

The *Contra Legem* Fable: A Reexamination of the History of Legal Theory and Private Law in the Formative Moments of the German Free Law School

Lucas Reckziegel WESCHENFELDER*

ABSTRACT: This article revisits the formative context of the Germanic Free Law Movement, one of the most influential theoretical developments in twentieth-century German and Austrian legal thought. The study aims to reconstruct, in a synthetic manner, the emergence of the so-called *contra legem* fable, a narrative that has persistently shaped interpretations of the Movement. The analysis is divided into two parts. First, it outlines the intellectual trajectory of Hermann Kantorowicz and Gustav Radbruch, emphasizing the relevance of Private Law and its early twentieth-century transformations in shaping their theoretical perspectives. Second, it investigates the historical and discursive conditions that led to the construction of the *contra legem* fable, particularly in response to the 1906 Manifesto. The article argues that this fable resulted from exaggerated, decontextualized, and strategically motivated interpretations advanced by contemporary critics, aimed at delegitimizing the Movement and its proponents. By reassessing primary sources and contextual elements, the study demonstrates that the Free Law Movement did not advocate arbitrary judicial decision-making but rather proposed a renewal of legal science through a more complex and reflexive understanding of normativity and of theory. The article contributes to the clarification of a persistent historiographical distortion and highlights its broader theoretical implications.

KEYWORDS: Free Law Movement; *contra legem* fable; Hermann Kantorowicz; legal theory; judicial decision-making.

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TÍTULO: *A fábula contra legem: um reexame da história da teoria do direito e do direito privado nos momentos formativos do movimento do Direito Livre alemão*

RESUMO: Este artigo revisita o contexto formativo do Movimento do Direito Livre Germânico, um dos desenvolvimentos teóricos mais influentes do pensamento jurídico alemão e austríaco do século XX. O estudo tem como objetivo reconstruir, de forma sintética, a emergência da chamada fábula contra legem, uma narrativa que moldou de maneira persistente as interpretações do Movimento. A análise está dividida em duas partes. Primeiramente, delineia-se a trajetória intelectual de Hermann Kantorowicz e Gustav Radbruch, enfatizando a relevância do Direito Privado e de suas transformações no início do século XX na conformação de suas perspectivas teóricas. Em segundo lugar, investigam-se as condições históricas e discursivas que conduziram à construção da fábula contra legem, especialmente em resposta ao Manifesto de 1906. O artigo sustenta que tal fábula resultou de interpretações exageradas, descontextualizadas e estrategicamente motivadas por críticos contemporâneos, com o objetivo de deslegitimar o Movimento e seus proponentes. Ao reavaliar fontes primárias e elementos contextuais, o estudo demonstra que o Movimento do Direito Livre não defendia uma tomada de decisão judicial arbitrária, mas sim propunha uma renovação da ciência do direito por

* PhD in Law. Completed doctoral studies at the Pontifical Catholic University of Rio Grande do Sul (2022–2026), having carried out internationalization of the doctorate at the Johann Wolfgang von Goethe University (Goethe University Frankfurt am Main) (2023–2024). Was a visiting doctoral researcher at the Max Planck Institute in Frankfurt am Main, in Legal Theory, and also a visiting doctoral researcher at the University of Cologne.

meio de uma compreensão mais complexa e reflexiva da normatividade e da teoria. O artigo contribui para o esclarecimento de uma distorção historiográfica persistente e destaca suas implicações teóricas mais amplas.

PALAVRAS-CHAVE: *Movimento do Direito Livre; fábula contra legem; Hermann Kantorowicz; teoria do direito; decisão judicial.*

SUMÁRIO: *1. Introdução; – 2. Um breve contexto histórico da formação do movimento do Direito Livre alemão; – 2.1. Libertando a Ciência do Direito!; – 3. A fábula contra legem: uma necessária releitura; – 3.1. O movimento defende um direito libertado e uma teoria livre; – 4. Conclusão; – Referências bibliográficas.*

1. Introduction

The present research aims, in essence, to revisit part of the history of the formation of one of the most significant theoretical movements in the development of German and Austrian legal theory in the twentieth century, with direct impacts on legal theories in Brazil: the Germanic Free Law Movement (the Movement).

To this end, the objective is to briefly demonstrate the formative context of the Movement and the construction of what came to be known as the *contra legem* fable. With this premise in mind, the work is divided into two parts. In the first, the intention is to outline the role of two of the Movement's principal founders — Hermann Kantorowicz and Gustav Radbruch — as well as the importance that Private Law, and its paradigmatic transformations at the beginning of the twentieth century, held for these authors in their early intellectual development.

The second part seeks to advance a historical-theoretical narrative aimed at demonstrating how the circumstances outlined in the first part of the article gave rise to what later came to be termed the *contra legem* fable. This notion emerged from both mistaken and strategic interpretations advanced by “theoretical adversaries,” particularly in response to the 1906 Manifesto, which historically marked both the Movement and its author, Hermann Kantorowicz.

2. A Brief Historical Context of the Formation of the German Free Law Movement

The Germanic Free Law Movement was a theoretical initiative that emerged from within German academic circles at the beginning of the twentieth century. It was primarily developed by young academic jurists but also included practicing lawyers and judges —

both at the early stages of their careers and those with more substantial professional experience.

It thus constituted the formation of a multifaceted epistemic community, marked not only by external conflicts (with other national and international communities), but also by internal tensions among its own “affiliates,” who, despite their differences, “shared the same spirit”.¹

This section focuses on a limited segment of the Movement’s history — its formative context and the role played by its two principal actors and founders, Hermann Kantorowicz and Gustav Radbruch.

2.1. Liberating Legal Science!

Within the history of legal theory, the Movement is commonly associated with its “founding myth” in 1906, particularly with the publication of the Manifesto The Battle for Legal Science (*Der Kampf um die Rechtswissenschaft*), signed by *Gnaeus Flavius*, a pseudonym adopted by Hermann Kantorowicz (and ‘approved’ by Gustav Radbruch in his dialogical and revisionary works engaging with Kantorowicz).² Indeed, the Manifesto may be regarded as a landmark for the Movement, and particularly for the trajectory of the young Kantorowicz.

However, neither the Movement nor the Manifesto originated in that moment or in isolation. There existed a prior articulation, developed by the young Kantorowicz and Radbruch in Berlin in the early 1900s, when both were still at the beginning of adulthood and studying law.

This initial phase is of particular relevance for both authors and friends, as it was in 1903 that they met and established a close intellectual relationship during their participation in the seminar of Franz von Liszt in Berlin. In that same year, Kantorowicz, together with Radbruch, decided to “found,” in a more or less organized manner, the “Society for Legal Science,” composed initially of four or five young jurists — the “free-thinking law students of Berlin University”. This group convened in meetings dedicated to theoretical and doctrinal-theoretical discussions outside the formal seminar structure, particularly

¹ FLAVIUS, Gnaeus. *Der Kampf für die Rechtswissenschaft*. Heildeberg: Carl Winter’s Universitätsbuchhandlung, 1906, p. 5.

² RADBRUCH, Gustav. *Der Innere Weg: Aufriß meines Lebens*. Göttingen: Vandenhoeck & Ruprecht, 1961, p. 96-97.

on issues of Private Law (including the controversial new Civil Code, shaped by pandectist scholarship) and Criminal Law.

From this collective of young academics emerged a network of personal and theoretical bonds that would later consolidate into what came to be known as the German Free Law Movement.³ The members of this “society” may be identified as Kantorowicz, Radbruch, Felix Genzmer, Ernst Wolff, and Theodor Sternberg.⁴

In addition to discussing the new codification projects proposed by the German state since the unification of 1871, as well as the recently enacted Civil Code of 1900 (Bürgerliches Gesetzbuch – BGB), the group also engaged with works by theorists and authors who did not conform to the pandectist “*status quo*”, nor to the traditional German conception of law — particularly of Private Law — which was increasingly perceived as undergoing transformation.

