Martin Löhnig

Alternative Legal Publicism?[1]

Four Legal Publications from the Long 1970s and Their Reception in Legal Studies and Legal Practice

Abstract

Between 1968 and the early 1980s, four long-term orientated legal publication media came into being in the Federal Republic of Germany: the journals *Kritische Justiz* (KJ) and *Zeitschrift für Rechtspolitik* (ZRP), as well as the *Alternativkommentar zum Bürgerlichen Gesetzbuch* (AK-BGB) and the *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (MünchKomm-BGB). Albeit in a different manner, each of these four claimed to constitute an alternative to more established publication media in law. The article describes which aspirations led to the foundation of these media—two of which competed with one another –, how they developed and how they were received in legal studies and legal practice. By doing so, the article exemplifies interactions between social movements and academic knowledge formation in contemporary history through the lens of jurisprudential publicism.

Keywords: *Alternativkommentar; Kritische Justiz; Jurisprudential Publicism; Rudolf Wassermann; Fritz Bauer*

Introduction

Today, jurisprudential publicism in the Federal Republic of Germany appears to be a field dominated by works published for decades. Important legal trade journals, for example, the *JuristenZeitung* (JZ), are in their 73rd or, in the case of the *Neue Juristische Wochenschrift* (NJW), 71st year after (re-)formation. Some are even significantly older, e.g. the *Archiv für die civilistische Praxis* (AcP) that has been published for 217 years. The journal market is continuously differentiating into further special fields of law. This may

1 About the term 'alternative' in this context c.f. Susanne Schregel's introduction to the present issue, Introduction: Social Movements, Protest, and Academic Knowledge Formation: Interactions since the 1960s.

DOI: 10.13154/mts.60.2018.95-120 Moving the Social · 60 (2018) · p. 95–120

be due to the stronger specialisation of the legal system as well as lower production costs. A comparable development can be observed in the field of legal commentaries dealing with the *Bürgerliches Gesetzbuch* (BGB)—the essential Civil Law Code in Germany. A highly regarded extended commentary, established by the Bavarian Privy Councillor Hans Theodor Soergel, was first published in 1921 and in its current 13th edition comprises around 30 volumes. The flagship of all BGB-commentaries, with around 100 volumes, was established more than 100 years ago by the Bavarian Privy Councillor Julius v. Staudinger. An annual standard commentary for legal education was founded in 1938 by Otto Palandt, President of the Law Students Examination Authority (Präsident des Reichsjustizprüfungsamtes). It still bears his name.[2]

This inventory could create the impression that alternatives to these established works, dating back to the pioneering spirit of the 1960s, never existed. To counter such erroneous perceptions, the following paragraphs will examine the two most important alternative projects in legal publishing, the *Alternativkommentar zum Bürgerlichen Gesetzbuch* (AK-BGB) and the journal *Kritische Justiz* (KJ). The AK-BGB, published in six volumes, is the largest project in the field of alternative commentaries that flourished in the 1970s and 1980s. Further 'alternative commentaries' were, for example, written for the criminal procedure code, the penal system code and the constitution. Especially the civil code that came into force on 1 January 1900 and has not been fundamentally changed for decades, could have given the authors of alternative commentary projects the opportunity to update this codification, and to apply the provisions to the completely changed societal circumstances. The journal *Kritische Justiz* is probably the best known 'critical' publication medium in the field of legal science inspired by the spirit of '1968'; it was connected to the aspiration of bringing science, society and politics closer together and providing a forum for criticism of the system.

The selection of AK-BGB and KJ enables a twofold comparison. On the one hand, it permits the comparison of two very different types of legal publications with regard to the aspect of 'alternativity'. Usually a legal commentary is required to present comprehensive knowledge and relevant jurisdiction to every single provision of the code before it is allowed to develop further thoughts of its own. As a rule, many years go by until a comprehensive commentary like the AK-BGB is completed. It is hard to stand out from the crowd of marketable competition products with (at least partly) similar claims to quality contents. A quarterly journal like the KJ is able to offer short-term responses to current developments in terms of legal policy and legislation. It can provide a forum for discussion of legal policy and publish articles without having to explain the entire state of the art and without being perfectly thought through. In addition, the KJ does not necessarily have to meet the readers' expectations like already established journals—on the contrary.

2 Cf. www.palandtumbenennen.de, accessed on 16 July 2018.

On the other hand, the choice of AK-BGB and KJ allows for a comparison of these two alternative projects with contemporary competitors from market leader C. H. Beck, namely the *Münchener Kommentar zum Bürgerlichen Gesetzbuch* and the *Zeitschrift für Rechtspolitik*. This comparison is particularly valuable to establish what had been 'alternative' or 'critical' about AK-BGB and KJ and to which extent they achieved the aspiration of indeed being 'alternative' which is encapsulated in the title. Therefore, the aspirations of these two alternative publications will be identified and will be measured against this common goal afterwards. In addition, the fate of the alternative projects and their influence on legal discourse will be examined. Apart from the aforementioned commentaries and journals, the sources for this examination are quotations of the editors responsible regarding their own aims, as well as general evaluations and jurisprudential publications.

The latest legal history and legal contemporary history[3] has only timidly started historicising the 1960s and 1970s,[4] although especially those years represent a time of socio-political revolution. Key terms of the legal field experienced profound change in meaning and obtained their present meaning or were substituted by other key terms. During this time, most fields of regulation underwent a fundamental paradigmatic shift amidst calls for even further reorientation. This has by no means been completely processed by Jurisprudence. Merely the interaction between law and social movements has already met with a certain legal-historical interest.[5] While topics like the development of a left-wing book and publisher market definitely had an impact on historical research on the "alternative milieu",[6] the analysis of alternative forms of publishing is breaking new ground in the history of law. As especially academic life formed an integral part of this alternative ambiance, it is necessary to complement the works at hand by analysing other forms of publication in different scientific disciplines.

3 Cf. Michael Zwanzger: Bürgerliches Recht und Rechtsgeschichte: Szenen einer Ehe, in: Diethelm Klippel/Martin Löhnig/Ute Walter (eds.): Grundlagen und Grundfragen des Bürgerlichen Rechts: Symposium aus Anlass des 80. Geburtstags von Dieter Schwab, Bielefeld 2016, pp. 23–59.

4 Martin Löhnig/Mareike Preisner/Thomas Schlemmer (eds.): Reform und Revolte: Eine Rechtsgeschichte der 1960er und 1970er Jahre, Tübingen 2012.

5 Cf. Martin Löhnig/Mareike Preisner/Thomas Schlemmer (eds.): Ordnung und Protest: Eine gesamtdeutsche Protestgeschichte von 1949 bis heute, Tübingen 2015.

6 Uwe Sonnenberg: Von Marx zum Maulwurf: Linker Buchhandel in Westdeutschland in den 1970er Jahren, Göttingen 2016; Philipp Felsch: Der lange Sommer der Theorie: Geschichte einer Revolte 1960–1990, München 2015; Sven Reichardt: Authentizität und Gemeinschaft: Linksalternatives Leben in den siebziger und frühen achtziger Jahren, Berlin 2014, pp. 223–312.

The *Alternativkommentar zum BGB*

"Alternative Law"

The *Alternativkommentar-BGB*[7] aspired to a high standard; even the title left no doubt that it strived to be an alternative.[8] "Alternative commentaries are a response to urgent problems that cannot be ignored by legal practice and legal education if they want to meet the challenges posed by society to its law"[9] , Rudolf Wassermann[10] wrote in the foreword to Volume 3 published in 1979 as the first volume of the commentary. Thereby, Wassermann kept an eye on the "transition from the (old) liberal to the social constitutional state". He postulated "drastic changes in law […] that on the one hand draw conclusions from the level of social, technical and economic development, attained so far, and on the other hand also aim at an organisation of social life guaranteeing all citizens of the Federal Republic a maximum of freedom and social equity"[11]. This unsettled legal practice. Therefore, Wassermann was concerned that new laws could be applied "in the traditional spirit", whereby the application of traditional law would even heighten the risk of insecurity. This would pose the risk of a growing recourse to "subjective preferences and assessments"[12] by the individual practitioner and the risk of a "careless takeover of precedents and unaudited everyday theories"[13]—a frontal attack by Wassermann on many of his fellow judges.

