

Book Review

Tommaso Dalla Massara, *Il consenso annichilito, La critica radicale del contratto in Siegmund Schlossmann* (Bologna: Società Editrice il Mulino, 2021) 160 pp, ISBN: 9788815292872.

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1 A Forgotten Revolutionary

One can still reap rich fruits from the plants of 19th century jurisprudence although not everyone is willing to muster the necessary strength for its cultivation. Unfortunately, in Germany in particular, many have forgotten the authors and works from whose reputation German-language jurisprudence still draws today. For this reason alone, Tommaso Dalla Massara has already earned merit with his recently published book: ‘Annihilated Consensus. The Radical Criticism of Contract in Siegmund Schlossmann’.¹ He turns a spotlight on Siegmund Schlossmann, whose work ‘Contract’,² published in 1876, has lost none of its radicalism or originality over the last one hundred and fifty years. This holds true not only for Schlossmann’s criticism of the concept of contract but also for his proposal of a new jurisprudence based on the ‘awareness of the law’ (*Rechtsbewusstsein*) as a source of law. On this new ground, Schlossmann developed a principle of liability for the culpable violation of legitimate expectations, ultimately aiming to reconstruct contractual liability.

Dalla Massara focusses on the first book of ‘Contract’, in which Schlossmann presented his ‘Criticism of the Concept of Contract’ (‘Kritik des Vertragsbegriffes’) (p. 13 n. 1). The Italian scholar provides an essential key for reading Schlossmann with his observation that the critic interweaved two argumentative levels in his work (‘il discorso di Schlossmann si sviluppa intrecciando essenzialmente due piani argomentativi’; p. 20). On the one hand, the attack is directed at the idea of a meeting or even merging of the minds of the contracting parties. Thereby, Schlossmann challenged the regime of contract formation, the details of which were highly disputed in Roman ‘Common law’ (*Gemeines Recht*) and which are dealt with quite differently by the various domestic legal systems (such as by the mailbox rule under English

¹ T. Dalla Massara, *Il consenso annichilito. La critica radicale del contratto in Siegmund Schlossmann* (Bologna: Società Editrice il Mulino, 2021). See also the reviews by M. Grondona, *Rivista trimestrale di diritto e procedura civile* 76 (2022) 634–639, and F. Mazzarella, *Annali del seminario giuridico* 65 (2022) 327–334.

² S. Schlossmann, *Der Vertrag* (Leipzig: Breitkopf und Härtel, 1876).

Common law). Schlossmann linked this criticism of contract as a *technique* of obligation to a more fundamental attack on the will of the parties as the *reason* of obligation. This led him to his conclusion that the concept of contract was ‘completely worthless’.³

2 Dalla Massara’s Reading

In his reflections on Schlossmann, Tommaso Dalla Massara takes up various aspects of the work. As a historian of Roman law and civil law scholar, he traces the problem of a general concept of contract from the Roman jurists to modern Italian civil studies. The focal point of his reflections, however, is the classification of Schlossmann in a larger intellectual framework. Dalla Massara characterises Schlossmann as an exponent of a ‘negative way of thinking’ (‘negatives Denken’, pp. 62–63) related to that of his contemporary Friedrich Nietzsche (p. 14 and *passim*). Emphasising the destructive aspect of Schlossmann’s work (e.g. p. 61), Dalla Massara contrasts it with a *zeitgeist* which sought to construct, be it in the field of the nation, the economy or the legal system and there in particular with regard to the concept of contract: ‘l’esigenza era quella di costruire, presto e nel presente’ (p. 18). Since the jurists dubbed contract *lex contractus* and thus attributed law-like force to it, Schlossmann casted doubts not only on the contract but also on the legal order and the basis of polity (pp. 39–47). For this argument, it might have been useful to focus more on the doctrine of social contract, according to which the legitimacy of political order depends on contract.

