sup>17</sup> These concepts were anticipated by Menger in *Das Recht and were* reiterated in the aforementioned *Der neuen Staatslehre*. See on this aspect the articles contained in «Quaderni Fiorentini», III/IV (1974/75) entitled: *Il socialismo giuridico. Ipotesi e letture*, and in particular: K. Seelmann, *Zur Marx-Interpretation bei Anton Menger, Gustav Radbruch und Karl Renner*, pp. 73-102; N. Reich, *Der Juristensozialismus von Anton Menger (1841-1906) im neunzehnten Jahrhundert und heute*, pp. 157-182; G. Orrù, *'Idealismo' e 'realismo' nel socialismo giuridico di Menger*, pp. 183-272.



Genug. Der Herr Professor gibt sich nun dran, den Sozialismus rechtsphilosophisch zu behandeln, das heißt, ihn auf ein paar kurze Rechtsformeln zurückzuführen, auf sozialistische “Grundrechte”, eine neue Ausgabe der Menschenrechte fürs 19. Jahrhundert. [...]

Also so weit sind wir bereits heruntergekommen, daß wir es nur noch mit Schlagworten zu tun haben. Erst wird der geschichtliche Zusammenhang und Inhalt der gewaltigen Bewegung beseitigt, um einer bloßen “Rechtsphilosophie” Platz zu machen, und dann reduziert sich diese Rechtsphilosophie auf Schlagworte, die eingestandenermaßen praktisch keinen Heller wert sind! Das lohnte in der Tat die Mühe<sup>18</sup>.

Menger’s simplification was, therefore, strongly criticised, above all because, according to the Marxists, the theory had no practical utility in the socialist struggle:

Was von manchem anderen Sozialreformer unserer Zeit, das gilt auch von Herr Menger: Große Worte und nichtige Taten.

In addition, they specify that «Das Recht auf Arbeit ist nur eine provisorische Forderung, “die erste unbeholfene Formel, worin sich die revolutionären Ansprüche des Proletariats zusammenfassen” (Marx) und gehört also nicht hierher». After all, for Marxism, labour law is not suitable for realizing the proletarian revolution. The term *Juristen-Sozialismus* therefore has for the two authors an offensive and ironic purpose and serves to put together all the bourgeois who make sterile theses that do not help the socialist cause. For the Marxists, attempts to represent socialism as a system of rights are of no value, the legal elaboration of socialism leads nowhere:

So schnöde gibt er jetzt seine sozialistischen “Grundrechte” preis. Aber wenn diese Grundrechte nicht imstande sind, einen Hund vom Ofen zu locken, wenn sie nicht die soziale Entwicklung bestimmen und verwirklichen, sondern durch sie bestimmt und verwirklicht werden, wozu dann diese Mühe, den ganzen Sozialismus auf die Grundrechte zu reduzieren? Wozu die Mühe, den Sozialismus seiner ökonomischen und historischen “Verbrämungen” zu entkleiden, wenn wir hinterdrein erfahren müssen, daß die “Verbrämungen” seinen wirklichen Inhalt ausmachen? Warum uns erst zum Schlusse mitteilen, daß die ganze Untersuchung gar keinen Zweck hat, da man das Ziel der sozialistischen Bewegung nicht durch die Verwandlung der sozialistischen Ideen in nüchterne Rechtsbegriffe, sondern nur durch das Studium der sozialen Entwicklung und ihrer treibenden Ursachen erkennen kann?<sup>19</sup>

<sup>18</sup> F. Engels, K. Kautsky, *Juristen-Sozialismus*, cit., p. 498.

<sup>19</sup> *Ibidem*, p. 508.

So this socialism of the jurists, and in particular «was Herr Menger auf diesem Gebiete fertiggebracht hat, vermag nur abschreckend zu wirken».

In the conclusion of their article, after reducing the right to a superstructure, the authors recognised the importance of the same for the socialist party, which must support its ideals with the appropriate legal claims:

Damit ist natürlich nicht gesagt, daß die Sozialisten darauf verzichten, bestimmte Rechtsforderungen zu stellen. Eine aktive sozialistische Partei ist ohne solche unmöglich, wie überhaupt jede politische Partei. Die aus den gemeinsamen Interessen einer Klasse hervorgehenden Ansprüche können nur dadurch verwirklicht werden, daß diese Klasse die politische Macht erobert und ihren Ansprüchen allgemeine Geltung in Form von Gesetzen verschafft. Jede kämpfende Klasse muß also ihre Ansprüche in der Gestalt von Rechtsforderungen in einem Programm formulieren<sup>20</sup>.

These theories were termed *socialist*, where the term was meant in a derogatory way. Such a categorisation led to the oblivion of Menger's theses<sup>21</sup>. However, this negative interpretation of *Juristen-Sozialismus* penetrated Europe to describe not only Menger's theory, but also those of other jurists, almost of private law, who argued for the socialisation of law, that is, reform of the law in light of the social changes in society that make the law of codes insufficient. This process culminated in the Italian *socialismo giuridico* or French *socialisme juridique* – terms without negative meanings that were used to indicate different theses that were united in their anti-individualist, evolutionist and Darwinist visions. Everything concerning the socialisation of law became juridical socialism, and in everything, we know, nothing prospers.