7 Possibly, the title of the commentary goes back to the so-called 'alternative draft' concerning the major penal reform in 1966. This draft had been published by a group of, generally speaking, left-wing, liberal penal lawyers in reaction to an extremely conservative bill that had been published four years earlier. This bill relevantly influenced the reform, which the social-liberal majority in the *Bundestag* voted for, cf. Michael Kubiciel: Vergeltung, Sittenbildung oder Resozialisierung? Die straftheoretische Diskussion um die Große Strafrechtsreform, in: Martin Löhnig/Mareike Preisner/Thomas Schlemmer (eds.): Juristische Zeitgeschichte der 1960er und 1970er Jahre, Tübingen 2012, pp. 217–229.

8 Cf. the anthology Alternativkommentare: Anspruch und Kritik, Luchterhand 1987, which comprises numerous sources used for this text.

9 Rudolf Wassermann (ed.): Alternativkommentar zum Bürgerlichen Gesetzbuch, Volume 3: Besonderes Schuldrecht, Geleitwort p. VII, Neuwied 1979.

10 Regarding Wassermann cf. Jörg Requate: Der Kampf um die Demokratisierung der Justiz: Richter, Politik und Öffentlichkeit in der Bundesrepublik, Frankfurt am Main/New York 2008, particularly pp. 147–149; 158–161; 229–233; 249–251; 289–293; 336–345.

11 Rudolf Wassermann (ed.): Alternativkommentar zum Bürgerlichen Gesetzbuch, Volume 3: Besonderes Schuldrecht, Geleitwort p. VII, Neuwied 1979.

12 Ibid.

13 Ibid., pp. VII-VIII.

In contrast, the *Alternativkommentar* wanted to draw attention to the historic relativity, as well as the "social, economic and political premises"[14] of the statutory rules, by linking them to social and economic sciences and putting stronger emphasis on the scientific character and on legal policy. It strived to show the enforcement of social, economic and political interests in law-making, in the application of law and in legal sciences, while at the same time naming existing interpretations and scopes for making a decision, as well as substantiated alternatives to the respective general views. Last but not least, the commentary wanted to serve as a source of information for every layman subjected to the law.[15]

This development on the juridical book market was even noted by the general press. *DIE ZEIT* reported—however, quite superficially—about "*Alternative Juristerei*"[16] ("Alternative Jurisprudence"). The author ultimately only dealt with the failed concern of the commentary with being layperson-orientated by stringing together some social and legal scientific technical terms that can only be understood by insiders. *Der SPIEGEL*[17] reported in detail on multiple pages and pointed out the added values of the commentary. Indeed, only the alternative commentary stated, for example, that 200,000 children in Germany did not have their own bed, that rents had increased so massively that low-income families had to spend half their disposable income on rent or that, if a large family lived there, properties suffered depreciation according to established legal precedent. *Der SPIEGEL* concluded that as soon as the "Wassermann" became quotable, judges would have to deal with such literature outside the usual focus that many jurists felt uneasy about—whether they liked it or not.

Little Attention—Despite Fair Reviews

The *Alternativkommentar* did not become quotable. Apparently, the majority of judges simply ignored it. A research of the database Beck-Online[18] only produces 653 hits in 10,000 court decisions of the last 30 years which can be searched in full on the database. A sample for the year 1990—the commentary had been published in its entirety in the

14 Ibid., p. VIII.

15 Regarding the alternative commentaries cf. David Kästle-Lamparter: Die Welt der Kommentare: Struktur, Funktion und Stellenwert juristischer Kommentare in Geschichte und Gegenwart, Tübingen 2016, pp. 88–89.

16 vM [probably v. Münchhausen]: Alternative Juristerei, in: Die Zeit, 14 March 1980, 12/1980, at: http://www.zeit.de/1980/12/alternative-juristerei, accessed on 16 July 2018.

17 Issue 8/1981, 16 February 1981, at: http://www.spiegel.de/spiegel/print/d-14326226.html, accessed on 16 July 2018.

18 Research in Beck-Online, at: https://beck-online.beck.de/Home, accessed on 24 November 2016.

meantime—produces 15 hits. In the database *juris*[19], there are 741 hits for the last 30 years and 12 hits for 1990. By contrast, the traditional 'big' commentaries produce 774 hits (*Soergel*) and 850 hits (*Staudinger*) for 1990. The *Münchener Kommentar zum BGB*, established at the same time as the AK-BGB, results in more than 1,000 hits. A search of all legal journals accessible at Beck-Online renders a similar picture: for the AK-BGB there are only 250 hits, for the *Soergel* more than 50,000 and for the *Staudinger* and the *Münchener Kommentar zum BGB* more than 100,000 hits.[20] These numbers impressively prove that the AK-BGB never arrived in terms of public awareness.

However, the legal specialist publications favourably received the AK-BGB. The *Neue Juristische Wochenschrift* (NJW)—both now and then the legal trade press with the highest circulation—published a reasonably positive review of the AK-BGB's first volume in 1980, written by Horst Hagen, judge at the *Bundesgerichtshof* (BGH).[21] He confirmed that the contents of the commentary lived up to its aspirations of quality in many respects. Furthermore, he recommended the commentary to every civil lawyer not stagnating in routine as a useful addition to traditional tools of the trade. Günther Beitzke, Professor of Family Law in Bonn, praised volume five of the commentary in the NJW for its scientific standards and vast amount of information on family sociology despite its stance on legal policy that - generally speaking - firmly conservative Beitzke probably did not share.[22]

In 1982, the *Archiv für civilistische Praxis*—which has been published since the beginning of the 19th century and despite its title accommodates highly technical theorising—published a detailed review of all three volumes of the *Alternativkommentar* available by then. It was written by civil lawyer and legal historian Christian Wollschläger in Bielefeld.[23] He classified the commentary as the intellectual heritage of the non-parliamentary opposition and rejected Wassermann's introductory words concerning the interpretation of the BGB under a welfare state perspective as "meaningless labels not showing more than an oppositional self-image".[24]

As the work leaves out certain parts of the BGB due to terms of legal policy—for example, contractual matrimonial law that, according to the commentary, is practically irrelevant in an "employees' society"—, Wollschläger prefers to refer to it as a 'complementary commentary' rather than an 'alternative commentary'. Nevertheless, he points out that the

19 Research in juris, at: https://www.juris.de/jportal/index.jsp, accessed on 24 November 2016.

20 Research in Beck-Online, at: https://beck-online.beck.de/Home, accessed on 24 November 2016.

21 Horst Hagen: Review of the *Alternativkommentar zum Bürgerlichen Gesetzbuch*, in: Neue Juristische Wochenschrift 1980, p. 2297.

22 Günther Beitzke: Review of the *Alternativkommentar zum Bürgerlichen Gesetzbuch*, in: Neue Juristische Wochenschrift 1982, p. 980.

23 Christian Wollschläger: Review of the *Alternativkommentar zum Bürgerlichen Gesetzbuch*, in: Archiv für die civilistische Praxis 182 (1982), pp. 473–478.

24 Ibid., p. 473 (translated by the author).

commentary offers extensive socio-economic and historical-philosophical introductions that cannot be found with competitors. According to him—as is always the case with compilations—the work is in some points theoretically brilliant, but too aloof and sometimes a disjointed collection of materials.

Wollschläger finds nothing radical about the *Alternativkommentar*. According to him, some specific preferences in terms of legal policy emerged, but the conclusions all stayed within the constitutional framework and also were largely represented in the legal establishment. In his NJW review of volume two, Hagen stated that the work "basically does not differ from other commentaries to a great extent"[25], although it contains interesting considerations on structure and function of general clauses (§ 242 BGB) or on the theory of money and currency that one does not come across in other commentaries. General clauses—the aforementioned § 242 BGB mandates the validity of the principle of good faith—are of enormous importance for the durability of a civil law codification. They enable adaption to the changes in needs and views without having to change the wording of the law. To do so they confer substantial powers onto the individual judge: by making up for legislative assessments left open to interpretation, they become lawmakers themselves. General clauses are, so to speak, transferring laws that impose a special obligation for substantiation onto each judge.[26]

Failed—But Why?

Just how alternative was the *Alternativkommentar*?

