

COMMUNITY IN HISTORICAL PERSPECTIVE

A translation of selections from
Das deutsche Genossenschaftsrecht
(*The German Law of Fellowship*)

by

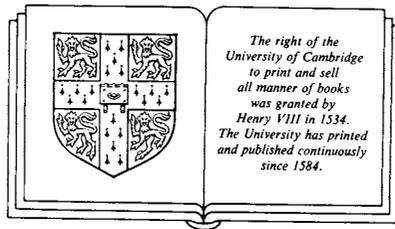
Otto von Gierke

principally from volume 1

Rechtsgeschichte der deutschen Genossenschaft
(*The Legal and Moral History of the German Fellowship*)

Translated by Mary Fischer

Selected and edited by Antony Black



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Introduction: the meaning of association; scope and plan of the work

[1] Man owes what he is to union with his fellow man. The possibility of forming associations [*Associationen**], which not only increase the power of those alive at the time, but also – and most importantly, because the existence of the association outspans that of the individual personality – unite past generations with those to come, gave us the possibility of evolution, of history.

As the progress of world history unfolds inexorably, there rises the unending arch of the noble edifice of those organic associations which, in ever greater and increasingly broad spheres, lend external form and efficacy to the coherence of all human existence and to unity in all its varied complexity. From marriage, the highest of those associations which do not outlast the life of the individual, come families, extended families [*Geschlechter*], tribes and nations, local communities [*Gemeinden**], states and confederations in rich gradations; and there is no conceivable limit to this development, other than that at some time in the remote future all men unite in a single organised common life and give visible expression to the fact that they are simply elements of one great whole.

But this development from apparently insurmountable complexity to unity presents only one facet of social progress. All the life of the intellect, all human excellence would atrophy and be lost if the idea of unity were to triumph alone to the exclusion of all others. The opposing principle forges its path with equal power and necessity; the idea of the plurality that persists within every all-embracing unity, the particular within the general, the principle of the rights and independence of all the lesser unities which go to make up the greater whole, down to the single individual – the idea of *freedom*.

[2] The struggle of these two great principles determines one of the most powerful motive forces in history. Their reconciliation, in a form suited to

the age, nationality, culture and all other existing circumstances, represents the good fortune of a people; one-sided dominance of one or other, or unequal or unsuitable division of their domain, is its misfortune. And as up to the present all those splendid world empires which neglected freedom for the sake of unity have collapsed, so no people which was incapable of limiting the independence of its constituent parts in favour of a higher unity has been able to withstand the tempests of history.

At nearly all times and in all lands we perceive a condition which is far removed from pleasant harmony – not just from the ideal which is by its nature unattainable, but even from that which is possible and attainable. Perfectly understandable! For humanity does not fulfil its destiny in steady peaceful progress! All history, like all life, is a battle; and the initial successes in battle seldom lead to harmony, more often to the oppression of the defeated and the tyranny of the victor. This is not only the case in battles between individuals and peoples, but also in the battle of ideas. When an idea enters the arena of history it grows with youthful vigour; all hostility on the part of the ageing ideas, which had dominated the world until this time and suspect the child to be their mortal enemy, only serves to invigorate it and give it training in warfare. It extends itself and makes violent inroads into the foreign territory. There comes an open breach; both ideas experience defeats and victories. Finally the idea to which the future belongs gains the decisive victory: and then it rules over society, often with merciless tyranny, until one day new-born ideas, perhaps the children of the ideas it had previously defeated, deliver it to the same fate. In the same way, a newly developing unity, more extensive in range and content than its predecessor, usually comes into sharp opposition with those entities subordinate to it, and attempts to suppress completely organisations which it would be wiser simply to confine. Conversely, a newly won freedom often denies to the generality what it must necessarily sacrifice if it is not to lead to individualism. If an approximate balance cannot be achieved, then a long-held freedom often founders on a new unity, or a new freedom annuls a long-established unity; until gradually, if the possibility of development still exists on both sides, the principle which has been overwhelmed is imbued with new substance, and a new struggle flares up.