It is within this specific framework that one can observe an intersection of different modes of theorizing law which, in contact with one another, co-produced themselves in a highly fruitful manner. The mode of theorizing Private Law in Germany, at the doctrinal level, underwent a trajectory of disputes throughout the nineteenth century (which

³ “Ich hatte Hermanns Bekanntschaft in Liszt’s Seminar gemacht. Es erwuchs daraus ein Besprechungsabend, den Hermann großartig ‘Gesellschaft für Rechtswissenschaftslehre’ taufte, in Wahrheit ein zwangloser Kreis von fünf jungen Juristen, nämlich dem späteren Professor und Edda-Übersetzer Felix Genzmer, dem späteren Kammergerichtsrat Wolff, Theodor Sternberg, der Göschenbändchen zur ‘Einführung in die Rechtswissenschaft’ verfasst hat und seit vielen Jahrzehnten in Tokio lebt, Hermann und ich. In diese Kreise wurden die Gedanken erörtert, die dann in der berühmten Streitschrift ‘Der Kampf um die Rechtswissenschaft’ Ausdruck fanden, die Hermann im Jahr 1906 veröffentlichte. Sie erschien unter dem Namen Gnaeus Flavius. Ihr Zweck war, die sich damals auffallend mehrenden Einzelstimmen, welche die rechtsschöpferische, nicht nur rechtsfindende Aufgabe der Rechtsprechung und Rechtswissenschaft betonten, zu der Einheit einer Kampfbewegung zusammenzufassen, sie mit werbkräftigen Schlagworten auszustatten und ihr einen Namen zu geben, der ihr geblieben ist, den Namen der ‘freirechtlichen Bewegung’” (RADBRUCH, Gustav. *Der Innere Weg: Aufriß meines Lebens*. Göttingen: Vandenhoeck & Ruprecht, 1961, p. 96-97). Translation: “I had made Hermann’s acquaintance in Liszt’s seminar. From this arose an evening discussion group that Hermann grandly christened the ‘Society for the Study of Legal Science’ — in truth, an informal circle of five young jurists: the later professor and translator of the *Edda*, Felix Genzmer; the later *Kammergerichtsrat* Wolff; Theodor Sternberg, who authored the small Göschen volume *Introduction to Legal Science* and has lived in Tokyo for many decades; Hermann; and myself. Within this circle, we discussed the ideas that later found expression in the notorious polemic *The Struggle for Legal Science*, which Hermann published in 1906. It appeared under the pseudonym Gnaeus Flavius. Its purpose was to bring together into a unified movement the increasingly numerous individual voices of the time that emphasized the law-creating, not merely law-finding, function of jurisprudence and legal science; to equip this movement with persuasive slogans; and to give it a name that has endured — the name of the ‘Free Law Movement’”.

⁴ Carter, Kantorowicz’s son, upon consulting his father’s personal archives, states that the original core group of “young jurists” of the Free Law School in Berlin — then known as the *Society for Legal Science* — consisted of four members: Gustav Radbruch, Hermann Kantorowicz, Felix Genzmer, and Ernst Wolff (CARTER, Frank Kantorowicz. Gustav Radbruch and Hermann Kantorowicz: two friends and a book – Reflections on Gnaeus Flavius ‘Der Kampf um die Rechtswissenschaft’ (1906). *German Law Journal*, vol. 7, n. 7, 2005, p. 662). Gustav Radbruch, in his biography, notes five initial members, adding Theodor Sternberg to the previously mentioned list (RADBRUCH, Gustav. *Der Innere Weg: Aufriß meines Lebens*. Göttingen: Vandenhoeck & Ruprecht, 1961, p. 96).

cannot be examined in detail here). This trajectory unfolded, it may be argued, under the influence of the Historical School, with Gustav Hugo, Friedrich Carl von Savigny, and the “young” Georg Friedrich Puchta, who introduced a shift within the tradition initiated by the former two, reorienting it toward a more strictly dogmatic-discursive plane. This transition marks the movement from the Historical School — characterized by an incipient and differentiated interdisciplinarity — to the paradigm of the jurisprudence of concepts, and subsequently to modern pandectist thought (along with its critics).

It is from within this latter paradigm that Rudolf von Jhering, initially an adherent of the pandectist model, would later distance himself (albeit not entirely) and subject it to irony in his well-known text *In the Juridical Firmament of Concepts: A Phantasmagorical Sketch*. In Jhering’s provocative narrative, one reads: “here, legal theorists are rewarded for the services rendered to these concepts on Earth; here, they behold the concepts which they had previously seen only dimly, in full clarity, seeing them face to face and interacting with them as equals. The questions for which they sought answers in vain during their lives are here answered by the concepts themselves”.⁵

This critical and ironic mode of narration developed by Jhering was, in fact, taken into consideration by the young Hermann Kantorowicz and Gustav Radbruch in Berlin, where Jhering was among the authors studied in their meetings. His work contributed to shaping their intellectual impetus to develop new ways of thinking about law and to challenge the dominant theoretical paradigms of the time. This affinity with Jhering’s ideas — particularly his emphasis on purposes and social ends, as well as on a closer integration between society and law, which he developed⁶ after distancing himself from pandectist thought — is also reflected in an alternative name once considered for the movement, prior to the consolidation of the expression “Free Law”. After the publication of the Manifesto in 1906, Kantorowicz wrote to Alfred Bozi suggesting that the movement be called the “Jhering Society,” conceived “for the study of reform questions in the field of legal science — in practice, study, and philosophy”.⁷

⁵ JHERING, Rudolf von. *Scherz und Ernst in der Jurisprudenz: eine Weihnachtsgabe für das juristische Publikum*. Leipzig: Breitkopf und Härtel, 1891, p. 249. Translation from: “*Hier werden die juristischen Theoretiker belohnt für die Dienste, die sie denselben auf Erden geleistet haben, hier erblicken sie dieselben, welche sie dort nur in verschleierter Gestalt sahen, in voller Klarheit, sie erschauen sie von Angesicht zu Angesicht und verkehren mit ihnen wie mit ihres Gleichen. Die Fragen, für die sie sich im Diesseits vergebens nach einer Lösung umgesehen haben, hier werden sie ihnen von den Begriffen selber beantwortet*”.

⁶ JHERING, Rudolph von. *Der Zweck im Recht*. Leipzig: Druck und Verlag von Breitkoff & Härtel, 1877, p. 85-86-97-98.

⁷ Text consulted in SCHMIDT, Katharina Isabel. *The Law that we feel living within us: German jurists and the search for “life” in modern legal science, 1900-1946*. 360f. Dissertation (Doctorate in Philosophy) – Department of History, Princeton University, New Jersey, 2021, p. 69. Excerpt from a letter sent to Alfred Bozi on 20 November 1909: “[...] Ferner käme in Betracht die Gründung einer Vereinigung (sagen wir

Other authors studied in the Berlin meetings — particularly those adopting approaches nonconforming to authoritative paradigms of Private Law — included Ernst Zitelmann,⁸ Eugen Ehrlich⁹ (one of the “founders” of modern sociology of law and a partial participant in the Germanic Free Law Movement within the Austro-Hungarian context),¹⁰ and Oskar von Bülow,¹¹ among others.