## 2. *The Movement of Social Private Jurists in Europe*

Nur ein Standpunkt wird in der großen Diskussion wahrscheinlich unvertreten bleiben, obgleich die betreffende Volksgruppe mindestens vier Fünftel der gesamten Nation umfaßt, und dieser Standpunkt ist jener der besitzlosen Volksklassen. Zwar verfügt der Sozialismus in Deutschland über zahlreiche ausgezeichnete Schriftsteller; aber diesen mangelt das juristische Fachwissen, das zur erfolgreichen Kritik eines so umfassenden Gesetzeswerkes unentbehrlich ist. Auch ist die Kritik des deutschen Sozialismus infolge des Einflusses von Lassalle, Marx und Engels fast ausschließlich auf die wirtschaftliche Seite unserer Zustände gerichtet, obgleich die soziale Frage in Wirklichkeit vorherrschend ein Problem

<sup>20</sup> *Ibidem*, p. 509.

<sup>21</sup> Thilo Ramm's article on legal socialism in Germany alludes to the almost total lack of reflection on this subject in German historiography. Cf. T. Ramm, *Juristensozialismus ist in Deutschland*, in «Quaderni fiorentini», III/IV (1974-1975), pp.7-25.

der Staatslehre und der Rechtswissenschaft ist. Da ich nun zu den wenigen deutschen Juristen gehöre, welche auf dem Gebiet des Rechts das Interesse der besitzlosen Volksklassen vertreten, so habe ich es für meine Pflicht gehalten, in dieser wichtigen Nationalangelegenheit die Stimme der Enterbten zu führen<sup>22</sup>.

Menger expressed his view on the project for a civil code in Germany in two articles that were later incorporated into *Das bürgerliche Recht und die besitzlosen Volksklassen* (1890), which reaffirmed his position on German social private law. In the articles, he responded to the Marxist criticism that his theories did not use socialism as a point of reference. However, Menger claimed to go beyond the socialist vision and, therefore, did not criticise the fundamental principles of existing private law or subvert the established order; instead, he called for a different and more social application of the principles underlying the legal system, arguing that German private law failed to take into account the interests of the weaker classes. Menger's thought recalls the theses on naturalistic evolutionism of Albert Schäffle (1831-1903), who with his *Bau und Leben des sozialen Körpers* (1875-1878) has an important influence on the jurists of the Italian social movement, and moreover, together with Comte's positivism and social Darwinism, represents the philosophical basis for the new social vision of European law.

Otto von Gierke<sup>23</sup> was another jurist who argued for the socialisation of the law and favoured reforming existing law in light of social changes. In his speech in Vienna in 1889, later published under the title *Die soziale Aufgabe des Privatrechts*, he argued that the law must regain a «sozial» dimension. Gierke argued that laws arose from social communities with their own conscience and life. Only social private law, such as the expression of a specific community, can solve a society's problems<sup>24</sup>. However, Gierke made clear that achieving the socialisation of German law was not a simple task:

Groß und schwierig ist das Problem. Dennoch muß es gelöst werden, wenn anders das Erbe unserer Väter nicht verloren gehen soll, Unser Privatrecht wird sozialer sein, oder es wird nicht sein. Wohl mag erst eine ferne Zukunft die Bestätigung bringen. Denn langsam nur vollziehen sich bei aller Kraft und Stetigfeit die aus der Häufung von Millionen fleiner Einzeleffekte entspringenden sozialen Wirfungen des Privatrechts: späte Enfel erst ernten den vollen Segen

<sup>22</sup> A. Menger, *Das bürgerliche Recht und die besitzlosen Volksklassen*, Tübingen 1908, S. 2.

<sup>23</sup> Otto von Gierke (1841-1921) is a renowned jurist and historian of German law. At the center of his thinking is the idea that the legal phenomenon finds its source and justification in the different human communities that are spontaneously formed through the aggregation of groups. We can remember two of his monumental works: *Das deutsche Genossenschaftsrecht* (4 voll., 1868-1913) e *Deutsches Privatrecht* (3 voll., 1895-1917).

<sup>24</sup> For these themes it is possible consult the monumental work of O. Gierke, *Das deutsche genossenschaftsrecht*, Berlin 1869-1881, I-IV.

oder Segen eines neuen Fa: milien oder Erbrechts. Gerade hierin jedod liegt die lunge- heure Verantwortung, die auf der Gegenwart laftet. Alle Stulturvölter haben daran Theil<sup>25</sup>.

The Germanic system had to be freed of any Romanist contamination and take on a social point of view to facilitate the reform the family law, property law, contract law and above all, labour law. Similar to Menger, Gierke argued for the need to redesign the relationship between employee and employer, not in terms of a formal legal equality based on exasperated formalism, but in terms of the differences between the two contractual entities, which have a very different contractual force. The social perspective on labour law manifested itself through a review of the employment contracts that could no longer be reduced to a different contract, and which argues that restrictions on the freedom of contracts must be considered to guarantee workers' rights<sup>26</sup>.