In fact, in many cases, the *Alternativkommentar* was more conventional than one would expect regarding the aspirations of its editor. In many areas it simply provided what legal practitioners expected: a thorough analysis of relevant case law and the criticism expressed by jurisprudence. This mainly applied to technical matters like the general doctrine of legal transactions (*allgemeine Rechtsgeschäftelehre*) in the first volume. So why issue yet another work of this kind, especially as the publishing house C.H. Beck—unchallenged market leader in legal trade press—published the *Münchener Kommentar zum Bürgerlichen Gesetzbuch* in 1978? This vast commentary of comparable extent had Attorney General

25 Horst Hagen: Review of the *Alternativkommentar zum Bürgerlichen Gesetzbuch*, Volume 2, in: Neue Juristische Wochenschrift 1981, p. 1255.

26 Cf. Martin Löhnig: Generalklauseln in der Rechtsprechung der österreichischen Senate des Reichsgerichts 1939–1945: Eine Studie auf Grundlage der unpublizierten Wiener Reichsgerichtsakten, in: RGÖ 2017, pp. 181–202.

Kurt Rebmann and Economy Law Professor Franz Jürgen Säcker in Berlin on the editorial board. It was easily successfully established—at the time of writing, the MünchKomm-BGB is available in its seventh edition.

However, compared with the *Münchener Kommentar*, the *Alternativkommentar* indeed partly reveals differences to conventional commentaries. One example is Peter Derleder's interpretation of the reform law on divorce (*Scheidungsrechtsreformgesetz*). Peter Derleder—Professor at the University of Bremen since 1974—interprets the new legislation on post-marital alimony with the background of legal regulation of human relations in a capitalistic society based on the universalised exchange of goods. According to him, the changed exchange ratio is now officially recognised, as according to §§ 1570 ff. BGB, someone who would have been divorced as the guilty party and therefore previously would have lost their claim, is now entitled to a maintenance claim. As he points out, there no longer is a connection between marital fidelity and lifelong financial support. Post-marital alimony is now more a return-to-work incentive or ensures the independence from state social security benefits. Derleder predicted this turnaround would lead to a rebalancing of childcare and housework, as the post-marital childcare is 'cash value' too. Two centuries later the *Bundesgerichtshof*[27] assumed this view, but without quoting the AK-BGB. Derleder goes even further and states that previously the way in which income was spent in a single-income marriage showed communist features and thereby created counter-structures to professional and economic socialisation (shared accounts, fifty-fifty purchase of property). The perspective of separated self-assertion in case of conflict, though, leads to a further economisation of the marital exchange process.[28] The marital or post-marital alimony is an instrument to stabilise economic self-assertion of each partner.[29] Such passages—many must have sounded provocative back then—sound perfectly familiar and not particularly alternative to the ears of a legal scholar, today. Some minority viewpoints or legal policy perspectives presented in the AK-BGB seem to have made their way through legal institutions successfully, though along other paths.

Such statements cannot be found in the Munich rival commentary which was established at the same time and published by Ministerialrat Gerhard Richter. Nevertheless, the MünchKomm-BGB wanted to highlight changes brought about by developments in the social, technical, economic and cultural realms, too[30]—thus even this claim of the AK-BGB was not 'alternative' any more. However, Richter thoroughly depicts the genesis[31] of the new divorce alimony law dating back to a first draft of 1970. This discloses the arguments and assessments of the political discussion and plays an important role

27 BGH, Urteil vom 13.6.2001 - XII ZR 343/99; BGH Neue Juristische Wochenschrift 2001, p. 2254.
28 All in AK-BGB/Derleder § 1569 BGB para. 3.
29 AK-BGB/Derleder § 1569 BGB para. 5.
30 Preface MünchKomm-BGB volume 1, p. VII.
31 MünchKomm/Richter vor § 1569 BGB para. 8–18.

when it comes to the application of this law that contains various normative legal terms. He also points out how the new legislation reacts to common criticisms of the old law and tries to overcome them.[32] This is the only way a legal practitioner acquires all the information they need to apply the new divorce alimony law neither in a traditional sense nor according to subjective preferences (as Wassermann feared), but according to the relevant legislator's assessments.

Vice versa, in the AK-BGB, the comment regarding extra-marital children by Johannes Münder, back then recently appointed Professor for Social Law at the TU Berlin, turned out to be astonishingly conservative. He compares, for example, the legal position of an unmarried father to his child—following a decision of the *Bundesverfassungsgericht* from 1971—with the legal position of the parent not entitled to custody after a divorce. This applies, too, if father, mother and child cohabit, because, according to him, in this case the genetic paternity—which does not affect the child's social situation—does not have consequences for the child's welfare.[33] It was Manfred Hinz, a young professor at the *Freie Universität* (FU) Berlin at the time, who wrote in the *Münchener Kommentar* that the law would pursue the outlawing of paternal care with the strength of a steadfast dogma.[34] This rigorism could—in the light of increased fatherly duties and children's rights—not be upheld any more. This is why Hinz believes the applicable law contravenes the *Grundgesetz*[35], while Münder denies that. Therefore, it is the *Münchener Kommentar* that demands what has been only gradually and with great delay been implemented by legislature ever since the *Kindschaftsrechtsreformgesetz* 1998 (Act on the Reform of Parent and Child Law): equality of 'legitimate' and 'illegitimate' children (and their respective fathers).

External Causes for the Failure

Nonetheless, the reasons why the AK-BGB did not gain acceptance primarily were probably not content-related. Like any of these legal commentaries written by numerous authors,[36] it contained stronger passages—in part worth reading until today– and weaker ones. Some opinions expressed in the commentary, for example, concerning family law, which one might have felt uneasy about, have arrived in mainstream society today. But, why then did the commentary fail? Presumably, the causes are related to the academic culture of Law.

32 MünchKomm/Richter vor § 1569 BGB para. 19–28.
33 AK-BGB/Münder vor §§ 1705 ff. BGB para. 10.
34 MünchKomm/Hinz vor § 1705 BGB para. 7 (translated and put into reported speech by the author).
35 MünchKomm/Hinz vor § 1705 BGB para. 9.
36 Cf. Wolfram Henckel: Zum gegenwärtigen Stand der Kommentarliteratur des Bürgerlichen Gesetzbuchs, in: JuristenZeitung 1984, pp. 966–971, p. 966.

The word 'alternative' in the title of a legal publication may have appeared strange at a time when quite a few jurists probably welcomed the 'intellectual and moral turning point' (*geistig-moralische Wende*—Helmut Kohl, this time the German chancellor, not the law professor of the same name) after the end of the social-liberal era. A commentary with this title should have been established ten years earlier; in the 1980s it had fallen out of time, so to speak. Then there was Luchterhand, the publishing house:[37] it is not a typical legal specialist publishing house, but one which also publishes fiction. Far more importantly in the eyes of many conservative contemporaries, Luchterhand was publishing far too left-wing West German (Günter Grass) and East German authors (like Anna Seghers or Christa Wolf). Furthermore, Luchterhand (in contrast to C.H. Beck) probably did not have the standing to successfully establish such a work for several editions.

A practitioner as sole editor, moreover a left-wing practitioner, likely did not encourage the acceptance of the commentary in academic circles, either. The publishing house C.H. Beck acted more skilfully and appointed a professor and a high-level practitioner as co-editors of the *Münchener Kommentar zum Bürgerlichen Gesetzbuch*. The choice of the politically more conservative editors practically ensured acceptance among scientists and practitioners alike and documented the aspiration of the commentary to be a medium of common discourse in science and practice. At the time this was (and is until the present day) the primary function of this form of publication, which the AK-BGB was not able to satisfy. And indeed, this function was not fulfilled, although there were numerous professorial authors among the commentators. However, their interest in dialogue with practitioners was probably not too great. Moreover, the choice of university authors of the *Alternativkommentar* seems rather unilateral: many firmly left-wing young professors, who often did not follow the usual path to professorship, by—as this was to a certain extent possible at the time—foregoing the *Habilitation*.[38] Moreover, some of them were teaching

37 Regarding the restructuring of the Luchterhand publishing house from a specialist publisher to a politically left trade publishing house in the 1960s cf. Uwe Sonnenberg: Von Marx zum Maulwurf: Linker Buchhandel in Westdeutschland in den 1970er Jahren, pp. 75–77.