What these authors suggested in their observations — through their distinct ways of thinking about and theorizing law, and Private Law in particular — was closely associated with the theme of “gaps” in the law and with the ways in which society itself, as well as jurists in academia and within the judiciary, produce normativity in both concepts and practices. These processes exhibit regional and cultural variations, and such legal conditions coexist with state-enacted normative texts and with the decision-making patterns employed by judicial and administrative authorities in a far more complex

einer Jhering-Gesellschaft) zum Studium der Reformfragen auf dem Gebiet der Rechtswissenschaft—Praxis, -Studium, und - Philosophie. Sie müsste Schriften pro et contra herausgeben, [...]”. Translation: “[...] Furthermore, consideration might be given to the establishment of an association (let us say, a Jhering Society) for the study of reform questions in the field of legal science — in practice, study, and philosophy. It would have to publish writings pro and contra, [...]”. It can be gleaned from the texts that Kantorowicz was opposed to the institutionalisation of Free Law, which is why, rather than referring to a School, he used more open terms such as Movement or associations of jurists. He feared that institutionalisation could lead to a limitation of the theoretical proposals he defended. When he refers to the Jhering Society, this notion is evident”.

⁸ “An unserem Gesetzbuch ist mehr als zwanzig Jahre mit rastlosem Fleiß und unermüdlicher Sorgfalt gearbeitet worden – und doch hört man oft genug, und die Verfasser haben das auch selbst vorhergesagt, es fänden sich auch in diesem Gesetzbuch wie in jedem anderen Lücken. Und zwar Lücken nicht bloß in dem Sinn, Darß man vor irgend einem Beurteilungsstandpunkt aus gesetzgeberisch einen Satz in dem geltenden Recht vermisst und eingeführt sehen möchte – das würde sich leicht begreifen lassen: wann hätte je ein Werk jedermann gleichmäßig zufrieden gestellt? und nun gar ein Gesetzeswerk, das doch immer aus harten Interessengegensätzen heraus geschaffen ist! –; nein, gemeint sind Lücken für die Rechtsanwendung, in dem Sinne also, dass das positive Recht für einen vorgelegten Fall keine Entscheidung gewähre, dass die Antwort auf eine bestimmte frage aus ihm nicht zu entnehmen sei. In diesem Sinne ist denn auch die Lehre von den Lücken des positiven Rechts ein eiserner Bestandteil unserer Lehrbücher geworden: gelehrt wird, jedes Recht habe Lücken, und müsse sie – so pflegt man mit einer bei Juristen fast befremdlichen Bescheidenheit hinzuzusetzen – angesehen das unvollkommene Maß irdischer Kräfte, haben. Da aber eine Entscheidung doch gefunden werden müsse, da insbesondere der Richter die Entscheidung nicht ablehnen dürfe, so müsse mit Hilfe der Rechtswissenschaft die Lücke ausgefüllt werden. Hier liegen zwei Probleme. Das eine lautet: was sind Lücken? [...]” (ZITELMANN, Ernst. *Lücken im Recht*: Rede gehalten bei Antritt des Rektorat der Rheinischen Friedrich-Wilhelms-Universität zu Bonn am 18. Oktober 1902. Leipzig: Verlag von Duncker & Humblot, 1903, p. 5-6). Translation: “Our code of law has been worked on for more than twenty years with tireless diligence and unremitting care — and yet one often hears, as the authors themselves had already predicted, that even in this code of law, as in every other, there are gaps. And these are not merely gaps in the sense that, from some particular evaluative standpoint, one might miss a certain legislative provision in the existing law and wish to see it introduced — that would be easily understandable: when has any work ever satisfied everyone equally? And all the less a legislative work, which is always created out of stark conflicts of interest! No — what is meant are gaps in the application of the law, in the sense that the positive law provides no decision for a given case, that an answer to a particular question cannot be derived from it. In this sense, the doctrine of the gaps in positive law has become an indispensable component of our textbooks: it is taught that every law has gaps and must — as is commonly added with an almost disarming modesty unusual among jurists — have them, given the imperfect measure of earthly powers. But since a decision must nonetheless be found, and since, in particular, the judge may not refuse to decide, the gap must be filled with the help of legal science. Here lie two problems. The first is: what are gaps? [...]”.

⁹ EHRLICH, Eugen. Über Lücken im Recht. *Juristische Blätter* 17, n. 38 a 53, jan./dec., Wien, 1888.

¹⁰ EHRLICH, Eugen. *Freie Rechtsfindung und freie Rechtswissenschaft*: Vortrag gehalten in der Juristen Gesellschaft in Wien am 4. März 1903. Leipzig: Hirschfeld, 1903.

¹¹ BÜLOW, Oskar. *Gesetz und Richteramt*. Leipzig: Verlag von Dunker & Humblot, 1885.

manner than was commonly assumed (this theme, and the differences among the authors, cannot be further elaborated here). The very concept of a “gap” in the law — often dogmatized by other epistemic communities, whether in Germany, Brazil, or elsewhere — is employed by these authors in a reflective manner, with the aim of building theoretical bridges between approaches and of criticizing dogmatic “worldviews” that are closed in upon themselves.

Advancing in time, it may be asserted that these insights were taken up by the young Hermann Kantorowicz and Gustav Radbruch, and that the extra-seminar debates in Berlin constituted formative elements for both authors. There was a process of subjectivation — a transition from youth to the early stages of maturity as individuals, but also as legal theorists — which increasingly shaped their posture toward the epistemic community in which they were situated. From this intellectual awakening, and from a process of critically reopening underlying assumptions, law came to be conceived by these authors as a social phenomenon far more complex than certain prevailing authoritative discourses — often coupled with strategic limitations of complexity grounded in historicist and naturalist perspectives — had suggested.

Within this framework — and also through the identification of other authors who advanced alternative approaches to law — Hermann Kantorowicz began to conceive the idea of a “movement,” that is, a non-institutional, unifying form of expression for a collective of theorists who, despite their differences, as noted, “shared the same spirit”.

Gustav Radbruch, following his period in Berlin, moved to Heidelberg to pursue his habilitation (the postdoctoral qualification required to begin an academic career as a professor in Germany), which he soon completed. Kantorowicz likewise spent time in Heidelberg with the aim of advancing his own habilitation (which would only be completed in 1911, in Freiburg), although he adopted a different posture from that of his colleague Radbruch, showing less urgency in completing these academic stages — owing both to his personal and theoretical interests and to a more comfortable financial situation supported by his family.¹²

In this new theoretical and socio-intellectual environment — Heidelberg being a space in which new forms of theoretical production flourished not only in law but also in other

¹² CARTER, Frank Kantorowicz. Gustav Radbruch and Hermann Kantorowicz: two friends and a book – Reflections on Gnaeus Flavius ‘Der Kampf um die Rechtswissenschaft’ (1906). *German Law Journal*, vol. 7, n. 7, 2005, p. 660-661.

social sciences, such as philosophy (the culturalist movement, associated with figures like Wilhelm Windelband, Heinrich Rickert, and Emil Lask) and sociology (notably Max Weber and others) — Kantorowicz began a theoretical reconfiguration of his own thought. The project he had already envisioned in Berlin, expressed in correspondence with Radbruch in 1903–1904, began to take shape along two fronts: the theoretical analysis of the history of legal theory, and, consequently, the theoretical examination of the scientific paradigms of his contemporary epistemic community. As he stated: “I will only be able to achieve something really worthwhile if I familiarize myself thoroughly with the spirit of jurisprudence in all its epochs”.¹³

The Movement thus began to take form in parallel with the intellectual maturation of Kantorowicz and Radbruch, and simultaneously with the broader process of generating multiple forms of theoretical self-reflection within legal science. It should also be noted that Hans Kelsen likewise spent time in Heidelberg in 1908,¹⁴ coming from Vienna for a period of research; although he would later criticize the Heidelberg culturalists, he would emerge as one of the most creative and influential jurists of the twentieth century.

The idea of publishing a Manifesto, aimed at facilitating the dissemination of the ideas of Kantorowicz, Radbruch, and other authors potentially associated with “free law” thinking, arose in 1905 during a visit by Radbruch to Kantorowicz in Florence,¹⁵ and was realized in 1906.