As the title ‘il contratto annichilito’ already suggests, Dalla Massara assigns Schlossmann to legal nihilism. The author thereby uses a category which was firmly established in Italy by Natalino Irti.⁴ Elsewhere, it is mainly used with regard to positions on public international law. In Germany, however, the term is not very common although Irti sees Nietzsche at the beginning of this school of thought. Nietzsche wrote in ‘Human, all too human’ in 1878: ‘Where, however, law is no longer tradition, as it is the case with us, it can only be *commanded*, imposed by constraint; none of us any longer possesses a traditional sense of law, so we have to put up with *arbitrary law*, which is the expression of the necessity of the fact that there *has to be* law.’⁵

³ Schlossmann, n. 2 above, 7: ‘völlig werthlos’.

⁴ See N. Irti, *Nichilismo giuridico* (Rome and Bari: Editori Laterza, 2005).

⁵ Aphorismus 459: ‘Wo aber Recht nicht mehr, wie bei uns, Herkommen ist, da kann es nur befohlen, *Zwang* sein; wir haben alle kein herkömmliches Rechtsgefühl mehr, deshalb müssen wir uns *Willkürsrechte* gefallen lassen, die der Ausdruck der Notwendigkeit sind, daß es ein Recht *geben müsse*’; English translation by Hollingdale, *Human, all too human* (Cambridge: Cambridge University Press, 1996); Italian translation by M. Olivieri, cited by Dalla Massara on p. 137: ‘Ma dove il diritto non è più, come da noi, tradizione, può essere solo imposto, solo *costrizione*; noi tutti non abbiamo più un senso tradizionale del diritto, perciò dobbiamo accontentarci di *diritti arbitrari*, che sono espressione della *necessità che esista un diritto*’.

At this point, it is perhaps noteworthy to point out how Nietzsche deals with the binding nature of promises in his *Genealogy of Morals* published in 1878: the ability to promise appears to him as an essential attribute of the human will. See the beginning of the second treatise: 'To breed an animal with the prerogative to *promise* – is that not precisely the paradoxical task which nature has set herself with regard to humankind? [...] And precisely this necessarily forgetful animal, in whom forgetting is a strength, representing a form of *robust* health, has bred for himself a counter-device, memory, with the help of which forgetfulness can be suspended in certain cases, – namely in those cases where a promise is to be made: consequently, it is by no means merely a passive inability to be rid of an impression once it has made its impact, nor is it just indigestion caused by giving your bonded word on some occasion and finding you cannot cope, instead it is an active *desire* not to let go, a desire to keep on desiring what has been, on some occasion, desired, really it is the *will's memory*: so that a world of strange new things, circumstances and even acts of will may be placed quite safely in between the original 'I will', 'I shall do' and the actual discharge of the will, its *act*, without breaking this long chain of the will'.⁶ Nietzsche argues in this work that cruel punishments and rituals enabled humanity to acquire conscience and memory. This seems to rehabilitate the traditional 'sense of law' (*Rechtsgefühl*) to a certain extent. Even if Nietzsche did not grant the binding nature of promises a foothold in reason or justice, at least he did not see it as an arbitrary commandment. Was Schlossmann perhaps more nihilistic than Nietzsche?

In the following, I would like to briefly address the two levels of Schlossmann's criticism of contract, i.e. the technical and the antivoluntaristic. From my own German perspective, I intend to frame Schlossmann's contribution in the discussions which neither began nor ended with him. Finally, I would like to briefly discuss the third book of 'Contract', which is entitled 'Infringement and Fault in Legal Relationships' ('Verletzung und Verschulden in Rechtsverhältnissen'). Here, Schlossmann proposed a