38 These professors appointed to chairs in Bremen without *Habilitations* include, among others: Gerd Brüggemeier (appointed in 1978), Wolfgang Däubler (appointed in 1971), Reinhard Damm (appointed in 1980), Peter Derleder (appointed in 1974), Roland Dubischer (appointed in 1971), Dieter Hart (appointed in 1975), Christian Joerges (appointed in 1974), Helmut Rüßmann (appointed in 1975) and Gerd Winter (appointed in 1973). In Kassel, Gerhard Fiessler was appointed to a chair (department of social affairs) in 1970 without a *Habilitation*. Helmut Rittstieg, whose *Habilitation* ("Eigentum als Verfassungsproblem" ["Property as a Constitutional Problem"]) was probably not accepted for political reasons, was appointed to the then recently founded law department of the University of Hamburg in 1976.

and researching at the faculty in Bremen that had the dubious reputation of being left-wing. Correspondingly, the late-born *Alternativkommentar* remained (to strain Wieacker's dictum about the BGB) a generation project that "grew old with its protagonists".[39]

Last but not least, the scolding of judges: those judges whom Rudolf Wassermann ultimately blamed of ruling solely according to their instincts and of not even being aware of that were—as shown—quite predominantly not inclined to cite the work. Of even greater importance is the fact that Wassermann's explanations positively invite criticism: Wassermann wanted to subject law to the "demands by society regarding its laws"[40]. These demands, Wolfram Henckel criticises, should be satisfied by legal education and legal practice without being legally standardised or possible to standardise.

> Thus, there would be hardly any boundaries for legal policy requests when interpreting and applying the law. Who knows and determines which requests a society […] has regarding its laws and whose expectations […] should be met? What legitimises a society to place demands to the laws set by the organs of a democratic constitutional state?[41]

Henckel methodically addresses fundamental questions regarding the interpretation of law and points out the bond of the judiciary not to societal demands, but to statute and law (cf. Art. 20 Abs. 3 GG and Art. 97 Abs. 1 GG) and thereby, to the assessments taken by the democratically appointed lawmaker. The interpretation of laws according to other criteria finally has to live with the reproach of "unlimited interpretation".[42] The methodical problem (still not solved to satisfaction) of working with aging codifications

39 Jürgen Jekewitz: Das Projekt Alternativkommentar: Ein Rückblick, in: Recht und Politik 2014, pp. 102–103, p. 103.

40 Rudolf Wassermann (ed.): Alternativkommentar zum Bürgerlichen Gesetzbuch, Volume 3: Besonderes Schuldrecht, Geleitwort p. VII, Neuwied 1979.

41 Wolfram Henckel: Zum gegenwärtigen Stand der Kommentarliteratur des Bürgerlichen Gesetzbuchs, in: JuristenZeitung 1984, pp. 966–971, pp. 968–969 (translated by the author).

42 The term '*unbegrenzte Auslegung*' ('unlimited interpretation') was coined by Bernd Rüthers in his *Habilitation* of the same title about the application of the law by judges during National Socialism, cf. Bernd Rüthers: Die unbegrenzte Auslegung, Tübingen 1968, 7th ed., Tübingen 2012. He marks the process of separation of a statute from the foundation of the lawmaker's motives and assessments and the way a new foundation (in the sense of different assessments) was pushed underneath, in Rüther's case the NS ideology under statutes that had been enacted before 1933. Rüthers was the first to show that the injustice during the NS time was not based on a strict positivism in law but on a re-assessment of the applicable law. This is, of course, not a singular process, but a process that probably can be seen in many situations of radical change. The courts re-assessed for example the statutes that had been enacted between 1933 and 1945 and were applicable also after 1945 by separating them from their ideological foundation, cf. to this Martin Löhnig: Neue Zeiten—Altes Recht: Die Anwendung von NS-Gesetzen durch deutsche Gerichte nach 1945, Berlin 2017.

like the BGB created at the end of the long 19th century—presumably what Wassermann wanted to point out—also has to be faced by lawyers who do not share Wassermann's political views (as shown in the preface to the *Münchener Kommentar zum Bürgerlichen Gesetzbuch* cited above).

The Journal *Kritische Justiz*

Remaining "Socially Inacceptable"?

Things were better for another alternative publication project already established in 1968 and existing until today: the journal *Kritische Justiz* (KJ). For its 30th anniversary in 1998, the journal was even classified as now being "socially acceptable"[43] by the conservative *Frankfurter Allgemeine Zeitung* (FAZ)—due to the fact that meanwhile it was being quoted. On the occasion of the 40th anniversary of the journal, 10 years later, it was promptly discussed whether it would not be better if the paper remained "socially unacceptable".[44] At least regarding their attitude some scientists associated with the journal still harbour a position beyond the legal establishment and insist on their position and self-image as being 'alternative'.

But to put things into chronological order: in 1967, trainee lawyer Jan Gehlsen—who later became Chancellor of the University of Hannover—had the idea of establishing a new journal with the title *Kritische Justiz*. In Attorney General Fritz Bauer (the Fritz Bauer who initiated the Frankfurt Auschwitz Trials and facilitated the kidnapping of Eichmann by the Mossad; also the Fritz Bauer who once said, "When I leave my […] office I enter enemy territory"[45]) and in Labour Court President Hans G. Joachim he found enthusiastic allies.[46] To the best of our knowledge, the *Kritische Justiz* is the only German legal journal founded by a jurist still in training.

Looking back, in 1998 Rainer Erd diagnosed the two crucial points that interacted perfectly well in 1967/68: first, students' discontent with a legal academia persistently refusing to process its Nazi history and the reasons that had led to it and secondly,

43 Nina Oellers, Nach drei Jahrzehnten salonfähig, in: FAZ 255/1998, 3 November 1998, p. 50.

44 The term '*salonunfähig*' ('not socially acceptable') is said to have been coined by a student of KJ editor Günter Frankenberg at the jubilee celebration (Felix Hanschmann), cf. Rudolf Walther, Kritische Justiz zwischen Aufruhr und Mainstream, in: Die Tageszeitung (taz), 27 October 2008, p. 16.

45 Cf. the article "Feindliches Ausland" in: Der SPIEGEL 31/1995, 31 July 1995, at: http://www.spiegel.de/spiegel/print/d-9205805.html, accessed on 16 July 2018 ("Wenn ich mein [Dienst-]Zimmer verlasse, betrete ich feindliches Ausland" translated by the author).

46 Rainer Erd: Zur Gründungsgeschichte der KJ, Kritische Justiz 1999, pp. 105–107.

discontent with the low practical relevance of the education ('*Repetitorwesen*').[47] In my opinion, these two points provide an inadequate explanation for the vigour with which the journal was founded. The '*Repetitorwesen*' has—the professionalisation of the providers aside—not changed since then. Furthermore, dealing with the Nazi past and the reasons that caused it (again) play a minor role today without causing discontent among students.

Colourful Flowers are Blooming

Thus, the question arises why, particularly in 1967/68, a generation of young jurists felt this discontent and dealt with questions that lay beyond fields relevant for exams and in doing so secured the existence of the *Kritische Justiz* (at least in its beginnings). In 1968—in contrast to the *Alternativkommentar* 10 years later—no editorial was provided or indeed needed to describe the reasons for the establishment of a new legal journal and its concerns. The paper was an immediate success; the first issue already was quickly out of print. The *ZEIT* cheered, "On a land that was left fallow colourful flowers will soon be blooming. The seed is already in the soil."[48] However, the cheering was not only meant for the *Kritische Justiz* but also for the prospective journal *Zeitschrift für Rechtspolitik* that market leader C. H. Beck wanted to publish in regular intervals as an appendix to the *Neue Juristischen Wochenschrift* (as it is still today with a slightly changed concept). The scientific responsibility was taken by Martin Kriele, a left-liberal legal philosopher—who, following his *Habilitation* at the University of Münster, had just been appointed to a Chair for General Theory of State and Public Law at the University of Cologne—, and Rudolf Gerhardt, working in the editorial department of the *FAZ* and later appointed to a Chair at the University of Mainz.[49]

47 Rainer Erd: Zur Gründungsgeschichte der KJ, Kritische Justiz 1999, p. 105 ("Der studentische Unmut über einen juristischen Wissenschaftsbetrieb, der sich beharrlich weigerte, seine nationalsozialistische Geschichte und die Gründe, die dazu geführt hatten, aufzuarbeiten, verband sich mit der Unzufriedenheit über die geringe Praxisrelevanz des Studiums (Repetitorwesen)", translated by the author). The term '*Repetitorwesen*' describes the fact that the majority of law students have always enlisted the fee-paid services of commercial providers (*Repetitoren*) to prepare for the first state legal examination. They expect their results to be far worse without such courses because the university education would not prepare them successfully and adequately for the state examination. Most universities are still not able to satisfy these education needs of the students. Hence, this is an ongoing practice.