It was in the Manifesto, entitled *Der Kampf um die Rechtswissenschaft (The Battle for Legal Science)* — a title that itself constitutes a homage to Rudolf von Jhering’s *Der Kampf ums Recht (The Battle for Law)* — that Kantorowicz (with revisions by Radbruch, Sternberg, and editorial collaborators) articulated new ideas, new theoretical structures,

¹³ CARTER, Frank Kantorowicz. Gustav Radbruch and Hermann Kantorowicz: two friends and a book – Reflections on Gnaeus Flavius ‘Der Kampf um die Rechtswissenschaft’ (1906). *German Law Journal*, vol. 7, n. 7, 2005, p. 661.

¹⁴ KELSEN, Hans. *Autobiografía*. Bogotá: Digiprint editores e.u., 2008, p. 82.

¹⁵ “In March 1905 Radbruch stayed for four weeks with Kantorowicz in Florence and it was at this point, as becomes clear for their subsequent correspondence, that the two friends decided that Kantorowicz should write a manifesto, feeling that this would be the best way to achieve their methodological aspirations. [...] Kantorowicz’s letters to Radbruch describe how he dictated the Manifesto in less than two weeks and only during his leisure time, that is, in the evening and on weekends between his main studies in Bologna. Equally remarkable is the fact that, of the 130 manuscript pages, he left three quarters completely unaltered from the original dictation, but for a few words here and there [...] When the manuscript was returned to him, Radbruch made his own amendments, some quite substantial, and then he began the main, laborious, task of preparing the work for the Publisher, undertaken entirely by himself in order to preserve the author’s anonymity: Radbruch’s own amendments, as well as those by Sternberg, can easily be detected in the text of the manuscript [...]” (CARTER, Frank Kantorowicz. Gustav Radbruch and Hermann Kantorowicz: two friends and a book – Reflections on Gnaeus Flavius ‘Der Kampf um die Rechtswissenschaft’ (1906). *German Law Journal*, vol. 7, n. 7, 2005, p. 664, 670-671).

and identified new authors (with and without their consent) who would come to be associated with the “Free Law Movement”.

Likewise, it is with the publication of the Manifesto that the *contra legem* fable — the subject of this article — was created and subsequently perpetuated, in some instances, up to the present day. It should be noted — and allowing for certain theoretical leaps — that the Manifesto was signed under the name “Gnaeus Flavius”. This name was chosen by Hermann Kantorowicz, and Kantorowicz Carter (his son), in consulting the archive of letters sent to Gustav Radbruch, highlights a letter dated February 28, 1906, in which the author explains his choice of “Gnaeus Flavius”.¹⁶ The reference is to the Roman scribe of Cato the Elder, who became known for publishing the secret procedural formulas of the jurists of the pontifical courts, thereby revealing “how law was created” and breaking the aura of ritual and formalism that had protected such knowledge, effectively granting “access to the formulas” to the plebeians.¹⁷

In the Manifesto, Kantorowicz sought to expose an analogous situation within contemporary German academia, unveiling its own “secret techniques,” which he understood as a mixture of falsehoods and self-deceptions. However, as Auer observes,¹⁸

¹⁶ CARTER, Frank Kantorowicz. Gustav Radbruch and Hermann Kantorowicz: two friends and a book – Reflections on Gnaeus Flavius ‘Der Kampf um die Rechtswissenschaft’ (1906). *German Law Journal*, vol. 7, n. 7, 2005, p. 668.

¹⁷ CARTER, Frank Kantorowicz. Gustav Radbruch and Hermann Kantorowicz: two friends and a book – Reflections on Gnaeus Flavius ‘Der Kampf um die Rechtswissenschaft’ (1906). *German Law Journal*, vol. 7, n. 7, 2005, p. 668. As noted by the jurist’s son, Kantorowicz Carter, the name “Gnaeus Flavius,” employed for the Manifesto, in fact also reveals a rare mistake by Kantorowicz: “[...] actually the clerk of Appius Claudius Caecus, Censor and Pontifex Maximus, a minor and untypical error by Kantorowicz”.

¹⁸ “In diesen zwei konzisen Sätzen ist, so die hier vertretene These, der bis heute aktuelle und nach wie vor theoretisch nicht ausgeschöpfte Kerngehalt des von Hermann Kantorowicz zeitlebens vertretenen Freirechtsbegriffs enthalten. Anlass genug, das durch allzu viele Verständnisse und Missverständnisse, Legenden und Gegenlegenden rund um die Begründung der ‚Freirechtsschule‘ verschüttete Werk 75 Jahre nach dem frühen Tod des Autors im Exil in Cambridge 1940 einer Neulektüre zu unterziehen. Dabei geht es, wie man ohne Übertreibung behaupten kann, um die tiefsten Fragen der Entstehung rechtlichen Sinns aus autoritativen Texten und damit um die Grundlagen der juristischen Methodenlehre und Wissenschaftstheorie überhaupt; Fragen also, die heute nicht weniger brisant und dringlich sind als zu Kantorowicz’ Lebzeiten und sich nach wie vor an dem Grundproblem entzündeten, ob und inwieweit die Rechtswissenschaft als methodisch rationalisierbare Rechtsanwendungswissenschaft ihren Namen verdient oder nicht vielmehr unter dem Deckmantel gesetzgeberisch gebundener Autorität doch nur pseudomethodisch verbrämte Scheinrationalität produziert. Die Frontstellung ist damit klar umrissen: Hier ‚Freirecht‘, dort das ‚byzantinische Ideal‘ des seine Geheimwissenschaft zelebrierenden Priesterjuristen, das allenfalls dem ‚zentralistische(n) Beamtenstaat des modernen Absolutismus‘, nicht jedoch – und hier liegt Kantorowicz’ eigentliche Lebensmotivation, die Wurzel der vielfach bezeugten ‚Besessenheit dieses Mannes von seiner Wissenschaft‘ bis hin zum ‚Bekennnishaften‘ – dem demokratischen Verfassungsstaat angemessen ist. Hier ‚Römer und Briten‘ als die das gesamte, umfassend rechtshistorisch zugreifende Werk des Autors durchziehenden Leitbilder guten, gerechten, staatlich intakten Judizierens, dort Byzanz und der Absolutismus als dessen defizitäre, despotische Schwundstufen. Die Wahl des Pseudonyms ‚Gnaeus Flavius‘ ist vor diesem Hintergrund so treffend wie typisch für Kantorowicz: Gnaeus Flavius war nach der römischen Überlieferung derjenige Schreiber, der um 300 v. Chr. die geheimen Klage – und Geschäftsformeln der römischen Rechtspriester veröffentlichte und damit deren Beratung – und Interpretationsmonopol zerstörte. Zu keinem geringeren Ziel ist Hermann Kantorowicz auch in seinem eigenen Leben angetreten” (AUER, Marietta. Der Kampf um die Wissenschaftlichkeit der Rechtswissenschaft: Zum 75. Todestag von Hermann Kantorowicz. *Zeitschrift für europäisches Privatrecht*, n° 4, 2015, p. 774-775). Translation: “In these two concise sentences is

this purpose — beyond the immediate objective described above — was linked to a broader intellectual project already evident in Kantorowicz's earlier correspondence with Radbruch during his youth: namely, the systematic study of legal theory in its diverse historical manifestations, as well as in its contemporary forms, within a broad theoretical undertaking. Just as Gnaeus Flavius had revealed the secrets of Roman priestly law, Kantorowicz proposed to pursue a similar — if not deeper — path.