6 'Ein Thier heranzüchten, das *versprechen* darf – ist das nicht gerade jene paradoxe Aufgabe selbst, welche sich die Natur in Hinsicht auf den Menschen gestellt hat? ist es nicht das eigentliche Problem vom Menschen? [...] Eben dieses nothwendig vergessliche Thier, an dem das Vergessen eine Kraft, eine Form der *starken* Gesundheit darstellt, hat sich nun ein Gegenvermögen angezüchtet, ein Gedächtniss, mit Hülfe dessen für gewisse Fälle die Vergesslichkeit ausgehängt wird, – für die Fälle nämlich, dass versprochen werden soll: somit keineswegs bloss ein passives Nicht-wieder-los-werden-können des einmal eingeritzten Eindrucks, nicht bloss die Indigestion an einem ein Mal verpfändeten Wort, mit dem man nicht wieder fertig wird, sondern ein aktives Nicht-wieder-los-werden-wollen, ein Fort-und Fortwollen des ein Mal Gewollten, ein eigentliches *Gedächtniss des Willens*: so dass zwischen das ursprüngliche "ich will" "ich werde thun" und die eigentliche Entladung des Willens, seinen Akt, unbedenklich eine Welt von neuen fremden Dingen, Umständen, selbst Willensakten dazwischengelegt werden darf, ohne dass diese lange Kette des Willens springt'. Translation by K. Ansell-Pearson and C. Diethe, *On the genealogy of morality' and other writings* (Cambridge: Cambridge University Press, 2016).

principle of liability to replace what the concept of contract had hitherto provided. Thus, the critic showed a constructive side.

3 Criticism on Consensus as the Technique of Obligation

Schlossmann's criticism of the technique of contract formation must be seen against the background of the more fundamental question whether it is really necessary for several people to work together in order for a liability to arise. Instead, the declaration by the later debtor of his intention to be bound, i.e. the mere promise, might be sufficient to establish his liability, even without acceptance by the recipient.⁷ This was argued by Heinrich Siegel in his work on 'Promise as Reason for Obligation'⁸ in 1873.⁹ Siegel thus justified the irrevocability of contractual offers and used the binding force of unilateral promises to lay a theoretical foundation for unilateral contracts (*Auslobungen*), for letters of exchange and other securities (*Wertpapiere*), and for the contract in favour of third parties.

Siegel's influence was significant. When drafting the *Bürgerliches Gesetzbuch*, it was nevertheless decided not to include the binding nature of unilateral promises as a rule. Yet, the commission adopted some of his concrete solutions and thus allowed it in exceptional cases. Since then, the Italian *Codice civile* in 1942 has recognised the binding effect of unilateral legal acts, at least in certain cases (Article 1987), and even under the French *Code civile* this no longer seems to be excluded after the recent reform of the law of obligations (see Article 1100 and Article 1100-1). According to the Restatement (Second) of Contract, unilateral promises can be binding if relied upon (§90). The Principles of European Contract Law and the Draft Common Frame of Reference have even turned to the opposite principle: They declare promises which

7 This problem – the problem of unilateral promise – is to be distinguished from the problem of consideration. I take the liberty of referring to two articles for details and references: G. Albers, 'Zum Versprechen als Verpflichtungsgrund in der Spätantike: Urkunden, Kirchengväter und der westgotische Gaius' *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 135 (2018) 334–363; 'Versprechen und Vertrag in Rechtsgeschichte und Rechtsvergleich', in G. Albers, J. Hast and K. Kaesling (eds), *Wortgebunden. Verbindlichkeit von Versprechen in Recht und Literatur* (Frankfurt am Main: Vittorio Klostermann, 2021) 29–88; abridged Spanish version: 'Promesa y Contrato', in J. Adame Goddard and L. Velázquez Arroyo (eds), *Estudios de derecho romano y derecho civil desde una perspectiva histórica, comparativa y práctica* (México: Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, Serie Doctrina Jurídica, núm 9582022) 19–62.

8 H. Siegel, *Das Versprechen als Verpflichtungsgrund im heutigen Recht. Eine germanistische Studie* (Berlin: Franz Vahlen, 1873).