German jurists' criticisms of private law were broadly the same as those made by French and Italian jurists in the same time period in terms of the idea that individualist law produced social issues, and that a new law was needed to regulate the new needs, avoiding a revolution that would erase all the legal principles underlying the system. This European dialogue on the socialisation of private law mainly involved Germany, Italy and France, and in the latter two countries, the label of 'legal socialism' was more successful as a historiographical category.

The definition of legal socialism appeared In Italy in the early 1890s, while the term *socialisme juridique* did not appear until 1904 in France<sup>27</sup> in a translation of the article by Engels, Kautsky in *Le Mouvement Socialiste*<sup>28</sup>; in the same year, André Mater's<sup>29</sup> article entitled *Le socialisme juridique* was published

<sup>25</sup> O. v. Gierke, *Die soziale Aufgabe des Privatrechts*, Heidelberg 1889, p. 45.

<sup>26</sup> For a reconstruction of the history of social law in Germany: M. Stolleis, *Geschichte des Sozialrechts in Deutschland. Ein Grundriss*, Stuttgart 2003.

<sup>27</sup> For an overview about the legal socialism in France can be cited the following works: J. Hitier, *La dernière évolution doctrinal du socialisme: le socialisme juridique*, Paris 1906; A.-J. Arnaud - N. Arnaud, *Le socialisme juridique à la «Belle Époque» : visages d'une aberration*, in «Quaderni Fiorentini», 3/4 (1974-1975), pp. 25-54; A.-J. Arnaud, *Les juristes face à la société du XIX<sup>e</sup> siècle à nos jours, passim*. Also: *Par le droit, au-delà du droit. Textes sur le socialisme juridique*, sous la direction de C. M. Herrera, Paris 2003; Id., *Les juristes face au politique: le droit, la gauche, la doctrine sous la III<sup>e</sup> République*, Paris 2003. Finally the articles contained in *Mil neuf cent. Revue d'histoire intellectuelle*, 29 2011, entitled *La Belle Époque des juristes. Enseigner le droit dans la République*. In summary, the article by D. Di Cecca, «*Il socialismo dei giuristi*» *Per una ricerca sul socialismo giuridico francese*, in «Historia et ius», www.historiaetius.eu - 3/2013 - paper 13.

<sup>28</sup> The article is translated by L. Remy with the title: *Socialismes des juristes*, in «Le Mouvement socialiste», 132 (1904), pp. 97-120.

<sup>29</sup> André Mater (1877-1964) is a French jurist and lawyer, Republican militant, Mater is considered

in *La Revue socialiste*<sup>30</sup>.

Mater adopted much of Menger's thinking by identifying legal socialism as the only way of implementing socialist theses; more specifically, legal socialism was defined as a «recherche méthodique, dans notre appareil juridique, des moyens propres, non pas à rendre tolérable le régime capitaliste, mais à justifier et réaliser un programme socialiste»<sup>31</sup>.

In France, *le socialisme juridique* was developed on the basis of ideas proposed by Menger. The socialist program can only be implemented on the light of a legal change, which was not produced through a radical change, but by starting from the existing law, limiting itself. In other words, it was necessary to interpret the law of the ruling class in a «sense socialiste»<sup>32</sup> and fight the capitalist system with its own weapons. In Mater's view, modelling the law would facilitate the adoption of a socialist system. In this context, jurisprudence had the fundamental role of «interpréter le droit en vigueur dans le sens des revendications formulées» so that «non pas de remplacer le droit bourgeois, mais de le retourner de manière à y faire pousser du collectivisme»<sup>33</sup>. Therefore, the only major difference between German and French legal socialism lay in the important role attributed to jurisprudence by the French author, in which judges ensure the socialisation of the law.

The jurists of the French private social law movement promoted a different application of the fundamental legal principles provided by the codes as a means of resolving the social question. These authors affirmed the need to replace individual utility with social utility and called for the new social function of law to be recognised. For example, Emmanuel Lévy<sup>34</sup> expressed that «le droit n'est pas un formulaire obscur; il est la science de nos relations sociales, la connaissance de nous-mêmes vivant et ne pouvant vivre qu'en société, l'art d'y vivre raisonnablement»<sup>35</sup>.

From Germany to Italy and through France, jurists such as Menger, Lévy, Vadalà-Papale sought to imbue their respective legal systems with legal

---

one of the most active members of French legal socialism. His main works: *L'État socialiste et la théorie de la gestion* (1903) and *Sources et origines juridiques du socialisme* (1903). See: C. M. Herrera, *Droit et gauche. Pour une identification*, Québec 2003.

<sup>30</sup> A. Mater, *Le socialisme juridique*, in «La revue socialiste», XL (1904), pp. 1-27.

<sup>31</sup> A. Mater, *Le socialisme juridique*, cit., p. 1.

<sup>32</sup> *Ibidem*, p. 2.

<sup>33</sup> *Ibidem*, p. 9.

<sup>34</sup> Emmanuel Lévy (1871-1944) is a French jurist considered the father of French legal socialism. For an exhaustive reconstruction of the figure of Levy see C. M. Herrera, *Le socialisme juridique d'Emmanuel Lévy*, in «Droit et société», 56-57 (2004), 111-128.