The Manifesto thus emerges as a medium, an intertextual intervention, a profanation of established theoretical frameworks, and a projection of a “new era”. Its purpose was to provoke controversy within German academia — it is not merely a theoretical text, but a discourse, a deliberately provocative discursive structure. As stated in its introduction, its objective is clear: “may this work recruit new fighters for the struggle for the liberation of legal science, for the assault on the last bastion of scholasticism”.¹⁹

This recruitment, and the liberation of legal science/theory, was effectively achieved. The *contra legem* fable thus emerges as a legend constructed by opponents with the aim of delegitimizing the diverse creative proposals amalgamated in the Manifesto and, even more significantly, of undermining the theoretical persona of the young Hermann Kantorowicz. It further sought to discredit his proposals to co-produce dogmatic legal science, culturalist critical philosophy, a theory of law as a self-reflective structure of the legal system, and sociology as a mode of observing the theoretical intersection between law and other sciences and extra-legal structures.

contained—so the present thesis holds—the still relevant and theoretically not yet exhausted core meaning of the concept of *free law* (*Freirecht*) as upheld by Hermann Kantorowicz throughout his life. This is reason enough to subject the work—buried beneath far too many interpretations and misinterpretations, legends and counter-legends surrounding the founding of the ‘Free Law School’—to a renewed reading seventy-five years after the author's early death in exile in Cambridge in 1940. What is at stake, one may say without exaggeration, are the most profound questions concerning the emergence of legal meaning from authoritative texts and, consequently, the very foundations of legal methodology and the theory of legal science itself—questions that are no less urgent and pressing today than they were in Kantorowicz's lifetime. They still ignite around the fundamental problem of whether, and to what extent, legal science, as a methodologically rationalizable discipline of legal application, deserves its name—or whether, under the guise of legislatively bound authority, it merely produces a pseudomethodological façade of spurious rationality. The opposing positions are thus clearly delineated: here, ‘free law’; there, the ‘Byzantine ideal’ of the priest-jurist celebrating his secret science—an ideal that may suit the ‘centralized bureaucratic state of modern absolutism’, but not—and here lies Kantorowicz's true life motivation, the root of the oft-attested ‘obsession of this man with his science’, even to the point of the ‘confessional’, — the democratic constitutional state. Here, ‘Romans and Britons’ serve as guiding models — pervading the author's entire, broadly conceived, legal-historical work — of good, just, and institutionally sound jurisprudence; there, Byzantium and absolutism appear as their deficient, despotic degenerations. Against this background, the choice of the pseudonym ‘Gnaeus Flavius’ is as fitting as it is characteristic of Kantorowicz: according to Roman tradition, Gnaeus Flavius was the scribe who, around 300 B.C., published the secret pleading and procedural formulas of the Roman priest-jurists, thereby destroying their monopoly on consultation and interpretation. Hermann Kantorowicz set out to achieve nothing less in his own life”.

¹⁹ FLAVIUS, Gnaeus. *Der Kampf um die Rechtswissenschaft*. Heidelberg: Carl Winter's Universitätsbuchhandlung, 1906, p. 6: “Möge diese Schrift neue Streiter werben für den Befreiungskampf der Rechtswissenschaft, für den Sturm auf die letzte Bastion der Scholastik”.

3. The *Contra Legem* Fable: A Necessary Reappraisal

The *contra legem* fable refers, in essence, to the alleged claim by Free Law theorists in Germany and Austria-Hungary — most notably Hermann Kantorowicz (and Ernst Fuchs, among others) — that the judiciary, and thus the judge, would possess the freedom to create legal normativity even when such normativity contradicts preexisting statutory law or codes, thereby establishing a framework of decisionism or an unrestricted “judicial will”. This narrative is a myth — a fable — constructed shortly after the publication of the 1906 Manifesto and subsequently reproduced continuously across various epistemic communities and historical contexts. By way of illustration, this myth/fable has been reiterated in Germany,²⁰ Italy,²¹ Portugal,²² and Brazil.²³

In order to understand the emergence of this fable, it is necessary to return to the formative moment of the Movement, to the drafting of the Manifesto, and to what effectively occurred during that period, thus situating, in a synthetic manner, the unfolding of these events.

3.1. The Movement Advocates a Liberated Law and a Free Theory

When attempting to access a historical moment, it is essential to recognize the limitations imposed by sources, narratives, and the dogmatisms that history itself — or, in this case, law and legal theory — tends to produce and perpetuate. As briefly outlined above, the Movement was formed by young jurists dissatisfied with the social, legal, political, and, more specifically, theoretical conditions in Germany and Austria-Hungary. In the Manifesto, this dissatisfaction is expressed through an inflammatory discourse — undeniably theoretical, yet also deliberately exaggerated in several respects. A manifesto, by its very nature, carries this dramatizing, romantic, and rhetorically charged character. It is therefore not merely a theoretical work and cannot be interpreted through such a limited lens.

²⁰ LARENZ, Karl. *Metodologia da ciência do direito*. Lisboa: Fundação Calouste Gulbenkian, 1997, p. 80-82. Karl Larenz, a jurist who operated within the Nazi milieu during the 1930s and 1940s, not only reproduced the *contra legem* fable but also contributed to constructing the narrative that the Free Law Movement had “laid the foundations” for the flourishing of Nazi-fascist theory. This discussion will be addressed in another article.

²¹ LOSANO, Mario G. *Sistema e estrutura no direito*, volume 2 – o Século XX. São Paulo: Wmf Martins Fontes, 2010, p. 135.

²² HESPANHA, António Manuel. *Cultura jurídica europeia: síntese de um milénio*. Coimbra: Almedina: 2012, p. 407-408; MAIA, R.P.; MAIA, A.P. O Movimento do Direito Livre e a possibilidade do julgamento *contra legem*. *Revista Videre*, vol. 12, n. 24, 2020, p. 419-432.

²³ STRECK, Lenio Luiz. *Dicionário de hermenêutica: 50 verbetes fundamentais da Teoria do Direito à luz da Crítica Hermenêutica do Direito*. Belo Horizonte: Casa do Direito, 2020, p. 152-153.

“Gnaeus Flavius” — that is, Kantorowicz, its principal author — intentionally constructed an inflammatory discourse with the aim of mobilizing a critique of prevailing paradigms while simultaneously portraying the advent of a new era: new forms of social relations, behavior, technology, science, and statehood demanded, in turn, new forms of law and legal theorization. The Manifesto appears to embody this spirit.

As Gustav Radbruch recounts in his autobiography, the decision to write a Manifesto and to establish a Movement — complete with slogans and deliberately exaggerated discourse — was a strategic choice by these young jurists to ensure that their ideas would have an impact and could be absorbed, at least in their core, through a structure of language that was accessible and compelling: “to equip this movement with persuasive slogans, and to give it a name that has endured — the name of the ‘Free Law Movement’”.²⁴

This event — the Manifesto and the Movement — was thus both curious and highly significant, marking German society at the turn of the century and its transition into modernity.

Kantorowicz, as noted, was a young scholar of Jewish background, with distinctive theoretical ambitions that set him apart, both positively and negatively. Radbruch, in fact, advised his friend not to publish the Manifesto under his own name (hence the use of the pseudonym “Gnaeus Flavius”), in order to avoid further damaging his already strained academic position in Heidelberg — an outcome that nonetheless materialized. Moreover, the use of a pseudonym was intended to create an element of intrigue, and also to mitigate exaggerated or misguided interpretations of the work, given both the ambition of the Manifesto and the fact that its author was still young, lacked extensive experience, and had not yet completed his habilitation.²⁵

²⁴*In diese Kreise wurden die Gedanken erörtert, die dann in der berühmten – oder soll ich sagen berüchtigten – Streitschrift “Der Kampf um die Rechtswissenschaft” Ausdruck fanden, die Hermann im Jahr 1906 veröffentlichte. Sie erschien unter dem Namen Gnaeus Flavius. Ihr Zweck war, die sich damals auffallend mehrenden Einzelstimmen, welche die rechtsschöpferische, nicht nur rechtsfindende Aufgabe der Rechtssprechung und Rechtswissenschaft betonten, zu der Einheit einer Kampfbewegung zusammenzufassen, sie mit werbkräftigen Schlagworten auszustatten und ihr einen Namen zu geben, der ihr geblieben ist, den Namen der ‘freirechtlichen Bewegung’” (RADBRUCH, Gustav. *Der Innere Weg: Aufriß meines Lebens*. Göttingen: Vandenhoeck & Ruprecht, 1961, p. 96-97). Translation: “In this circle, the ideas were discussed that later found expression in the famous — or should I say infamous — polemic ‘Der Kampf um die Rechtswissenschaft’ (*The Struggle for Legal Science*), which Hermann published in 1906. It appeared under the name Gnaeus Flavius. Its purpose was to unite the numerous, increasingly frequent individual voices that emphasized the law-creating—not merely law-finding—role of jurisprudence and legal scholarship into a single movement of struggle, to equip it with effective slogans, and to give it a name that it has retained: the ‘Free Law Movement’”.*

²⁵ CARTER, Frank Kantorowicz. Gustav Radbruch and Hermann Kantorowicz: two friends and a book – Reflections on Gnaeus Flavius ‘Der Kampf um die Rechtswissenschaft’ (1906). *German Law Journal*, vol. 7, n. 7, 2005, p. 666-667.