But the more advanced the age, the more a new factor comes into play, increasing the prospect of finally attaining the longed-for harmony: the growing intelligence and consciousness of the peoples. Nations awake to self-knowledge later than the individual. But when it does happen, then more and more what had once been the result of a vague impulse becomes

the consequence of a considered act, and movements find form and goal through [3] a more exact knowledge of the opposing elements, through the increased patience which necessarily results from this and from the growing sense of community (*Gemeinsinn*).

Of all the peoples mentioned in history, none has been so deeply or powerfully gripped by the opposing forces depicted above, none is more suited by its innermost temperament to the realisation of both principles and therefore to their final reconciliation, than the Germanic* people. It seems almost as if this people alone had been called to create states which are at once united and free, as if the Latin peoples only had a share in this in so far as they had received a fraction of Germanic characteristics with the fraction of Germanic blood flowing in their veins, or had borrowed them from institutions created by the Germanic spirit.

Second to none in the march to universality and in their ability to organise states, surpassing most in their love of freedom, the Germanic people have a gift other peoples lack, by means of which they have given the idea of freedom a special substance and the idea of unity a more secure foundation – they have the gift of forming fellowships [*Genossenschaften*]. The people of antiquity recognised, as do the non-Germanic peoples of today, the existence, between the highest generality and the individual, of many gradations of natural and arbitrary associations. But their love of the corporate life, their sense of family, community and nation, their ability and enthusiasm for free association, cannot even remotely be compared with that inexhaustible Germanic spirit of association, which alone is able to guarantee an independent existence to all the lesser conformations within the state, while maintaining sufficient power to create from the still uncommitted energy within the people a vast profusion of lively, active fellowships, inspired not from above but from within, for the most general as well as the most isolated purposes of human existence.

These more restricted communities [*Gemeinwesen**] and fellowships, which appear to the generality as particular cases, but which for their members are themselves the universality, alone offer the opportunity to combine a large and all-encompassing unitary state with active civic freedom and with self-administration. The lack of them is the main reason which prevents so many Latin people from attaining civic freedom, their presence the most secure guarantee of English and American freedom. Although, or perhaps because, our German* nation developed, more thoroughly than its sister nations, these basic Germanic attitudes which press forward to universality as well as to individual freedom and reconcile

both in the spirit of fellowship, it has suffered longer and more deeply than they under the opposing principles. A short time ago it was still possible to say that where unity was lacking the independence of the separate elements celebrated a dismal triumph,¹ while in single states the freedom of communities and organisations had sunk to a miserable sham in the face of exaggerated unity. But the mighty [4] progress of our day has shown that the German people is aware of its aim in both directions, and gives cause to hope that the latest of the European confederations will be the most perfect. And that strength which has characterised the Germanic people since the beginning of history and which always rose victorious above all the vicissitudes of fate – the creative power of association – lives on and is at work, more than in any other people, in the German people of today.

If then the system of association in its totality is of the greatest importance for German life in the present and future, it is certainly worthwhile to submit even a relatively small part of this subject to a more detailed examination. This will be the task of *The German Law [Recht*] of Fellowship* in the following investigations. The area which will come under scrutiny will be isolated from the concept of association in general by the following boundaries.

Only the juridical aspects of the German law of fellowship will be discussed. The concept of German association is endangered by foreign influence in the sphere of law more than in any other and even today the Germanic concept of Right is engaged in persistent struggles to regain many positions which have been wrested from it. For even today national law has been dispossessed, by the majority of jurists, of any characteristic perception of those associations which have developed to independent unity; even today the German system of fellowship is confined in both theory and practice in the strait-jacket of the Latin corporation – not, of course, that of the ancient Romans, but that which was debased to a shadow of its former independence under the Byzantine empire.² It is true that eminent Germanists have made a significant start in reconstructing the German law of fellowship from first principles.³ However, there is still lacking a more comprehensive survey, which on the one hand would follow the moral and legal idea [*Rechtsgedanke*] of the German fellowship and its transformation through history, and on the other give equal consideration to public and private law – two areas equally caught up in and transformed by this concept. Alongside the legal and moral [*rechtlich**] aspect of fellowship, its cultural-historical, economic, social and ethical aspects should of course not be neglected; but these will only be considered either in so far as they are necessary for understanding the

formation of law, or in order to demonstrate the insoluble link which exists between matters of Right and cultural life as a whole.