<sup>35</sup> E. Lévy, *La paix par la justice. Éléments d'une doctrine du droit*, Paris 1929, p. 4.

sociality to soften the legislation in favour of the less well-off classes. The contact between these jurists took place in reviews, in which ideas concerning the socialisation of European law were discussed, including in the German magazine directed by Heinrich Braun (1854-1927) *Archiv für soziale Gesetzgebung und Statistik*, the French *Revue socialiste* by Benoit Malon (1841-1893), and the Italian *La scienza del diritto privato* by Giuseppe D'Aguanno (1862-1908) and Alfredo Tortori (1866-1942). The objectives of the journals mirrored those stated by Braun in the first issue of *Archiv*:

Das hier beginnende Unternehmen soll seine hauptsächliche Aufgabe darin erblicken, dem bezeichneten Bedürfnis Genüge zu leisten. Erforschung und Darstellung der Lage der Gesellschaft in Hinsicht ihres thatsächlichen Zustandes und Kritik der gesetzgeberischen Massnahmen zur Besserung dieser Lage in erster Linie von Standpunkt der Thatsachen wird vornehmlich die Arbeit dieser Zeitschrift<sup>36</sup>.

Social statistics, the study of society and its inequalities and the analysis of the conditions of workers were the journals' focus, which went so far as to propose reform of the system by creating social legislation. The reason for this was not political, but an «unparteiischen nur die Wahrheit suchenden Darstellung der sozialen Zustände des Volkes trat daher hinter die politischen Interessen zurück»<sup>37</sup>. The same principles animated the French and Italian reviews, and it can be argued that the social movement of European private law developed in the pages of these magazines.

In summary, in the three countries, common threads and ideas linked the different authors. All jurists attributable to this movement:

- a) Rejected the label of legal socialism;
- b) Supported the need for laws that were built on the individual but on all social classes to better meet the legal needs of society;
- c) Sought new discussion on the freedom of contract and promotes new social legislation to include labour, property and family law. According to the new private law, «manifestazione fisiologica della vita sociale»<sup>38</sup>;
- d) Criticised existing legislation and codes that failed to take into account the new complexity of society<sup>39</sup>, arguing that laws must necessarily

<sup>36</sup> H. Braun, *Zur Einführung*, im «Archiv für soziale Gesetzgebung und Statistik», I (1888), pp. 1-6.

<sup>37</sup> *Ibidem*, p. 3.

<sup>38</sup> E. Cimballi, *Le obbligazioni civili complemento e funzione della vita sociale*, cit., p. 314.

<sup>39</sup> D'Aguanno for example write: «Bisogna cioè studiare il diritto in genere e i singoli istituti del diritto civile in rapporto all'ambiente, in cui si producono e si svolgono, ed in rapporto all'uomo di cui sono un fatto psicologico guardando esclusivamente sotto il punto di vista dell'utile che possono rendere all'individuo. Questo sistema di far convergere nell'individuo tutta la ragione sociale – è – frutto di un esagerato individualismo». G. D'Aguanno, *La genesi e l'evoluzione del diritto*

become «sozial» and «democratisch» according to Menger's law policy<sup>40</sup>. They considered the codes too abstract with respect to the concreteness of the social reality<sup>41</sup>. In addition, according to the various authors of the movement, the legislation had to be redesigned according to the new perspectives of solidarity. Here, Emanuel Lévy stated that «Le droit est d'essence relative. Il change avec le croyance sociale, espersion elle-même du besoin»<sup>42</sup>;

- e) Promoted the drafting of a social code that could replace or supplement the Civil Code and produce comprehensive social legislation. On this point, the theses of Glasson (1839-1907), Ehrlich (1862-1922), Salvioli were summarised in the proposal for a private social code proposed by Vadalà-Papale in *Diritto privato e codice privato sociale*<sup>43</sup>.
- f) Sought to infuse the law with the new social sciences and move away from the immobility of the law in the *École de l'Exégèse* and the individualism of the *historische Rechtsschule* to a reality in which the complexity of society was understood and regulated by private law.

The European jurists shared and promoted the socialisation of private law in their respective countries. These jurists debated each other, translated their colleagues' main works and were inspired by common ideals that led to social private law: ideals that brought them together not in an empty school of legal socialism, but in the heterogeneous tendency of social private jurists.

#### 4. *Beyond Socialismo Giuridico. The Italian Experience of the Movement of Private Social Law*

È sorta da vari anni, e va acquistando autorevoli e calorosi aderenti, una scuola di giuristi, che potrebbe senza grave errore definirsi come la scuola del socialismo giuridico.

Invero sono diverse le graduazioni dei vari scrittori che la compongono, sono diversamente accentuate le loro censure e i loro disegni di riforma, ma a tutti però è comune l'intento di assoggettare il diritto vigente ad una critica rigorosa, ispirandosi al criterio della politica sociale, alla necessità di elevare le sorti delle

---

*civile, secondo le risultanze delle scienze antropologiche e storico-sociali, con applicazioni pratiche al Codice vigente*, Torino 1890, p. 19.

<sup>40</sup> N. Reich, *Sozialismus und Zivilrecht*, Frankfurt am Main 1972, p. 55.