Ultimately, Gustav Radbruch's precautions were well-founded. The very conception and construction of the *contra legem* fable can be understood as a byproduct of this situation. It is evident that, beyond the effort to delegitimize "Gnaeus Flavius" — that is, Hermann Kantorowicz — and other authors labeled as "free lawyers," there existed a strategic opposition within certain sectors of the German epistemic community aimed at defending their theoretical presuppositions — presuppositions that also reflected the model of state and society they sought to preserve. In a class-structured society marked, moreover, by elements of antisemitism — particularly within academic environments — the *contra legem* fable emerged as a highly effective "response," capable of stripping an author (and his ideas) of legitimacy. This was especially the case for a thinker as critical, independent, and theoretically ambitious as Kantorowicz, who sought to contribute to a renewal of legal theory, legal history, and the very dogmatic structures of German and European law, all of which were undergoing transformation.

This observation is relevant because, despite his considerable intellectual potential as a theorist and scholar, Kantorowicz's position within German society — as a relatively assimilated Jew (not without reservations, a matter to be addressed elsewhere) and as a member of the bourgeoisie — remained precarious. Throughout his career in Germany — owing, *inter alia*, to his criticism of Otto von Bismarck and to his report attributing responsibility for the outbreak of World War I to Germany and Austria-Hungary — he secured a full professorship only in 1928–1929, in Kiel, at the age of 51. It may be inferred that this appointment was facilitated, at least in part, by Radbruch, who had previously held a chair in Kiel and served as dean of the faculty before returning to Heidelberg in the late 1920s.²⁶

With the rise of National Socialism under Adolf Hitler, Kantorowicz was among the first professors to be dismissed in 1933. Shortly thereafter, in 1934, he was nominated for the Nobel Peace Prize alongside Hans Kelsen,²⁷ and was subsequently forced into exile in England, where he died prematurely in 1940.

²⁶ CARTER, Frank Kantorowicz. Gustav Radbruch and Hermann Kantorowicz: two friends and a book – Reflections on Gnaeus Flavius 'Der Kampf um die Rechtswissenschaft' (1906). *German Law Journal*, vol. 7, n. 7, 2005, p. 691-694.

²⁷ "Kelsen had established a constitutional school based on his doctrine of government (the Viennese school). Kelsen stated that a theory of law should validate and give order to law itself, and his doctrine sought to understand the state from a juridical viewpoint not depending on political, social and psychological arrangements. An ardent supporter of a law reaching beyond the single states, Kelsen stressed the importance of establishing a system of international law emancipated from any political views. Kantorowicz was nominated for ignoring national barriers while seeking mutual understanding in his work for internationalism and pacifism. He asserted the necessity of sociological studies in order to understand the functional aspects of law, and his doctrine of free law contributed to the development of the sociology of law" (THE NOBEL PRIZE. Nomination for Nobel Peace Prize. 1934. Nominee 1: Hans Kelsen; Nominee 2: Hermann Kantorowicz. 1934. Disponível em: nobelprize.org/nomination/archive/show.php?id=7633).

What, then, is the relationship between these intertemporal developments — past, future, and present — and the Manifesto, the rise of the Movement, and, consequently, the creation of the *contra legem* fable?

We thus proceed with the historicization of the subject, alongside a speculative reconstruction of the narrative under examination. The *contra legem* fable arises from an exaggerated, decontextualized, and ultimately malicious interpretation advanced by certain jurists, based on a specific paragraph contained in the 1906 Manifesto:

We therefore proceed from the premise that the administration of justice is, in its essence, a function of the state and must remain so. Accordingly, we demand that the judge, bound by his oath, decide the case as it is to be decided according to the clear wording of the law. He may and should depart from this: first, when the law does not appear to offer an unambiguous solution; second, when, in his free and conscientious conviction, it is not probable that the existing state authority at the time of the decision would have decided the matter as the law requires. In both cases, he should render the decision which, in his conviction, the present state authority — if the particular case had been before it — would have made. If he is unable to form such a conviction, he should decide according to free law. Finally, in desperately complex cases or those involving merely quantitative issues — such as compensation for non-material damage — he should, and indeed must, decide according to discretion. At all times, however, the parties in civil proceedings should remain free, by joint application, to release the judge from the obligation to observe any given rule of state law. It should not be objected that such judicial conviction is uncontrollable and that our proposals therefore leave the judge entirely free to act at will. For if we can no longer rely on the judge's oath — which demands a serious and sincere conviction — then everything collapses. Even today, we entrust to the judge's free and uncontrollable conviction what he, through interpretation, declares to be valid law and what he, through examination, establishes as truth. Sufficient protection against excesses of subjectivity is provided by the balancing plurality of minds within judicial panels and by the system of appellate review.²⁸

Notably, in the excerpt referenced above, there is no explicit defense of authorizing the judiciary — the judge — to create state legal normativity in a wholly arbitrary or *contra legem* manner. What occurs in that passage, it must be recalled, is the use of a deliberately exaggerated formulation, intended to encompass a broad conception of “free law” as a possible theoretical architecture capable of assisting in the production of

²⁸ FLAVIUS, Gnaeus. *Der Kampf um die Rechtswissenschaft*. Heidelberg: Carl Winter's Universitätsbuchhandlung, 1906, p. 41.

normativity — whether within the framework of existing state law, or in situations where such law proves insufficient in a given case and within the decision-making process.

Nevertheless, the issue requires further nuance. Although in this passage “Gnaeus Flavius” — that is, Hermann Kantorowicz — addresses the creation of law within the judiciary, in relation to existing normative texts such as the *Bürgerliches Gesetzbuch* and the German Penal Code, among others, there is no epistemic limitation to these specific domains. These observations form part of a broader epistemic project developed by Kantorowicz across various writings, in which he more systematically elaborates what “free law” signifies within his theoretical framework.

For instance, in 1910, at the First German Congress of Sociology held in Frankfurt am Main, Kantorowicz presented the paper *Legal Science and Sociology (Rechtswissenschaft und Soziologie)*,²⁹ in which he conceptualized law and its possible epistemic structures in relation to other fields of knowledge, such as mathematics, statistics, and the emerging technosciences. He examined how these distinct epistemes interact and generate “extra-scientific” relations that law must also address.

Does Kantorowicz thereby seek to abandon legal dogmatics, the problem of judicial decision-making, or the relevance of codified law and doctrinal construction? Clearly not. His proposal is plural and integrative: it aims to develop a theoretical framework capable of cognitively grasping the intersections between different domains of knowledge, and of enabling legal dogmatics to benefit from such co-production — both in order to critique outdated presuppositions and to envision new concepts, practices, and interpretations responsive to evolving social relations.