48 Gerhard Ziegler, Zwei neue Zeitschriften für Juristen, in: ZEIT 34/1968, 23 August 1968, p. 46.

49 Hermann Weber: Juristische Zeitschriften des Verlages C.H. Beck: Von den Anfängen im 19. Jahrhundert bis zum Zeitalter der elektronischen Medien, München 2007, p. 66.

> Prosaically one could say: in the field of legal journals clever jurists found a market niche. But, it is probably closer to the truth to assume that the growing willingness of jurists in the Federal Republic to leave their ivory tower created a 'readers' climate'.[50]

According to the *ZEIT* both journals pursued similar goals: to uncover the connection between law and society, to open up law for the knowledge of other sciences and to see law as a dynamic process which is influenced by the changeability of the set of values. These wordings are exchangeable.

"The Crisis of the State" vs. Federal Minister of Justice Heinemann

However, are the contents exchangeable, too? The first essay of the first issue of the *Kritische Justiz* published under the programmatic title "*Die Krise des Staates und das Recht*" ("The Crisis of the State and the Law") revealed that the *Kritische Justiz* obviously wanted to proclaim a certain proximity to Marxism. The choice of the journal's name already documented the proximity to the—at the time also popular—*Kritische Theorie* by Horkheimer and Adorno. All in all, a colourful mixture of 'alternatively-thinking' jurists seems to have come together in the *Kritische Justiz*—from dogmatic representatives of the Marxist theory (accordingly in opposition to the 'system') to left-liberal jurists focused on the rule of law and democracy.[51] The joint flag under which the troops could rally was the "analysis of legal-technical mechanisms, of the role of the National Socialist State and the re-evaluation of its crimes"[52], to which the KJ undoubtedly contributed immensely. For years, it did so in the role of the 'left-wing fouling their own nest'. Almost as a reflex this attribution was—despite all social acceptance achieved in the meantime—revitalised when in the *Kritische Justiz,* for the first time, the PhD-thesis of a serving minister, Minister of Defence Guttenberg, was accused of being full of plagiarism.[53]

50 Gerhard Ziegler, Zwei neue Zeitschriften für Juristen, in: ZEIT 34/1968, 23 August 1968, p. 46.

51 Sonja Buckel/Andreas Fischer-Lescano/Felix Hanschmann: Die Geburt der Kritischen Justiz aus der Praxis des Widerständigen, in: Kritische Justiz 2008, pp. 235–242, p. 236.

52 Joachim Perels: Stichwort: Kritische Justiz, in: Historisch-Kritisches Wörterbuch des Marxismus, edition 8/I, Hamburg 2012, pp. 142–146, p. 142.

53 Andreas Fischer-Lescano: Review of: Karl-Theodor Frhr. zu Guttenberg: Verfassung und Verfassungsvertrag: Konstitutionelle Entwicklungsstufen in den USA und der EU, in: Kritische Justiz 2011, pp. 112–119.

The first page of the first issue of the *Zeitschrift für Rechtspolitik* (ZRP) published in October 1968, however, contained a preface of the Federal Minister of Justice at the time (and later Federal President) Gustav Heinemann, who wished this "forum for discussion between law makers and citizens interested in legal policy a lively resonance and lasting success".[54] Heinemann also pointed out that the "critical intelligence" had to become involved "because there should be no offside or outside in a democratic legal life".[55] Therefore, the ZRP had the claim to criticise, but (in contrast to the *Kritische Justiz*) not the claim to display criticism of the system. The authorship was widely diverse. From legal trainee to professor, from Theo Rasehorn, a main author in the KJ in terms of class justice, to the aforementioned commentary editors Rudolf Wassermann and Franz-Jürgen Säcker to Hans-Dietrich Genscher (*Freie Demokratische Partei*, FDP), at the time Member of the German Parliament, or the Federal Minister of Science, Gerhard Stoltenberg (*Christlich Demokratische Union Deutschlands*, CDU). Articles by Rudolf Wiethölter or Erhard Denninger, professors in Frankfurt and authors of the book *Rechtswissenschaft*—a "celebrated classic of the '68 generation"[56]—can be found, as well as a harsh critique of this book written by Peter Schwerdtner, at the time still research assistant in Bochum, and a similarly harsh reply by Wiethölter. The first issue of the ZRP dealt with the debate of the extension of limitation periods for Nazi crimes[57] or questions about the forfeiture of constitutional rights due to the abuse of these rights "in the fight against the free democratic basic order" (Art. 18 GG).[58] It dealt with the development of federalism,[59] the demonstration penal law (§ 116 StGB vs. Art. 8 GG)[60] or the restriction of secrecy of correspondence through the Emergency Constitution that had recently come into force (Art. 10 Abs. 2 GG).[61] With the threats to the freedom of the press through concentration of media ownership, in the hands of Axel Springer et al.[62] or the party programme of the newly founded *Deutsche Kommunistische Partei* (DKP).[63] All articles have few footnotes and are opinionated. However, not these articles caused a

54 Gustav Heinemann, Geleitwort, in: Zeitschrift für Rechtspolitik 1968, p 1.
55 Ibid.
56 Hanno Kühnen, DIE ZEIT 18/1986, 25 April 1986.
57 Michael Kirn: Der Hintergrund der Verjährungsfrage, in: Zeitschrift für Rechtspolitik 1968, pp. 3–6.
58 Dietrich Müller-Römer: Staatsschutz und Informationsfreiheit, in: Zeitschrift für Rechtspolitik 1968, pp. 6–8.
59 Josef Kölble: Föderalismus - warum, in: Zeitschrift für Rechtspolitik 1968, pp. 8–9.
60 Werner v. Simson: Verfassungskonforme Demonstrantenbestrafung, in: Zeitschrift für Rechtspolitik 1968, pp. 10–11.
61 Günter Dürig: Ein Orwellsches Experiment, in: Zeitschrift für Rechtspolitik 1968, p. 11.
62 Martin Löffler: Die Pressekonzentration bedroht die Pressefreiheit, in: Zeitschrift für Rechtspolitik 1968, pp. 12–17.
63 Das Programm der neuen Kommunistischen Partei, in: Zeitschrift für Rechtspolitik 1968, pp. 28–29.

scandal, but the short interjection[64] by a professor in Cologne, Bernhard Rehfeld, pleading for a change in the structure of lawyer's fees (abolition of settlement fees) which would have resulted in a remarkable loss of income for lawyers.[65]

What was the first issue of the *Kritische Justiz* about? It dealt with such topics as the political mandate of the student body[66], questions of conscientious objection[67] and "norms in disguise" in the Emergency Constitution.[68] Jürgen Seifert, who previously wrote his doctorate on questions of the emergency exclusion clause and became Professor for Political Science at the Technical University of Hanover in 1971, criticised the fact that the Emergency Constitution would contain various formulaic compromises not aiming to secure a broad enough majority to change the constitution but "to disguise the political decisions that had been taken".[69] At the same time, referring to Marx' analysis of the French Constitution of 1848, he accused the Emergency Constitution of tricks, as it promised "full freedom"[70] and the "best principles"[71] but restricted them through its norms. In the same way the prohibition of particular case law in Art. 19 Abs. 1 GG aims at the protection of constitutional rights of the individual, but is not applicable in the so-called '*Spannungsfall*' (Art. 80a GG).[72] Incidentally, the *Zeitschrift für Rechtspolitik* did not adopt significantly softer tones. Günter Dürig, for example, criticised the amendment to Art. 10 GG (privacy of correspondence, post and telecommunications) with a second paragraph under the revealing title *Ein Orwellsches Experiment* ("*An Orwellian Experiment*"). According to him, unconstitutional constitutional law had been enacted, degrading those affected by a surveillance procedure to a mere object of the state's actions in disrespect of the constitutional guarantee of the dignity of man.[73]

64 Bernhard Rehfeld: Eine Gebühr zu viel, in: Zeitschrift für Rechtspolitik 1968, p. 9.

65 Hermann Weber: Juristische Zeitschriften des Verlages C.H.Beck: Von den Anfängen im 19. Jahrhundert bis zum Zeitalter der elektronischen Medien, p. 66.