9 Schlossmann, n. 2 above, 87.

are intended to bind without acceptance to be binding (Article 2:107 PECL; Article II – 1:103(2) DCFR). Apparently, the criticism of the technique of consensus prevails; time has proven Siegel right – and Schlossmann with him.¹⁰

Schlossmann certainly recognised that he was close to Siegel in his technical criticism of contract. Probably precisely for this reason, he felt compelled to make clear what distinguished both of them: that Siegel attributed the force of the unilateral promise to the will, while Schlossmann searched for a different basis. He explained: ‘These remarks are also directed against Siegel, whose view differs from the prevailing one only in that it grants binding force to the ‘will to make oneself a debtor’ even without acceptance.’¹¹

4 Criticism of the Will as Foundation of Obligation

The fact that Schlossmann distanced himself from Siegel shows that he himself attached decisive importance to the second level of his critique. It was directed at the voluntarist foundation of contractual obligation. While medieval jurists had constructed a general concept of contract from the Roman sources with the help of the notion of *causa*,¹² not these scholars, but later natural law thinkers had developed the attacked ‘dogma of the binding force of the will’. It is important to note at the outset that Schlossmann did not reject party autonomy per se: he allowed the will to govern not only testaments but inter vivos, interestingly enough, for example, to govern the transfer of property.¹³ He did not go along with the parallelisation of obligation and transfer of ownership.¹⁴ His attack aimed in particular at the voluntaristic justification of the obligatory effect of contract. Just like for his critique on the technique of obligation, Schlossmann could rely on a role model for his second, more fundamental

¹⁰ It is this trend that I examine in the article on promise and contract, n. 7 above, where details and evidence can be found.

¹¹ Schlossmann, n. 2 above, 88 n. 1: ‘Diese Ausführungen sind auch gegen Siegel gerichtet, dessen Ansicht von der herrschenden sich nur dadurch unterscheidet, dass sie dem “Willen sich zum Schuldner zu machen” auch ohne Accept obligatorische Kraft zuerkennt’.

¹² Recently on this, M. Schermaier, ‘Die Rolle der causa bei der Überwindung des Typenzwangs durch die mittelalterlichen Juristen’, in G. Albers, F. P. Patti and D. Perrouin-Verbe (eds), *Causa Contractus. Auf der Suche nach den Bedingungen der Wirksamkeit des vertraglichen Willens/Alla ricerca delle condizioni di efficacia della volontà contrattuale/À la recherche des conditions de l’efficacité de la volonté contractuelle* (Tübingen: Mohr Siebeck, 2022) 97–152.

¹³ Schlossmann, n. 2 above, 92–94.

¹⁴ Famously, H. Grotius, *De iure belli ac pacis*, liber ii, caput xi, §i 3; on this, K. Kowalski, *Das Vertragsverständnis des Hugo Grotius. Zwischen Gerechtigkeit, Treue und Rechtsübertragung* (Vienna and Cologne: Böhlau, 2022) 294–296. For a modern proposition see P. Benson, *Justice in Transactions. A Theory of Contract Law* (Cambridge, Massachusetts: Harvard University Press, 2019).

criticism as well. This role model was provided by Friedrich Liebe, who had published his monograph on 'The Stipulation and the Simple Promise'¹⁵ in 1840.

According to Liebe, the simple (accepted) promise of modern law produced a binding obligation by virtue of a positive legal principle as a so-called formal legal act, just like the stipulation did under Roman law, but its effect depended on a *causa* outside the mere agreement.¹⁶ Liebe had categorically rejected that consensus itself could result in any binding force: 'If, in natural law, one argues for or against the validity of contracts as such, and in so doing takes the contract per se for an accepted promise, reaching any tenable result is out of the question. The contract in that sense does not present any characteristic from which a validity or invalidity could be generally proven. [...] The promise itself is no different from any indifferent conversation. It contains the declaration of a party's will. But everyone can change his will until it becomes action, and what happens cannot be undone. It is not conceivable what difference it shall make that the will was directed at something beneficial for another, and that the latter agreed to it. To make and pronounce resolutions which one does not carry out may be contrary to the moral law and violate the *constantia*, but it does not violate the legal law. [...] The actual moment on which a legal validity can be based therefore lies outside the promise itself, and is to be sought in the circumstances under which it appears in the individual case. [...] Then, in addition to the simple will, we also have a legal ground for the same.'¹⁷ Liebe

15 F. Liebe, *Die Stipulation und das einfache Versprechen. Eine civilistische Abhandlung* (Braunschweig: G. C. E. Meyer, 1840).