Within this broader horizon, the concept of “free law” occupies a central place — at least for Kantorowicz. Sociology, then in its formative stages, would function as an observational framework for analyzing these relationships and intersections between fields of knowledge. Kantorowicz thus poses the question: “should and can we make legal sociology useful for jurisprudence?”³⁰

²⁹ KANTOROWICZ, Hermann. *Rechtswissenschaft und Soziologie*. In: *Verhandlungen des 1. Deutschen Soziologentages vom 19. Bis 22. Oktober 1910 in Frankfurt am Main*. Frankfurt am Main: Sauer u. Auvermann, 1969.

³⁰ KANTOROWICZ, Hermann. *Rechtswissenschaft und Soziologie*. In: *Verhandlungen des 1. Deutschen Soziologentages vom 19. Bis 22. Oktober 1910 in Frankfurt am Main*. Frankfurt am Main: Sauer u. Auvermann, 1910, p. 279. “*In diesem Sinne also frage ich: sollen und können wir die Rechtssoziologie für die Jurisprudenz nutzbar machen?*”.

Returning to the theme of the *contra legem* fable, it must be noted that this narrative was unjustifiably constructed by jurists of the period, such as Oskar von Bülow — whose position came as a surprise to Hermann Kantorowicz, as he had regarded him as a “free lawyer” and supporter on the basis of his 1885 work³¹ — as well as Joseph Unger, Franz Klein, among others.³² Promptly, and especially after the authorship of the Manifesto became known, there was a collective and amplified adherence to this fable, and the narrative was instrumentalized to delegitimize other theoretical constructions advanced by Kantorowicz.

This dynamic extended, in particular, to its use by professors in Heidelberg, who invoked the alleged “radicalism” and “criticality” of Kantorowicz — combined with preexisting antipathies toward him, whether due to his Jewish background, his critical mode of theorizing, or other perceived traits such as supposed arrogance — to obstruct the continuation of his habilitation process at the institution. Gustav Radbruch, lamenting the situation, observed that one of the factors working against Kantorowicz (even before the authorship of the Manifesto had been publicly revealed) was an ironic “catch-22” circumstance: the faculty feared they might be “stuck with him because anti-Semitism will

³¹ “Freilich um einen schweren Preis! Für das eigene warmblütige, auf das innigste mit dem deutschen Wesen verwachsene Recht musste es ein in fremder Sprache geschriebenes, in fremdem Geist gedachtes todtes Recht, das Gesetzbuch eines längst unter gegangenen Volkes hinnehmen! Und auf welche Weise, durch welche ‚Rechtsquelle‘ wurde diese gewaltige, das nationale Leben auf das tiefste erschütternde Rechtswandelung hervorgebracht? Einzig und allein durch die Gerichte, durch die rechtsumbildende Macht des Richteramts! Kein deutsches Geseke hat die römischen Gesetze ein- geführt. Als gegen Ende des 15. Jahrhunderts die römischen Kaiser deutscher Nation sich gelegentlich mit der Anwendung jener von ihren ‚Vorfahren am Heiligen Reich‘ erlassenen Gesetze einverstanden erklärten, als Kaiser Friedrich der Dritte damals der neu gegründeten Tübinger Universität in seinem Bestätigungsbriege den Wunsch mit auf den Weg gab, es möchten jene Gesetz dort, den Ohren seiner Unterthanen immer besser ein = geträufelt werden, war ihre Geltung in Deutschland schon ausgemacht und zum großen Theil vollzogen. Die Einführung des römischen Rechts wurde von Rechtsspruch zu Rechtsspruch aus der Mitte der Gerichte durch ihren eigenen freien Entschluss bewerkstelligt” (BÜLOW, Oskar. *Gesetz und Richteramt*. Leipzig: Verlag von Dunker & Humblot, 1885, p. 25). Translation: “Admittedly, this came at a heavy price! For its own vibrant, living law — intimately rooted in the German spirit — it had to accept a dead law, written in a foreign language and conceived in a foreign spirit: the code of a long-vanished people. And in what manner, through what “source of law,” was this immense transformation—one that shook national life to its core—brought about? Solely through the courts, through the law-shaping power of the judiciary. No German statute introduced Roman law. When, toward the end of the fifteenth century, the Roman Emperors of the German nation occasionally expressed their approval of applying those laws issued by their “predecessors in the Holy Empire”, and when Emperor Frederick III, in his letter of confirmation to the newly founded University of Tübingen, expressed the wish that these laws might be ‘ever more instilled into the ears of his subjects’, their validity in Germany had already been determined and, to a great extent, implemented. The reception of Roman law was accomplished from judgment to judgment, from within the courts themselves, through their own free decision”.

³² CARTER, Frank Kantorowicz. Gustav Radbruch and Hermann Kantorowicz: two friends and a book — Reflections on Gnaeus Flavius ‘Der Kampf um die Rechtswissenschaft’ (1906). *German Law Journal*, vol. 7, n. 7, 2005, p. 684. The author, Kantorowicz’s son, upon examining a letter sent to Radbruch on July 12, 1906, identifies a sense of surprise and disappointment in response to certain reactions to the Manifesto. For consultation in the original, see: UNGER, Joseph. *Der Kampf um die Rechtswissenschaft*. *Allgemeine Österreichische Gerichtszeitung*, n. 296, 1906; KLEIN, Franz. *Der Kampf um die Rechtswissenschaft*. *Allgemeine Österreichische Gerichtszeitung*, n. 265, 1906; SILBERG, Sebastian. *Hermann Kantorowicz und die Freirechtsbewegung*. Berlin: Logos, 2005. As Carter notes, this latter work includes, in an appendix, a list of readings and contemporaneous commentaries on the Manifesto.

prevent your prospects of further promotion away from here”.³³ The Manifesto and the *contra legem* fable became contributing elements to this hostile academic atmosphere.

Moreover, whether during the decade from 1900 to 1910 or in subsequent periods, this theoretical “fake news” persisted in multiple forms and extended its effects to other authors identified as “free lawyers,” including those who participated in efforts at greater organizational coherence, such as the first — and only — meeting of jurists in 1910, held in the garden of Radbruch’s residence in Heidelberg. One such author was Eugen Ehrlich,³⁴ who, in the post–World War II period, was also subjected — alongside other proponents of Free Law — to the narrative that the Movement had laid the foundations for the emergence of Nazi-fascist law.

Shortly after the publication of the Manifesto in 1906, Kantorowicz became aware that many readers were interpreting, whether mistakenly or deliberately, the passages he had written concerning the creation of law within the judiciary. This realization led him to remove certain excerpts from a version he was preparing for publication in Italy in 1907. Even with this revised edition — published in Italy and not provoking the same level of controversy as in Germany and Austria — the *contra legem* fable continued to persist.

It was precisely for this reason that, in 1911, Hermann Kantorowicz published a text specifically aimed at addressing this issue, entitled *The Contra-legem Fable (Die Contra-legem-Fabel)*.³⁵ In it, he emphasized that he had never, at any point, defended the production of normativity in an arbitrary manner within the judiciary, nor that this branch of power should be authorized to disregard legislation — statutes or codes — or to decide arbitrarily, *contra legem*. The author referred to other writings in which he had already clarified this matter and presented his position in a more developed and systematic way, outside the deliberately “inflammatory” discursive context of the Manifesto.

This issue — judicial decision-making and the *contra legem* fable — left a lasting mark on both the author and the Movement, as well as on the multifaceted meaning of its

³³ CARTER, Frank. Kantorowicz, Gustav Radbruch and Hermann Kantorowicz: two friends and a book – Reflections on Gnaeus Flavius ‘Der Kampf um die Rechtswissenschaft’ (1906). *German Law Journal*, vol. 7, n. 7, 2005, p. 688. To identify the specific letter, reference is made to: Letter from Gustav Radbruch to Hermann Kantorowicz (3 April 1906) (GRGA.17.84). The “catch-22” situation was related to Radbruch by Karl von Lilienthal who was Dean of the Law Faculty at the time. This is incontrovertible proof of the strong anti-Semitic feelings in German and Austrian universities at the beginning of the 20th century.