66 Stephan Leibfried: Wissenschaftsprozess und politische Öffentlichkeit: Zu den Entscheidungen der Verwaltungsgerichte Köln, Berlin und Sigmaringen zum politischen Mandat der Studentenschaft (Juristenzeitung 1968, pp. 260 ff.), in: Kritische Justiz 1968, pp. 29–45.

67 Wolfgang Perschel: Situationsmotivierte Kriegsdienstverweigerung und innerer Bundeswehreinsatz: Neue Aspekte einer nicht mehr neuen Verfassungsrechtsprechung, in: Kritische Justiz 1968, pp. 46–50.

68 Jürgen Seifert: Verfassungskompromisse und Verschleierungsnormen in der Notstandverfassung, in: Kritische Justiz 1968, pp. 11–21.

69 Ibid., p. 19 ("die getroffenen politischen Entscheidungen zu verschleiern", translated by the author).

70 Ibid., p. 15.

71 Ibid., p. 15.

72 A *Spannungsfall* is the formal ascertainment through parliament of a situation of increased international tension for the existence of the Federal Republic of Germany. As a consequence, the state of emergency law is applicable.

73 Günter Dürig: Ein Orwellsches Experiment, in: Zeitschrift für Rechtspolitik 1968, p. 11.

Under the title "*Kritik und Selbstkritik der Richter*" ("Criticism and Self-criticism of Judges") co-founder of the *Kritische Justiz* and State Labour Court President Hans G. Joachim called for confronting "the pseudo-objectivism of the traditional scientific methods with a socially critical method".[74] The article contains—according to Joachim's colleague Joachim Perels—"the programme of a democratic-liberal judiciary" and is indeed, until today, worth reading (Perels wrote this in 1989 but the same applies for 2018).[75] According to the author, a judge must take into account that a significant proportion of their judgments has to be wrong as measured by the true facts. Often, the court is actually not told the true facts. This is the case since, in civil procedure law, only the litigants decide which facts constitute the basis of the judgment and since the court must not make inquiries *ex officio*. This is why the court decides on the basis of a formal rather than a material truth.[76] Furthermore, the desolate condition of the laws facilitates mistakes. And ultimately, people with human flaws and frailties have to pronounce the judgment. In the *Zeitschrift für Rechtspolitik,* District Court Councillor Karl G. Deubner expressed similar thoughts:

> It is not only the dependence of many judges on their own view of the world that can influence through fact-finding the content of a judgment in an uncontrollable way. For manifold reasons judges are often not willing to admit their powerlessness in the face of facts.[77]

As, furthermore, the law is formulated in a strange manner, according to him, there is a risk of unlawful judgments which can only be minimised through a new version imposed by the lawmaker.[78]

In terms of subject matter, the first issue of the *Kritische Justiz* probably covers a smaller range than the first issue of the *Zeitschrift für Rechtspolitik*; but, above all, the tone of some articles partially significantly differs from the *Zeitschrift für Rechtspolitik*. Heinz Guradze who welcomed the *Kritische Justiz* in the FAZ in an article with the title *Gegen den Staat* ("Against the State") felt the same.[79] Guradze differentiated between single articles but

74 Hans G. Joachim, Kritik und Selbstkritik der Richter, in: Kritische Justiz 1968, pp. 22–28 ("Pseudo-Objektivismus der überkommenen wissenschaftlichen Methoden eine gesellschaftskritische Methode gegenüberzustellen", translated by the author).

75 Joachim Perels: Zum Gedenken an Hans G. Joachim, in: Kritische Justiz 1989, pp. 482–483.

76 Detailed to formal and material truth in civil proceedings Martin Löhnig: Der Zivilprozess zwischen Staat und Gesellschaft bei Grolman, in: Jens Eisfeld et al. (eds.): Naturrecht und Staat in der Neuzeit, Tübingen 2013, pp. 417–429.

77 Karl G. Deubner: Richtermacht im Scheidungsrecht, in: Zeitschrift für Rechtspolitik 1969, pp. 220–223, p. 221 (translated by the author).

78 Ibid., pp. 221–222.

79 Heinz Guradze: Gegen den Staat, in: FAZ, 6 November 1968, p. 11.

he complained, for example, about the arguments in an article which, according to him, was scientifically nebulous[80] and used terminology borrowed from the cliché of Berlin's *Allgemeiner Studierendenausschuss* (general students' committee, AStA) as well as offensive polemic. The justification of "violent protest against the police and Springer Publishing" as "counterviolence"[81] in the *Kritische Justiz* (this article is not contained in the online archive[82] and not listed in the table of contents!) reminds Guradze of the parole "The street belongs to the Sturmabteilung (SA)"[83]. It might have been bitter for the editors of the *Kritische Justiz* with their aspiration to objectively distance themselves from National Socialism that this extremely critical review was written by Heinz Guradze. Guradze[84] was not a 'Nazi-jurist' but on the contrary had been persecuted as a Jew and had lost his position as Municipal Council Councillor in Magdeburg in 1933. Guradze seemed to dislike the entire habitus of the *Kritische Justiz*: "The journal has no editors, just 'staff'", he lamented, and the journal "disdains to introduce their authors as it is usually done". This must have been a great compliment for the "staff", since thereby he had attested to them having broken with something that is "otherwise usual".

Despite all ideological determination, the *Kritische Justiz* allowed the young professor in Gießen Dieter Schwab—who was not close to the 1968 movement—to put on record some surprisingly clear words. "A jurisprudence that only serves the legal solidification of preformed dogmas, social models or accepted basic ideologies would be a miserable business; just as a historiography that served the art of decoration of ideologies under the catchword 'politicisation'."[85]

Almost 50 Years of *Kritische Justiz* …?

How could such a forum of 'alternatively-thinking' jurists, from dogmatic representatives of Marxism who stood in opposition to the 'system', to left-liberal jurists who put the rule of law and democracy in their focus, survive until today? The question arises especially as

80 Meant was Stephan Leibfried: Wissenschaftsprozess und politische Öffentlichkeit: Zu den Entscheidungen der Verwaltungsgerichte Köln, Berlin und Sigmaringen zum politischen Mandat der Studentenschaft.

81 Heinrich Hannover: Demonstrationsfreiheit als demokratisches Grundrecht, in: Kritische Justiz 1968, pp. 51–59, p. 55 ("gegen Polizei und Springerverlag", "Gegengewalt" translated by the author).

82 Online archive of the *Kritische Justiz*, at: http://www.kj.nomos.de, accessed on 16 July 2018.

83 Heinz Guradze: Gegen den Staat, in: FAZ, 6 November 1968, p. 11.

84 For his biography, cf.: http://www.uni-magdeburg.de/mbl/Biografien/0087.htm, accessed on 16 July 2018.

85 Dieter Schwab: Zum Selbstverständnis der historischen Rechtswissenschaft im Dritten Reich, in: Kritische Justiz 1969, pp. 58–70, p. 70.

the journal became socially acceptable, according to the FAZ, and was confronted with clear words[86] on the occasion of its 30th birthday in 1998 by the circle of sympathetic and renowned readers.

The basic orientation soon gave way to an understanding described as "liberal-pluralistic"[87] by the responsible editors, but interpreted differently by the aforementioned readers:

> An editorial line is hardly visible, the contours of a theoretical or political conception that the journal generally stands for are too pale: too often a lecture in an issue resulted in a simple shrug—alarming for a publication with such a name.[88]

And further, they pointed out their impression that in certain areas the *Kritische Justiz* had quite simply slept through central developments of the legal system. They mention the increasingly tight normative contouring of a European legal order, the legal regulation of economy through economy law, the commissioning of law for a security flanking of processes of social restructuring, the gradual degradation of fundamental rights or the question of the role of the *Bundesverfassungsgericht* in political processes. This is followed by the criticism that the *Kritische Justiz* pursued an "alternative moral entrepreneurship"—with the tightening of criminal law as the only instrument to solve problems.[89]

The damning review was aimed in particular at the founding editors, who had aged in the meantime and who, according to the critics, were caught up in their patterns of thought and could not recognise urgent tasks at hand for the *Kritische Justiz*. Which articles could have been the ones that left the critical readers dumbfounded? Let us take a glance at 1998, the publication year just before the criticism. Did the various articles on NS topics not address current questions? There were, for instance, topics and titles such as: *Der Nürnberger Juristenprozeß im Kontext der Nachkriegsgeschichte: Ausgrenzung und späte Rezeption eines amerikanischen Urteils*[90] ("The Nuremberg Lawyer Trial in the Context of Post-War History: Exclusion and Late Review of an American Judgment"), *Aufhebung des Todesurteils gegen Franz Jägerstätter*[91] ("Annulment of the Death Penalty against Franz Jägerstätter"), *Politische Strafjustiz in der frühen Bundesrepublik: Eine*