The law of the German fellowship *per se* excludes both related legal structures outside Germany and those associations which have grown up within Germany from foreign roots (in particular the church with its rich corporate life), or simple imitations of Latin institutions. It will none the less be necessary to include from time to time similar legal structures [5] in kindred nations for purposes of comparison, and a detailed examination of the influence of foreign – and especially canon-law and Latin – concepts upon the formation of German fellowship, will also be indispensable in order to attain the main aim of the present work, which is: to reassert this attribute of the German spirit, impoverished by jurisprudence itself in precisely this area, by means of an independent conceptual structure, and thereby to demonstrate one of the most significant bases of the German state and legal system of German freedom and German autonomy.

The subject to be discussed is the law of the German fellowship, not the German law of association in general. The term ‘fellowship’ will be understood in its narrowest technical sense as every body subject to German law and based on the free association of its members – that is, an organisation with an independent legal personality. This is how it is used in the work of Beseler,⁴ who first used the word as a technical term. In a wider sense, the local communities and the state itself come under this notion of fellowship; but they also have a wider significance and are therefore to some extent beyond the scope of our subject. In Germany, however, state and local community, while they arose partly from a heightening of the concept of fellowship, arose also partly from a heightening of its opposite. Consequently (according to the tendency of the age), they have retained and developed elements of the concept of fellowship to a very varied degree; the history of previous centuries, for example, is characterised by its almost total extinction, the transformation of the present by its re-awakening. And so state and local communities come within the range of our discussion in two respects: with regard to their origins and with regard to their inner structure. On the other hand those organisations or moral and legal associations which have not been able to assert an independent dominant group identity over their members are completely excluded.

The subject matter is to be the German law of fellowship, not of individual fellowships. As in all branches of history, so in moral and legal or again constitutional history only the developing principle is truly lasting and fundamental, while the factual and material world can merely offer

symptoms and a source by which the principle can be recognised. The actual subject matter of the investigation will therefore be the development and the present form of the legal and moral idea of the German fellowship. As far as is possible, however, this idea will be pursued in all its ramifications and everywhere the general sought out from among the particular.

The German law of fellowship will within the above limitations be treated in its entirety and therefore both as a developing and as a developed unity [*als ein werdendes wie als gewordenes*]. The present state of the law can only be grasped completely through a comprehensive historical explanation; conversely it is only possible to approach an understanding of the history of German fellowship when the current movement, [6] as its most recent and familiar manifestation, is taken into consideration. Therefore for practical reasons the material as a whole is not separated into 'history' and 'current law', but instead a different division will be chosen, according to historical and juridical methods. To this end Part I will deal with 'the history of the law of German fellowship' and Part II with 'the nature of the law of German fellowship'. In the first part exposition will predominate, in the second investigation. In Part I the present condition appears as the last phase of a great historical process of development; in Part II the historical process appears as the cradle of concepts of law valid today. In Part I, detailed questions regarding juristic constructs will not be subject to close scrutiny but rather, in so far as it is imperative that they be discussed, the reader will be referred to the results of Part II, so that an overall picture of the German fellowship movement can emerge, unbroken by any wide-ranging debate. Conversely, in Part II, so that the juridical debate is not crushed beneath factual and material considerations, the foundation laid in Part I is taken for granted. Part I takes as its point of departure a general view of an age and, by arranging the study according to periods of time, attempts to present the internal and external fate of the system of fellowship according to its sources. Part II starts from and culminates in one cardinal question: the ideology appropriate for an independent legal entity present within a pluralistic structure – or, expressed differently, the issue of the nature of the ideal legal personality of an association (constitutional personality and legal person). Because it is precisely the presence of such a personality which makes the association a 'corporation [*Körperschaft**]' and distinguishes the corporation from other associations, so the investigation of the concept of corporation devolves on Part II. . .

[7] Part I has the dual purpose of, first, furnishing, at least in outline, an

independent legal history of German fellowship and its influence on the formation of the German state and law as a whole, as a basis for autonomy; and, second, of providing a foundation for the specific discussion of Part II.