³⁴ SEINECKE, Ralf. Ehrlichbilder: Freirecht, Rechtssoziologie und Rechtspluralismus Zum 100. Todestag von Eugen Ehrlich. *ZEuP – Zeitschrift für Europäisches Privatrecht*, 2022.

³⁵ KANTOROWICZ, Hermann. *Die Contra-legem-Fabel*. Berlin: C. Heymanns, 1911. The said text was consulted based on the list of references compiled by: SCHMIDT, Katharina Isabel. *The Law that we feel living within us: German jurists and the search for “life” in modern legal science, 1900-1946*. 360f. Dissertation (Doctorate in Philosophy) – Department of History, Princeton University, New Jersey, 2021, p. 63.

slogans and the discursive imagery associated with the expression “free law.” This is evident in the fact that, in 1928, while in the United States as a visiting professor at Columbia University, at the height of his intellectual maturity, Kantorowicz proposed a seminar whose outcome sought, among other objectives, to advance a serious and innovative project concerning the construction of a “theory of judicial decision-making”. This endeavor coexisted with his ongoing work in legal history, the history of legal theory, philosophy, and the dogmatics of private and criminal law. For the Kantorowicz of 1928, such a theory of decision was necessary to refine the processes of normative creation within law — particularly state law and within epistemic communities, including the judiciary — while simultaneously establishing safeguards against arbitrary subjectivity embedded in positions of power.³⁶

The Free Law Movement, the Manifesto, and Kantorowicz himself never advocated arbitrariness in the creation of legal normativity. Whether at the level of self-reflective theorization, the constructive development of legal dogmatics and its presuppositions, or in the interdependent relationship between the legal subsystem and other social subsystems, including the production of law within the judiciary, there is no endorsement of the idea that law should be created in disregard of existing codes, statutes, or legislation. On the contrary, what the Movement — and particularly Kantorowicz — proposed, from his youth through his intellectual maturity, was a collective project for legal scholars: to assume an active role, abandoning a condition of passivity and subservience to the prevailing *status quo*. The aim was to liberate legal science, thereby refining its structures and expanding the capacity of law for self-reproduction and creative development. This project was oriented toward the regeneration of the theoretical foundations of law, as well as of the German state and society, which remained constrained by a “historical” or “natural” reality that was already in the process of dissolution.

4. Conclusion

The present work sought to provide a concise exposition of the formation of the *contra legem* fable, which emerged in relation to the Germanic Free Law Movement and, in particular, to the detriment of Hermann Kantorowicz.

³⁶ “If this purpose cannot be ascertained, then the judicial ideal of the interpreter takes its place. This method alone, although the contrary seems to be true, is capable of giving a scientific character to juristic theories, of diminishing the uncertainty of judicial practice, and of abolishing its arbitrariness” (KANTOROWICZ, Herman U.; PATTERSON, Edwin W. Legal science – a summary of its methodology. *Columbia Law Review*, vol. 28, n. 6, jun./1928, p. 705).

This research constitutes only part of a broader project aimed at revisiting German, Austrian, Hungarian, and French theorists who were central figures in the early twentieth century and who have exerted — and continue to exert — direct or indirect influence in Brazil.

Within the context of the *contra legem* fable, it was emphasized that this narrative was constructed shortly after the publication of the Manifesto in 1906, yet it subsequently persisted beyond Germany. In its various forms and perspectives, the fable remains present within German academia — albeit with diminished support, in light of specialized studies that have addressed these issues in a more systematic manner since the 1980s — as well as in Italian, Portuguese, and Brazilian scholarly communities, as noted.

The primary objective of the article was to outline the formative context of this fable and, simultaneously, to demonstrate the relevance and impact of this erroneous theoretical narrative on the life of Kantorowicz and on the Movement itself. The latter was structurally shaped through engagement with, and inspiration from, specific theoretical narratives, particularly those advanced by traditional authors within the domain of private law, albeit with diverse proposals. Although this perspective is necessarily limited, it appears to be significant and will be further developed in greater depth and detail in subsequent research.

References

AUER, Marietta. Der Kampf um die Wissenschaftlichkeit der Rechtswissenschaft: Zum 75. Todestag von Hermann Kantorowicz. *Zeitschrift für europäisches Privatrecht*, n° 4, 2015.

BÜLOW, Oskar. *Gesetz und Richteramt*. Leipzig: Verlag von Dunker & Humblot, 1885.

CARTER, Frank Kantorowicz. Gustav Radbruch and Hermann Kantorowicz: two friends and a book – Reflections on Gnaeus Flavius ‘Der Kampf um die Rechtswissenschaft’ (1906). *German Law Journal*, vol. 7, n. 7, 2005.

EHRlich, Eugen. *Freie Rechtsfindung und freie Rechtswissenschaft*: Vortrag gehalten in der Juristen Gesellschaft in Wien am 4. März 1903. Leipzig: Hirschfeld, 1903.

FLAVIUS, Gnaeus. *Der Kampf um die Rechtswissenschaft*. Heidelberg: Carl Winter’s Universitätsbuchhandlung, 1906.

HESPANHA, António Manuel. *Cultura jurídica europeia: síntese de um milénio*. Coimbra: Almedina: 2012.

KANTOROWICZ, Hermann. Rechtswissenschaft und Soziologie. In: *Verhandlungen des 1. Deutschen Soziologentages vom 19. Bis 22. Oktober 1910 in Frankfurt am Main*. Frankfurt am Main: Sauer u. Auvermann, 1910.

KANTOROWICZ, Hermann. *Die Contra-legem-Fabel*. Berlin: C. Heymanns, 1911.

KANTOROWICZ, Herman U.; PATTERSON, Edwin W. Legal science: a summary of its methodology. *Columbia Law Review*, vol. 28, n. 6, jun./1928.

KELSEN, Hans. *Autobiografia*. Bogotá: Digiprint editores e.u., 2008.

KLEIN, Franz. Der Kampf um die Rechtswissenschaft. *Allgemeine Österreichische Gerichtszeitung*, n. 265, 1906.

LARENZ, Karl. *Metodologia da ciência do direito*. Lisboa: Fundação Calouste Gulbenkian, 1997.

LOSANO, Mario G. *Sistema e estrutura no direito*, volume 2: o Século XX. São Paulo: Wmf Martins Fontes, 2010, p. 135.

MAIA, R.P.; MAIA, A.P. O Movimento do Direito Livre e a possibilidade do julgamento contra legem. *Revista Videre*, vol. 12, n. 24, 2020.

RADBRUCH, Gustav. *Der Innere Weg: Aufriß meines Lebens*. Göttingen: Vandenhoeck & Ruprecht, 1961.

SCHMIDT, Katharina Isabel. *The Law that we feel living within us: German jurists and the search for "life" in modern legal science, 1900-1946*. 360f. Dissertation (Doctorate in Philosophy) – Department of History, Princeton University, New Jersey, 2021.

SEINECKE, Ralf. Ehrlichbilder: Freirecht, Rechtssoziologie und Rechtspluralismus Zum 100. Todestag von Eugen Ehrlich. *ZEUP – Zeitschrift für Europäisches Privatrecht*, 2022.

SILBERG, Sebastian. *Hermann Kantorowicz und die Freirechtsbewegung*. Berlin: Logos, 2005.

STRECK, Lenio Luiz. *Dicionário de hermenêutica: 50 verbetes fundamentais da Teoria do Direito à luz da Crítica Hermenêutica do Direito*. Belo Horizonte: Casa do Direito, 2020.

UNGER, Joseph. Der Kampf um die Rechtswissenschaft. *Allgemeine Österreichische Gerichtszeitung*, n. 296, 1906.

ZITELMANN, Ernst. *Lücken im Recht*: Rede gehalten bei Antritt des Rektorat der Rheinischen Friedrich-Wilhelms-Universität zu Bonn am 18. Oktober 1902.

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