<sup>41</sup> M-C. Belleau, *Les juristes inquiets: classicisme juridique et critique du droit au début du XX siècle en France*, en «Les cahiers de Droit», XI (1999), pp. 507-544.

<sup>42</sup> E. Lévy, *Sur l'idée de transmission de droits (À propos de la preuve de la propriété immobilière)*, Paris 1896, p. 165.

<sup>43</sup> G. Vadalà-Papale, *Diritto privato e codice privato sociale*, in «La scienza del diritto privato. Rivista critica di filosofia giuridica, legislazione e giurisprudenza», I (1893), pp. 7-39.

classi lavoratrici, al desiderio di migliorare più o meno radicalmente e di rendere meno sperequata ed iniqua la costituzione economica odierna; tutti, dal più arduo al più timido, questi scienziati si propongono di ottenere cogli scritti e coll'opera una modificazione del diritto, la quale faccia ragione alle esigenze dei volghi poveri e li tragga a meno sconsolati destini<sup>44</sup>.

The economist Achille Loria (1857-1943) introduced the term *socialismo giuridico* in Italy in 1893 as a non-literal translation of *Juristen-Sozialismus*, publishing an article in the first issue of *La scienza del diritto privato*. In the context of the Italian theorisation of the movement, the judgment was not as negative and ironic as it had been in Germany. On the contrary, Loria recognised the importance of the international legal school that had produced Fichte, Proudhon (1809-1865), Mill and Lassalle, as well as Menger as one of the main new prophets, who dedicated his work to «l'illustrazione storica del socialismo giuridico»<sup>45</sup>. However, the Italian economist argued that the Austrian jurist's theses were too «aspri e vibranti» and the movement was considered «raddolcito» with «latina mitezza» by the Italian author. Loria identified a group of «pochi animosi» among the jurists who had consistently been bastions of established power, who «ricusandosi dalla funzione di incondizionata difesa delle istituzioni vigenti, osano assurgere alla censura obbiettiva dell'ordinamento giuridico e sociale»<sup>46</sup>.

Nevertheless, as has already been pointed out, the jurists who fell within the so-called legal socialism were deprived of the political traits of socialism. They did not propagandise the subversion of the established order, nor did they support the struggles of the socialist parties. Loria noted the new jurists' distance from socialist ideas, stating «pari al guerriero della leggenda che ereditava tutte le qualità dagli avversari da esso uccisi» the new movement had «ereditato dal proprio nemico – le scuole giuridiche precedenti – il vizio organico che lo condanna» in other words, it sought to maintain and defend the *status quo*. In addition, Loria criticised the *nuova scuola*, which he said neglected the importance of the economy. He argued in favour of radical reform of the economy, while the jurists focused only on promoting legal reforms. This same criticism is made by Engels and Kautsky against Menger.

The legal socialism label soon transformed into a historiographical paradigm in Italy that was easily imposed and of which much has been written<sup>47</sup>, an «empty vessel»<sup>48</sup> in which to insert a series of authors, including

<sup>44</sup> A. Loria, *Socialismo giuridico*, in «La scienza del diritto privato», I (1893), pp. 519-527: 519.

<sup>45</sup> *Ibidem*, p. 520.

<sup>46</sup> *Ibidem*, p. 522.

<sup>47</sup> There are three monographs on the subject produced in the early twentieth century: S. Panunzio, *Il socialismo Giuridico. Esposizione Critica*, Genova 1906; F. Cosentini, *Il socialismo Giuridico*, Catania



Gian Pietro Chironi, Enrico Cimbali, Giuseppe D'Aguanno, Emanuele Gianturco (1857-1907), Giuseppe Salvioli, Giuseppe Vadalà-Papale and Cesare Vivante (1855-1944). These jurists feel a particular anxiety towards the current law considered too abstract, stylized on the features of an individual compressed by legal equality, which is unable to absorb the social complexity of the second half of the nineteenth century, thus generating the crisis of law that foments the so-called social question. The program in the journal *La scienza del diritto privato*, which was edited by D'Aguanno and Tortori, outlined the genesis of the social private jurists' movement:

Un fatto meraviglioso [...] il progresso della scienza sperimentale – ha generato – un movimento oramai fatale ed irresistibile. Fu così che vennero create o rimodernate molte scienze; che ora vivono di una vita abbastanza rigogliosa, come la biologia, la fisio-psicologia, l'antropologia, la sociologia, l'etnologia, la statistica, l'economia politica, ecc. Questo risveglio potente nelle scienze antropologiche e sociali doveva avere un'eco profonda nella fisiologia giuridica: si vide nel campo del giure pubblico affermarsi una scuola di diritto repressivo con criteri nuovi, il cui valore può essere scientificamente facilmente apprezzato.

Il Diritto civile non poteva restare estraneo a questo universale rivolgimento. Troppi sono i suoi rapporti colle scienze antropologiche e sociali per non capirsene il legame metodico di dipendenza. È obbligo dei nuovi giuristi, mercé l'applicazione del metodo scientifico, di far sparire dalla nostra legislazione civile tutto ciò che costituisce un anacronismo e pei principi a cui essa è informata e per la sua stessa comprensione ed estensione<sup>49</sup>.