16 On the doctrine of the formal - or abstract - contract, which originated from Friedrich Carl von Savigny and Liebe and was led to success by Otto Bähr, with whom German jurisprudence definitely and radically turned away from the *causa* as a requirement for the validity of the contract and instead subjected the contract to control by the law of unjust enrichment, see G. Albers, 'Die causa vom Code civil zum BGB: Zuwendungen tragen statt Verpflichtungen begründen', in Albers, Patti and Perrouin-Verbe (eds), *Causa contractus*, n. 12 above, 263–321.

17 Liebe, n. 15 above, 74–78: 'Wenn man im Naturrechte für oder gegen die Gültigkeit der Verträge an sich streitet, und dabei den Vertrag schlechthin für ein angenommenes Versprechen nimmt, so ist an die Erreichung irgend eines haltbaren Resultats nicht zu denken. Der Vertrag in jenem Sinne bietet überall kein Merkmal dar, aus welchem sich eine Gültigkeit oder Ungültigkeit allgemein nachweisen ließe. [...] Das Versprechen an sich unterscheidet sich von einem gleichgültigen Gespräche nicht. Es enthält die Erklärung des Willens einer Partei: seinen Willen aber kann Jeder ändern, bis er zur That geworden, und das Geschehene nicht ungeschehen zu machen ist. Was hiervon der Umstand, daß der Wille auf etwas einem Andern Vortheilhaftes gerichtet war, und dieser sich damit einverstanden erklärt hat, ändern soll, ist nicht einzusehen. Es mag dem Sittengesetz widersprechen, und die constantia verletzen, Entschlüsse zu fassen und auszusprechen, die man nicht ausführt, aber das Rechtsgesetz ist dadurch nicht verletzt. [...] Das eigentliche Moment, auf welchem eine rechtliche Gültigkeit beruhen kann, liegt sonach außerhalb des Versprechens selbst, und ist in den Verhältnissen zu suchen, unter welchen es im einzelnen Fall erscheint. [...] Alsdann haben wir außer dem einfachen Wollen auch noch einen Rechtsgrund für dasselbe'.

had found this *causa* in the consideration provided or promised in exchange for the promise or in some form of reliance on the promise.¹⁸

Liebe's work had served as the starting point for Schlossmann's dissertation on the 'Causa of Obligatory Contracts', published in 1868. Here, Schlossmann had still rejected Liebe's criticism of the contract, but he had primarily accused him of inconsistency: if the promise remained non-binding, it is hard to see why acting in reliance on it should change anything. Schlossmann had not thought that Liebe's construct had fitted contract: according to Liebe, performance was not actually owed, but non-performance imposed an obligation to compensate like a tort – Schlossmann came closer to this idea later on. In particular, Schlossmann had argued against Liebe that the legal validity of contracts could not be determined at all by deductions from reason.¹⁹ When writing 'Contract', Schlossmann considered Liebe an ally and distanced himself from his earlier criticism: 'The fact that I polemicalised against this passage in my treatise [...] is explained by the fact that I myself still believed in the dogma of the binding power of the will at that time.'²⁰ However, it is remarkable that Schlossmann had already reached the same conclusion as Liebe in 'Causa' with regard to so-called 'abstract contracts' (*abstrakte Verträge*): By virtue of the will alone, contracts could not bind categorically, i.e. without regard to whether a *causa* exists. Such an effect, according to Schlossmann, could only be produced by virtue of a positive legal principle.²¹ With regard to the particularly controversial question concerning abstract contracts, Schlossmann had thus already anticipated his later scepticism of voluntarism in his discussion with Liebe.

¹⁸ Liebe, n. 15 above, 78–79.

¹⁹ S. Schlossmann, *Zur Lehre von der Causa obligatorischer Verträge* (Breslau: Jungfer, 1868) 26–27.