86 Jürgen Bast et al.: Kritische Rechtswissenschaft und Kritische Justiz, in: Kritische Justiz 1999, pp. 313–323.
87 Nina Oellers, Nach drei Jahrzehnten salonfähig, in: FAZ 255/1998, 3 November 1998, p. 50.
88 Jürgen Bast et al.: Kritische Rechtswissenschaft und Kritische Justiz, in: Kritische Justiz 1999, pp. 313–323 (translated by the author).
89 Ibid., p. 314 ("alternatives Moralunternehmertum", translated by the author).
90 Joachim Perels in: Kritische Justiz 1998, p. 84.
91 Manfred Messerschmidt in: Kritische Justiz 1998, p. 99.

historische Ortsbestimmung[92] ("Political Criminal Justice in the Early Federal Republic: A Historical Localisation"), *Die neue Rechtsprechung in Sachen NS-Zwangsarbeit*[93] ("The New Jurisdiction Concerning NS Forced Labour"), *Hans Litten: Ein zu Unrecht fast vergessener Anwalt der Opfer*[94] ("Hans Litten: An Unjustly Nearly Forgotten Lawyer of the Victims"). Above all, the contents of the 1998 edition indeed showed that the *Kritische Justiz* had little to say about the admonished topics.

Ultimately, the *Kritische Justiz* became more similar to the ZRP. It had ceased being concerned with basic system-critical articles and integrated itself into discourses within the system. It had resigned itself to operating on this level rather than wanting to do everything differently; and thereby helped the formerly criticised system "survive in a well-tempered manner".[95] For years, the *Kritische Justiz* had worked on current topics of new social movements: Gorleben, Brokdorf, NATO-Double-Track-Decision, squatting, Runway West. With these topics, the journal covered the mainstream of developments after 1968: at the end of the 1970s the era of great theoretical systems came to an end; the *Kritische Theorie*, to which the journal *Kritische Justiz* had committed itself in the journal's name, had long lost its air of sovereignty.[96] With the fatigue of theory began the triumph of ecology, disrespectfully described by Reinhard Mohr as a "reign of crude empiricism by Becquerel, thyroid levels and soil samples".[97] Before the socio-ecological directional change of the journal *Kritische Justiz*, they had not paid attention to post-structuralism, imported from France by Suhrkamp and Merve, either. This may have been one of the reasons why the protagonists of post-structuralism hardly played a role in German jurisprudence—a finding that is valid to today. Furthermore, for a long time, feminist topics were underrepresented in the *Kritische Justiz,* as well as women in the editorship.[98] Looking back, the authors of the anniversary edition's preface of the *Kritische Justiz* in 2008 diagnosed a "long-term blockade of feminist topics" that lasted until the 1990s; modest attempts to cover such topics were abruptly rebuked, as were their authors.[99]

92 Dirk Blasius in: Kritische Justiz 1998, p. 219.
93 Herbert Küpper in: Kritische Justiz 1998, p. 246.
94 Maren Witthoeft in: Kritische Justiz 1998, p. 405.
95 Philipp Felsch: Der lange Sommer der Theorie: Geschichte einer Revolte 1960–1990, p. 156, citing a reproach by Baudrillard to the ecological movement (translated by the author).
96 Philipp Felsch: Der lange Sommer der Theorie: Geschichte einer Revolte 1960–1990, p. 37, pp. 154–155.
97 Reinhard Mohr: Zaungäste, Frankfurt a.M. 1992, p. 153 (translated by the author).
98 Sonja Buckel/Andreas Fischer-Lescano/Felix Hanschmann: Die Geburt der Kritischen Justiz aus der Praxis der Widerständigen, pp. 237–238; Stephen Rehmke: Unsere Altachtundsechzigerin, in: Forum Recht 4/2008, p. 133–134.
99 Sonja Buckel/Andreas Fischer-Lescano/Felix Hanschmann: Die Geburt der Kritischen Justiz aus der Praxis der Widerständigen, in: Kritische Justiz 2008, p. 237 (translated by the author).

Thus, it is not surprising that in 1983, the *Feministische Rechtszeitschrift STREIT!* was founded[100] which—as a journal explicitly dealing with feminist topics—understood to compete with the *Kritische Justiz*.

Did they get their Act together after all?

What did things look like ten years later? The central topics of the early years—NS-history, political trials, AStA-matters or questions of execution of a sentence—gave way, as the *Tageszeitung* (taz) reported on the occasion of the 40th birthday of the *Kritische Justiz* in 2008, to the discussion of gender and social-specific discrimination, media law, ecological problems, attacks on fundamental rights by the security state.[101] What exactly was, for example, the issue of the year 2008 about? Did the editors take the harsh criticism on board or did they go on as before? The *Kritische Justiz*, in 2008, dealt with the enforcement of social human rights on an international level[102] and questions of humanitarian international law.[103] It also discussed the role of the *Bundesverfassungsgericht* in the German constitutional structure[104] and constitutional questions on the European level.[105] It was about feminist human rights politics using the example of sexualised war crimes[106] and statutory provisions on transsexualism in Great Britain.[107] It was about the

100 Cf. Sibylla Flügge: STREIT: Feministische Rechtszeitschrift, in: Kritische Justiz 2008, pp. 243–244.

101 Rudolf Walther: Kritische Justiz zwischen Aufruhr und Mainstream, in: Die Tageszeitung (taz), 27 October 2008, p. 16.

102 Jan Philip Wimalasena: Die Durchsetzung sozialer Menschenrechte: Probleme und Perspektiven internationaler Rechtsfortbildung im Rahmen internationaler Menschenrechtsabkommen am Beispiel des Internationalen Sozialpakts von 1966, in: Kritische Justiz 2008, pp. 2–23.

103 Daniel von Devivere: Unmittelbare Teilnahme an Feindseligkeiten: Kniefall des humanitären Völkerrechts vor der Wirklichkeit?, in: Kritische Justiz 2008, pp. 24–47.

104 Rainer Erd: Bundesverfassungsgericht versus Politik: Eine kommentierende Dokumentation der jüngsten Entscheidungen zu drei Sicherheitsgesetzen, in: Kritische Justiz 2008, pp. 118–133.

105 Tanja Hitzel-Cassagnes: Die 'Verfassungskrise' der Europäischen Union: Viel Lärm um nichts?, in: Kritische Justiz 2008, pp. 134–148.

106 Nora Markard/Laura Adamietz: Herausforderungen an eine zeitgenössische feministische Menschenrechtspolitik am Beispiel sexualisierter Kriegsgewalt, in: Kritische Justiz 2008, pp. 257–265.

107 Adrian de Silva: Zur Normalisierung heteronormativer Zweigeschlechtlichkeit im Recht: Eine queere Analyse der Regulation des Geschlechtswechsels im Vereinigten Königreich, in: Kritische Justiz 2008, pp. 266–270.

international fight against corruption[108] and the apology of Australia to its indigenous people.[109] So the editing team did take some of the criticism to heart, although the paper did not change completely.

At the same time the leap from a generation project to an intergenerational medium seems to have worked, although the editing board, having admitted some new young members in 2009, is mainly composed not of young jurists, but (as the scientific advisory board) of more or less established chair holders[110] who now like to display their academic titles. However, the editorial on the increase in numbers of the editing board points out[111] that the older generation did not resign and that they expect intense debates about common bases between the different generations of the editorial board. Such processes can also be observed with other journals that have had the same structure in their board of editors for centuries.

It can be observed that the scientific quality of the articles in the KJ meanwhile is consistently very solid; polemic articles concerning legal policy with few footnotes were replaced by the named articles that were partly criticised for being "well behaved".[112] This does not have to be a mistake. At the moment, maybe more can be achieved with solid articles on detailed questions than with fundamental criticism in a high tone. Ultimately, the KJ has been accepted into the establishment and having had articles published in the KJ is no longer a flaw barring the way to a chair. The *Kritische Justiz* does not criticise the system any more but has become part of the system; therefore, it is not surprising that Andreas Fischer-Lescano, co-editor of the *Kritische Justiz* since 2009, felt obliged to comment his review of Defence Minister zu Guttenberg's PhD thesis in the following way: "We do not have a political motivation, we do not aim to bring down Mr Guttenberg!"[113] The arrival in the establishment is documented most notably by the change in seat of publishing of the *Kritische Justiz* from the Europäische Verlagsanstalt to Nomos, a brand of the unchallenged market leader in jurisprudential literature: the publishing house C. H. Beck. The role of this publishing house in the years 1933–1945, exactly the years

108 Sebastian Wolf: Internationale Korruptionsbekämpfung: Anmerkungen zum zehnjährigen Jubiläum des OECD-Bestechungsübereinkommens, in: Kritische Justiz 2008, pp. 366–377.