A radical reform of the law was subsequently proposed through «una nuova legislazione civile». To suggest this reform, «un' eletta schiera di giuristi lavora assiduamente e contemporaneamente in Italia ed in Germania»<sup>50</sup>. The

1910; B. Donati, *Il socialismo Giuridico e la riforma del diritto*, Torino 1910. The topic after the seventies of the last century has aroused great interest, they can be cited as follows: the very useful bibliography of M. Sbriccoli, *Elementi per una bibliografia del socialismo giuridico italiano*, Milano 1976; M. Cascavilla, *Il socialismo giuridico italiano. Sui fondamenti del riformismo sociale*, Urbino 1987; P. Grossi, «*La scienza del diritto privato*». *Una rivista-progetto*, cit.. In addition to these works there are numerous articles written in various reviews, among the most important of which are: P. Ungari, *In memoria del socialismo giuridico*, parte I. Le «*scuole del diritto privato sociale*», and parte II *Crisi e tramonto del movimento*, in «*Politica del diritto*», 1 (1970), pp. 241-68 and 387-403; the two books of «*Quaderni fiorentini*» (1974-1975), cit.; C. Carini, *Cultura e politica del socialismo giuridico (1890-1910)*, in «*Annali della Facoltà di Scienze politiche dell'Università di Perugia. Materiali di storia*», XVIII, 6 (1981-1982), pp. 54-100; M. Stronati, *Il socialismo giuridico e il solidarismo*, in *Il Contributo italiano alla storia del Pensiero – Diritto* (2012); F. Mazzarella, *Dialoghi a distanza in tema di socialità e storicità del diritto. Italia, Francia e Germania tra fine Ottocento e Primo Novecento*, in «*Quaderni fiorentini*», XLIV (2015), pp. 381-423.

<sup>48</sup> P. Grossi, «*La scienza del diritto privato*». *Una rivista-progetto*, cit., p. 16.

<sup>49</sup> G. D'Aguanno, E. Tortori, *Ai Lettori*, in «*La scienza del diritto privato*», I (1893), pp. 3-6.

<sup>50</sup> The two directors of the review explicitly stated that they were inspired by the *Archiv für soziale Gesetzgebung und Statistik*. See: G. D'Aguanno, E. Tortori, *Ai Lettori*, cit., p. 5.

German arguments, particularly those of Menger, increased support for private social law throughout Europe; however, many of the German themes were anticipated by Italian jurists, for example, in Enrico Cimbali's<sup>51</sup> 1881 *Lo studio del diritto civile negli Stati moderni, discorso tenuto presso l'Università La Sapienza di Roma*. Cimbali was, perhaps, the first to stir the calm waters of Italian law with his argument on social needs. At the heart of his discourse was the conception of law as an expression of the life and needs of a historical community:

Il diritto è la vita. E come nella vita, essendo questa sempre in continuo divenire, mutano, con perpetua vicenda, di numero e di qualità gli elementi che la costituiscono, e con ciò anche il loro grado d'integrazione e di specificazione; dal pari nell'organismo del diritto debbano riflettersi con perfetta rispondenza corali mutamenti: esso perciò deve, per virtù di continua evoluzione, trasformarsi continuamente<sup>52</sup>.

The Sicilian jurist proposed a «nuova fase» of Italian private law in his 1885 work:

Un desiderio profondo di novità, una smania febbrile di riforme in tutte le sfere molteplici della vita, della scienza, dell'arte, pervade ed agita violentemente le fibre della società moderna. Nessun sistema, nessun istituzione, nessun organismo scientifico, artistico, sociale, malgrado abbia il suggello e la consacrazione dei secoli, si considererà più sacro ed inviolabile. Tutto cade e si trasforma, a vista di occhio, sotto il martello inesorabile della critica, sotto l'impulso irresistibile di nuovi sorgenti bisogni. In mezzo a tanta vertigine di rivolgimenti e di trasformazioni, quasi nave incantata che solca tranquilla le onde burrascose dello oceano seminante di cadavere e di moribondi, il Diritto civile sembra non risenta per nulla l'influenza rivoluzionaria dei nuovi tempi<sup>53</sup>.

He argued that the individual as the subject of autonomous law must be replaced by a new subject – a more heterogeneous protagonist who necessarily lives within the complexity of the social. For the author, the task of the state was to mediate between class conflicts and use social laws to resolve such conflicts and other social tensions. The old adage, *ius privatum est quod ad singulorum utilitatem spectat*, was no longer applicable if the individual

<sup>51</sup> Enrico Cimbali (1855-1887) originally from Sicily, is an academic and lawyer known for his theories on social civil law. Among his main writings: *Lo studio del diritto civile negli Stati moderni* (1881); *La funzione sociale dello Stato moderno* (1881), e *Le prime due fasi dell'azione dello Stato* (1881). *La Nuova fase del diritto civile* (1885). At only 31 years of age, he caught a sudden typhoid fever that caused his death.

<sup>52</sup> E. Cimbali, *Studi di dottrina e giurisprudenza civile*, Lanciano 1889, p. 26.