²⁰ Schlossmann, n. 2 above, 81 n. 1: 'Dass ich gegen diese Stelle in meiner Abhandlung [...] polemisirte, erklärt sich daraus, dass ich damals selbst noch an das Dogma von der bindenden Kraft des Willens glaubte'.

²¹ Schlossmann, n. 19 above, 87: 'The will cannot possibly abstract from its own content – and the one constituent part of it is the *causa*. If I only want to owe for the sake of the *causa*, I cannot at the same time want to owe without regard to the *causa*. Only the law may disregard the *causa* in determining the requirements for the arising of an obligation. An abstract obligation can [...] only arise on the basis of a legal principle which attaches obligatory effect to a certain form, without regard to the will of the parties.'; 'Der Wille kann unmöglich von seinem eigenen Inhalte – und der eine Bestandtheil desselben ist die *causa* – abstrahiren. Will ich nur um der *causa* willen schulden, so kann ich nicht zugleich schulden wollen ohne Rücksicht auf die *causa*. Nur das Gesetz kann bei der Normirung der Voraussetzungen für die Entstehung einer Obligation von der *causa* absehen. Eine abstracte Obligation kann [...] nur auf Grund eines Rechtssatzes entstehen, welcher an eine bestimmte Form, ohne Rücksicht auf den Parteiwillen, obligirende Wirkung knüpft'. However, Schlossmann conceived of the *causa*, which for Liebe was an external circumstance, as an aspect of the will: Schlossmann, n. 19 above, 49.

The criticism of the will as the foundation of the contractual obligation has not prevailed in Germany. Shortly before Schlossmann's 'Contract', Rudolf von Jhering fiercely pleaded for the autonomy of the will at the ninth German Jurists' Conference in 1870, and it was decided: 'A contract directed exclusively at the 'owing of a debt' or at the performance of an object without stating the reason for the obligation is enforceable'.²² The editors of the *Bürgerliches Gesetzbuch* rejected Schlossmann's criticism of contract and considered the will to be an essential element of every contract – despite differing views between Albert Gebhard and Franz Philipp von Kübel on how private will and the legal system interact to give effect to the contract. Even the binding nature of abstract promises was codified in the *Bürgerliches Gesetzbuch*: The first commission wanted to attribute effect to declarations that something was owed, even if such a declaration did not specify the reason of the debt. But they did not want to commit themselves regarding the dogmatic construction. Instead, the second commission chose to permit the abstract contract, in which 'the promise alone shall establish the obligation'.²³ They thus acknowledged the obligatory force of the bare will.²⁴

Doubts about the obligatory power of the will, however, have not been silenced. In the Anglo-Saxon world, critical contract theory is usually traced back to Lon Fuller and William Perdue's 1936 article on reliance damages. They argued that the claim for damages for breach of contract, calculated according to the performance interest, gave the creditor something he had not had before. Thus, they denied that the performance expectation legitimised by the contract had asset value, i.e. they denied the obligatory force of the contract. Instead, only the loss of reliance could be compensated, for which the interest in fulfilment could at best serve as an approximation.²⁵ Later, Patrick Atiyah expressed the thesis that it is not the obligation that arises from contract, but that lawyers assume a contract when an obligation exists. According to him, liability is linked to induced reliance (tort) and the reception of goods and services (unjust enrichment).²⁶

For German dogmatic, too, the question arises as to whether it does not overload the will. For example, distinguishing between a legal act and a mere favour is regularly

22 'Ein ohne Angabe des Schuldgrundes ausschließlich auf das "Schuldig sein" oder auf die Leistung eines Gegenstandes gerichteter Vertrag ist klagbar'.

23 See in § 780 BGB: 'das Versprechen die Verpflichtung selbständig begründen soll'.

24 To this end, they even invoked 'old German legal consciousness' (*altdeutsches Rechtsbewußtsein*). – For references and details, see Albers, n. 16 above, in particular 304–310, 312–316.