109 Martin Kment: Die Entschuldigung Australiens bei seinen Ureinwohnern und ihre Bedeutung für den Regimediskurs zwischen der Lebensordnung der Aborigines und dem staatlichen Recht, in: Kritische Justiz 2008, pp. 458–464.

110 Stephen Rehmke: Unsere Altachtundsechzigerin, in: Forum Recht 4/2008, pp. 133–134.

111 Editorial, in: Kritische Justiz 2009, p. 1.

112 Jürgen Bast et al.: Kritische Rechtswissenschaft und Kritische Justiz, in: Kritische Justiz 1999, pp. 313–323 (315).

113 Quoted after N.N.: Gegenangriff auf Guttenberg-Kritiker, in: FOCUS-online, 16 February 2011, at: http://www.focus.de/panorama/vermischtes/doktorarbeit-gegenangriff-auf-guttenberg-kritiker_aid_600684.html, accessed on 16 July 2018 (translated by the author).

which the *Kritische Justiz* once wanted to shed light on, is more than controversial.[114] Stephen Rehmke stated in *Forum Recht* regarding the 40th anniversary of the KJ that the old 1968ers had not remained true to themselves.[115]

Summary and Outlook

In marked contrast to the *Kritische Justiz,* the *Alternativkommentar* did not rigorously oppose the organisation of state and government, mainly because of its aim of explaining applicable law in form of a commentary. In terms of contents, it did not only stay within the constitutional frame, but a lot of opinions were shared that were found in other works also, without any 'alternative' aspirations, and some passages seem astonishingly uncritical and conventional. Conversely, several positions developed in the *Alternativkommentar* became 'prevalent opinion'. Over long periods, the *Alternativkommentar* did not differ essentially from its competitors, as the medium of a commentary provided little scope here; however, it had a lower practical orientation and a higher density of scientific-monographic interpretations. The commentary could only partly fulfil its aspiration of raising readers' awareness of the historical conditionality and social, economic and political premises of the norms through an interdisciplinary link with social and economic sciences. Conversely, the realisation of the necessity of such a link had long since ceased to be 'alternative'. It was shared (and also only partly achieved) by editors of other commentaries like the *Münchener Kommentar,* established at the same time. An explanatory work to the *Bürgerliches Gesetzbuch* going beyond the level of trivial dogmatics remains *desideratum* until today. This is true even though a new commentary has been compiled again with the *Historisch-kritischer Kommentar*[116], reflecting the historical conditionality and social and political premises of the norms in the *Bürgerliches Gesetzbuch*, and thereby filling in some gaps. The *Alternativkommentar* probably ultimately failed least of all due to being alternative in matters of content, but rather due to reasons based in the 'culture' of the academic discipline of law. And the story of the *Alternativkommentar zum Bürgerlichen Gesetzbuch*—in contrast to the one of its siblings, for example, the commentary on the

114 Cf. to this Rudolf Walther: Vornehm arisiert: Zwei Historiker, zwei Bücher, zwei zerstrittene Brüder: 250 Jahre Beck Verlag—und kein Friede im Haus: Ein Fall von Methodenstreit und Altersstarrsinn, in: Die Tageszeitung (taz), 21 October 2013, at: http://www.taz.de/!5056670/, accessed on 16 July 2018. The two books named are Stefan Rebenich: C.H.BECK 1763–2013: Der kulturwissenschaftliche Verlag und seine Geschichte (Festschriften, Festgaben, Gedächtnisschriften), München 2015, and Uwe Wesel: 250 Jahre rechtswissenschaftlicher Verlag C.H.Beck: 1763–2013, München 2015.

115 Stephen Rehmke: Unsere Altachtundsechzigerin, in: Forum Recht 4/2008, p. 133–134.

116 Mathias Schmoeckel/Joachim Rückert/Reinhard Zimmermann (eds.): Historisch-kritischer Kommentar zum BGB, Tübingen 2003.

Strafvollzugsgesetz (laws of prison administration)—cannot be told as anything else than a story of abject failure. The commentary is not a work that was born of its time and then discontinued. It is rather a child fallen out of time and born too late. Consequently it did not find resonance in legal science and legal practice from the beginning. In habitus and diction of the early 1970s, the commentary tried to achieve objectives that had already been granted in the 1980s.

In this, the *Kritische Justiz* is markedly different. In 1968, it started with the aspiration to (also) criticise the system and at the same time to unmask a jurisprudence perceived as denying history and not always working according to the rule of law. The journal was 'alternative' by virtue of being the only legal journal with this aspiration and fulfilling it in many instances. This is the difference to all other legal journals. The *Zeitschrift für Rechtspolitik* for instance, founded at the same time, did not foster an oppositional stance, but started with a preface by the Federal Minister of Justice. A lasting credit of the KJ is its great contribution to the understanding of the history of law and legal practice in the Third Reich, as well as the tracing of continuity of these practices into the Federal Republic of Germany. Furthermore, the KJ provided a forum for manifests about legal policy without footnotes that would have surely been rejected by other journals. However, the KJ could only survive to this day because it—as well as many of its young authors—soon became part of the system they criticised. The structurally conservative insistence of the founder generation on a certain view of what being 'alternative' meant and the thematic choice of published articles, by the 1990s at the latest, endangered the survival of the journal and led to its marginalisation in legal publishing. Only the *Zeitschrift für Rechtspolitik* managed to establish itself as a medium of dialogue between jurisprudence and (national) politics. So, the KJ was neither able to achieve a sustainable impact on legal publishing. But the KJ—unlike the *Alternativkommentar*—had great success in the years following its foundation. Today the KJ is firmly established as a left-liberal journal on legal policy.

Due to public authority being bound to statute and law (*Bindung der staatlichen Gewalt an Recht und Gesetz*, Art. 20 Abs. 3 GG), jurisprudence necessarily is a rather structurally conservative science. As a textual science, its predominant role is to make the meaning of a specific canon of texts accessible while using a toolbox limited by the constitution. The reflection on the conditions and change of this canon seems to come off somewhat badly in current academic life. An extensive law commentary as the central publishing format in law does not seem to be the right forum for such reflections, since, on the one hand, its task is to organise a dialogue between science and practice about the application of the current legislation and, on the other, because these works have been published by various authors in various volumes for years. Moreover, an entire *Alternativkommentar* is probably not necessary as in many technical civil law matters there are simply no discussible alternatives. Nonetheless, this does not mean that the idea of what a legal commentary ought to provide has not changed during the 1960s and 1970s and it does not mean that nowadays, legal policy has not been brought more into focus. A journal can operate more flexibly than a compendium and does not have

to achieve completeness. Therefore, alternative ideas, rooted in the 1960s, about what legal publishing should (also) provide could definitely exert influence on jurisprudential publishing. This was not achieved by establishing autonomous strong publication media, but rather by working towards the existing publication media.

In any case, reforms from this period have shaped many fields of law quite substantially. A changing society was gradually given the legislation it required through reforms in many fields, started by the social-conservative and the social-liberal coalition governments. However, in jurisprudential publishing, there was never a left-wing hegemony or a left-wing mainstream group supported by recently established journals, book series or publishing houses, as seems to be the case in other social sciences. On the contrary, there was an attempt to deal with the reforms within the traditional media, forms of publication and publishing houses—with an ever-growing dominance of the publishing house C. H. Beck. Within these conservative structures, jurisprudence as a playing field for university jurists and scientific practitioners may be incredibly more lively and pluralistic than some clichés may suggest.

Martin Löhnig has held a Chair of Civil Law, German and European History of Law and Canon Law at the University of Regensburg, Germany, since 2008. His research focuses on family and inheritance law from a dogmatic, comparative legal and trans-disciplinary perspective as well as on the German and European history of law since 1750 and contemporary legal history.