<sup>53</sup> E. Cimbali, *Opere complete*, cit., p. 5.

was no longer an abstract concept, but was instead changeable, able to shift forms according to its social context. Private law, therefore, represented a garment worn by a society in the process of deep and rapid transformation – a garment made of living and elastic fabric that was able to adapt to continuous social changes.

The premature death of Cimbali interrupted his reflections. However, others continued his social analysis of private law, among them the Sicilian Vadalà-Papale<sup>54</sup>, author of the 1881 essay *Il codice civile e la scienza*, which affirmed the need to raise the lowest social classes for the good of all private law. Vadalà-Papale was also among the first to apply Darwin's theory on the evolution of the species to society and considered society a living organism that was subject to the same natural laws as all living beings. According to evolutionist positivism, the law must follow the constant evolution of society to be able to regulate the economic and social realities of the system. Hence the critique of individualism, which considers the collectivity as a set of individuals all the same, while according to the social Darwinism of Vadalà-Papale, society was made up of groups of people representing the cells, tissues and different organs of society itself. Embracing this perspective, the Sicilian jurist criticised the current code as a source of separation between private law and the real life of the community. In his 1883 *La nuova tendenza del diritto civile in Italia*, the author sought to demolish the false idea of a perfect civil code, beneficiary of all private law for all societies and times. Just in front of the imperfection of the civil code, it is necessary that the «nuova tendenza del diritto civile», defined as «positiva» and «sociale» proposed new legislation «più rispondente ai bisogni della nuova era». For this reason, he argued for the need for a «Codice privato sociale» or «Codice Sociale-Civile»<sup>55</sup>; it is interesting to note how Vadalà-Papale, in the elaboration of his thesis, states that he was inspired by the theses of Schäffle and Gierke.

A number of authors have reflected on the jurist social movement. For example, Giuseppe D'Aguzzo<sup>56</sup> denounced the social upheaval caused by «progressi dell'industria e dei mezzi di comunicazione», and «le mutate condizioni dell'agricoltura, dell'industria, degli scambi», that «hanno creato

---

<sup>54</sup> Giuseppe Vadalà-Papale (1854-1921) was born in Catania, is among the first in Italy to embrace social Darwinism. Among the most important works: *Morale e diritto nella vita: studi* (1881); *D'una scienza delle legislazioni comparate nei rapporti sociologico, storico, legislativo e politico* (1882); *Dei metodi d'interpretazione giuridica per il novello indirizzo degli studi di diritto privato* (1903).

<sup>55</sup> G. Vadalà-Papale, *Per un codice privato-sociale*, in «Spedalieri», I (1891) pp. 59-60.

<sup>56</sup> Giuseppe D'Aguzzo (1862-1908) jurist and academic is the founder of the journal *La scienza del diritto privato*. The jurist from Trapani, embraces the evolutionary and sociological theses of law by imposing yourself among the most sensitive jurists to the socialization of private law.

nuove esigenze sociali»<sup>57</sup> to which the private Code was unable to respond. For D'Aguanno, it was necessary to study law as an anthropological science – as a discipline generated and conceived of by man to be applied to human needs. In other words, at the centre of the legal system, people should not be conceived of in an individualistic or solitary sense, but as beings immersed in the social life that is part of a complex social organism<sup>58</sup>.

The analysis of individualism as the basis of the private code is at the centre of Emanuele Gianturco's<sup>59</sup> argument in his 1891 work *L'individualismo e il socialismo nel diritto contrattuale*. For the Italian jurist, the legislator was no different to the «apertissima iniquità» produced by individualism and the «pretesa uguaglianza di diritto dei contraenti»<sup>60</sup>. Legal equality and freedom were conquests of the modern legal age which, if not contextualised within the new society, produced ferocious injustices:

Giuridicamente, è libero, ed eguale in diritto rispetto all'usuraio, al proprietario di terre e all'imprenditore anche lo sfinito popolano, che debba scegliere fra il subire l'usura o il morire di fame, anche il contadino che debba subire l'alternativa di accettare patti colonici insopportabili o emigrare in America, anche l'operaio che debba decidersi fra la miseria dei suoi figliuoli o l'accettare il salario derisorio impostogli da un prepotente capitalista. [...] La libertà astratta è un nome vano, a cui sono stati sacrificati i più sacri interessi. È un'amara irrisione dire a chi muore di fame, che in diritto, egli è eguale a Van de Bilt o a Rothschild<sup>61</sup>.

Though it is not within the remit of this article to deepen the theses of social civilism, the nineteenth and twentieth century need to reform existing law, as suggested by the new social sensibility, should be emphasised. The social private jurists movement in Italy was prolific and fruitful, and the jurists anticipated many of the themes that were subsequently supported by the *Freirechtsbewegung*<sup>62</sup>. It is the combination of these theories with socialism that

<sup>57</sup> G. D'Aguanno, *La riforma integrale della legislazione civile*, in «La scienza del diritto privato», I (1893), pp. 42-48.

<sup>58</sup> G. D'Aguanno, *La genesi e l'evoluzione del diritto civile seconda le risultanze delle scienze antropologiche e storico-sociali con applicazioni pratiche del codice vigente*, Torino 1890, p. 19.