25 L. L. Fuller and W. R. Perdue, 'The Reliance Interest in Contract Damages' *The Yale Law Journal* 46 (1936/1937) 52–96 (Part I), 373–420 (Part II).

26 P. S. Atiyah, 'Contracts, Promises and the Law of Obligations', in *Essays on Contract* (Oxford: Oxford University Press, 1986) 10–56 (originally in *Law Quarterly Review* 1978). Note the proximity also to Liebe's remarks, n. 18 above.

presented as a problem of interpretation, but in legal practice it is done based on objective criteria. The problem of the normative significance of contract types, especially those not codified in a statute, indicates as well that the legal system assesses not only the parties' intentions, but – to a considerable extent – also the substantive appropriateness of an agreement. Italian doctrine, with the *causa (concreta)* and the requirement that atypical contracts must aim at the realisation of interests which deserve legal protection (Article 1322(2) Codice civile), has other points of reference for dealing with these problems.²⁷ In order to precisely delimit the binding effect of the given word and at the same time to provide a firmer justification for it, the attempt to better explain it remains justified.²⁸

5 Schlossmann's Own Approach

What did Schlossmann himself put in place of the contract that he believed to have destroyed as a source of obligation? The third 'book' of his work, entitled 'Infringement and Fault in Legal Relationships' ('Verletzung und Verschulden in Verkehrsverhältnissen'), gives insight into this.

Fuller and Perdue saw Schlossmann as a representative of a 'psychological' justification of the binding nature of the promise. 'This answer would run something as follows: the breach of a promise arouses in the promisee a sense of injury. This feeling is not confined to cases where the promisee has relied on the promise. Whether or not he has actually changed his position because of the promise, the promisee has formed an attitude of expectancy such that a breach of the promise causes him to feel that he has been "deprived" of something which was "his". Since this sentiment is a relatively uniform one, the law has no occasion to go behind it. It accepts it as a datum and builds its rule about it.'²⁹ The American authors referred to the beginning of Schlossmann's third book, where he presented his conclusions: '(1)

27 For Italian law, I rely mainly on the following contributions in *Causa contractus* (Albers, Patti and Perrouin-Verbe (eds), *Causa contractus*, n. 12 above) A.M. Garofalo, 'Itinerari della causa dal Code civil del 1804 al Codice civile del 1942' 201–245; F. Bartolini, 'La causa del contratto dal Codice civile del 1942 ai giorni nostri' 247–261; A. M. Garofalo and F. P. Patti, 'La causa tra fisiologia e patologia del contratto' 455–498.

28 It can only be from my personal perspective when I refer at this point to two approaches: On the one hand, the mystical nature of the act of obligation is affirmed by H. Grefrath, "Ver-sprechen": Sprache und Bindung im Recht zwischen Versprechen und Magie', in Albers, Hast and Kaesling (eds), *Wortgebunden*, n. 7 above, 321–345. On the other hand, the contract is subjected to a discourse-theoretical justification by B. Lomfeld, *Die Gründe des Vertrages* (Tübingen: Mohr Siebeck, 2015); B. Lomfeld, 'Versprechen als Vertrag. Skizze eines rechtlichen Expressionismus in 20 Bilder', in Albers, Hast and Kaesling (eds), *Wortgebunden*, n. 7 above, 347–372.

29 Fuller and Perdue, n. 25 above, 57 with n. 8.

The person to whom an “express” or “implied” promise has been made regards the non-performance of his promise as a pecuniary loss. The suffering caused to someone by the non-performance of a promise is in no way different from that which someone feels over the destruction or theft of a thing belonging to him, and there is no reason to regard these different cases as separate legal cases. The reason why the maker of an express or “implied” promise, and he in particular, is considered bound to remedy the suffering felt by the promisee over the non-performance, lies in the general principle contained in our immediate awareness of law, and because it does not require proof, it is to be considered an axiom: anyone who culpably injures another person is obliged to compensate for the damage.³⁰