<sup>59</sup> Emanuele Gianturco (1857-1907) is one of the most active jurists and politicians of the new social law movement. He holds many government positions and teaches civil law at the University of Naples. Among the most important works: *Istituzioni di diritto civile* (1887) e *Sistema del diritto civile* (1894).

<sup>60</sup> E. Gianturco, *L'individualismo e il socialismo nel diritto contrattuale. Prolusione al corso di diritto civile letto nella R. Università di Napoli*, Napoli 1891, p. 5.

<sup>61</sup> *Ibidem*, p. 6.

<sup>62</sup> On the subject compare: L. Lombardi Vallauri, *Saggio sul diritto giurisprudenziale*, Milano 1967; Id., *Diritto Libero*, in *Digesto delle discipline privatistiche*, VI, Torino 1990, pp. 279-284; and also F. Mazzarella, *Dialoghi a distanza in tema di socialità e storicità del diritto*, cit., pp. 381-423.

led to a lack of adequate reflection.

## 5. Conclusion

Much more could be written about the authors of European social private law, including the many German, French and Italian jurists who discussed the socialisation of private and commercial law. However, it is clear that these jurists were not part of the world of socialism and its political consequences. These jurists are children of the same cultural climate, that of the socialization of private law. So this movement aimed to reform the legislative system through legislation that the jurists themselves defined as social. The jurists created a bridge between the law and social sciences, recasting European scientific trends, such as Darwinism, evolutionism and positivism, in their own image. It seems misguided, therefore, to speak of *Juristen-Sozialismus* or legal socialism since these jurists of socialist have very little. Instead, it is enough to refer to Menger's opposition to the etiquette shadowed or even the skepticism of D'Aguanno towards the alleged school of legal socialism<sup>63</sup>. The *Juristen-Sozialismus* are far removed from the socialist political world, both by the admission of the members of the movement themselves, as well as according to the view of those who profess themselves to be socialists.

In addition to Engels and Kautsky in Italy, the two Marxists Claudio Treves (1869-1933) and Antonio Labriola (1843-1904) were critical of the movement. According to Treves The Code of Private Law is the expression of the bourgeoisie, therefore it protected the interests of the bourgeoisie alone. The socialism of the jurists was unable to produce a new right; indeed, only by demolishing the old regime «con l'abbattimento della classe che l'aveva creato per sfruttare e asservire una classe inferiore»<sup>64</sup> was it possible to arrive at the new socialist right.

This idea was also echoed by Antonio Labriola, for whom socialist law could be achieved through the schemes and institutions of bourgeois law; in other words, it is impossible for socialists to arrive at a law that defends the conditions of the proletariat and the weaker classes without first completely overcoming bourgeois society. Labriola harshly criticised the socialist jurists who propagated a new utopia: «l'utopia dei cretini»<sup>65</sup>.

The theses of the jurists of the social movement of private law, once

---

<sup>63</sup> See G. D'Aguanno, *Ancora sul socialismo giuridico del Prof. Loria*, in «La scienza del diritto privato», I (1893), pp. 641-643.

<sup>64</sup> C. Treves, *Socialismo e diritto civile*, in «Critica Sociale», IV, 20 (1884), pp. 313-317: 313.

<sup>65</sup> A. Labriola, *Saggi sul Materialismo storico*, a cura di V. Gerratana-A. Guerra (ed.), Roma 1964, p. 26.

considered socialists, therefore find themselves in the cauldron of the quasi-socialists, who are, according to Marxists, the new utopians: the supporters of *state socialism*, the *bourgeois revolution*, the deluded few who believe they can improve the living conditions of the less well-off, even though themselves are part of the bourgeoisie.

For the European socialist circles, at the end of the nineteenth century, the legal-political revolution can only and exclusively take place through the class struggle with the prevalence of the proletariat and its interests over the other social classes. Jurists, just because they are such, cannot fully support the cause of the weaker classes; reforming the civil code is not considered a useful action for the socialist cause. In conclusion, it is clear from what has been observed so far that the label of legal socialism is completely wrong. Despite the fact that many of them do not recognize themselves in the label attached to them, their theses are caged in a faded, bourgeois socialism that in some ways condemns to oblivion many original voices that should have found greater fortune. Abolishing the label of legal socialism, going beyond the definition of *Juristen-Sozialismus*, to embrace a more generic movement of social jurists seems to be able to better frame the legal trend of the time. For European socialist circles at the end of the nineteenth century, the legal-political revolution could take place solely through the class struggle, with the emancipation of the proletariat and its interests over the other social classes. Jurists were unable to fully support the cause of the weaker classes, and reforming the civil code was not considered useful to advancing the socialist cause. In conclusion, it is clear that the label of 'legal socialism' is misguided. Despite the fact that many of them do not recognise themselves in the label attached to them, their theses are caged in a faded, bourgeois socialism that condemns many original voices, who should have found a greater number of listeners, to oblivion. With this in mind, abolishing the label of legal socialism and going beyond the definition of *Juristen-Sozialismus* to embrace a more holistic movement of social jurists may better reflect the reality of the European legal landscape at the time.