Fuller and Perdue objected to such an approach, arguing that law does not enforce all promises and that the outrage of the disappointed is not a suitable criterion for enforceability.³¹ But Schlossmann did not simply focus on the personal feelings of the specific recipient of the promise. Rather, he found an objective corrective in the judgement of a reasonable man (*bonus vir*): ‘In all cases where, according to the judgement of a *bonus vir*, a promise obliges, the non-performing promisor is subject to the disapproving judgement of honest men, in other words, he is culpable.’³²

As a result, Schlossmann replaced conventional contractual dogmatics with ‘a question reflecting on the infringement of assets and on the moment of guilt’,³³ namely: ‘Under what conditions must a person consider the non-performance of a legitimate expectation aroused in him by the promise or other conduct of another as an

30 Schlossmann, n. 2 above, 288–289: ‘(1) Derjenige, dem ein “ausdrückliches” oder “stillschweigendes” Versprechen gegeben worden ist, empfindet die Nichterfüllung seiner Zusage wie eine Vermögensbeschädigung. Das Leiden, welches jemandem dadurch verursacht wird, dass ihm eine versprochene Sache nicht geleistet wird, ist in nichts von demjenigen verschieden, welches jemand über die Zerstörung oder die Entwendung einer ihm gehörigen Sache empfindet, und es giebt keinen Grund, diese verschiedenen Fälle als juristisch zu sondernde Erscheinungen aufzufassen. (2) Der Grund, warum der Urheber eines ausdrücklichen oder “stillschweigenden” Versprechens, und gerade er zur Beseitigung des vom Promissar über die ausbleibende Leistung empfundenen Leides verbunden erachtet wird, liegt in dem allgemeinen, in unserem unmittelbaren Rechtsbewusstsein enthaltenen, und weil des Beweises nicht bedürftig, als ein Axiom anzusehenden Grundsatz: Wer schuldhafterweise einen Anderen verletzt, ist zur Wiederausgleichung des Schadens verpflichtet’.

31 Fuller and Perdue, n. 25 above, 57–58.

32 Schlossmann, n. 2 above, 325: ‘In allen Fällen, wo nach dem Urtheile eines *bonus vir* ein Versprechen verpflichtet, da trifft den nichtleistenden Promittenten das missbilligende Urtheil redlicher Männer, fällt ihm mit andern Worten ein Verschulden zur Last’. – On the reasonable man and its relation with the *bonus vir* see M. J. Schermaier, ‘From Meticulous Guide to Average Joe: The Reasonable Man – German Style’, in *Modelli teorici e metodologici nella storia del diritto privato*, vol. 4 (Naples: Jovene Editore 2011) 419–442.

33 Schlossmann, n. 2 above, 338: ‘eine auf die Vermögensverletzung und das Schuldmoment reflectirende Fragestellung’.

infringement of assets?’³⁴ The only way to an answer is ‘an analysis of our awareness of law and our economic concepts and affections, and the science of property law therefore a psychology directed at a specific side of our mental activity.’³⁵

With this, Schlossmann took up the programme he had developed in the second book (‘On the Task and Method of the Science of Property Law’, ‘Ueber die Aufgabe und Methode der Wissenschaft des Vermögensrechtes’): of a jurisprudence which serves justice by exploring the ‘awareness of law’ (*Rechtsbewusstsein*) which is the supreme source of law. This approach seems quite optimistic, and some might accuse it of naivety. Apparently, Schlossmann relied on a universal ‘awareness of law’ that can be scientifically studied, described, and rationalised for the application in individual cases. He thus undertook a new construction himself, of which, however, he only executed basic elements.³⁶

Can one nevertheless draw parallels from Schlossmann’s to a nihilistic legal thinking? The fact that he himself did not want to judge, but to observe the judgement of others, showed firstly little confidence in the ability to make generally valid judgements on a normative level. In this sense, one could speak of an escape from – annihilated? – jurisprudence into the empirical sciences. Schlossmann considered the task to be in the field of psychology.³⁷ More precisely, he assigned the ‘psychological study of economic affections’ (‘psychologische Erforschung der wirtschaftlichen Affektionen’) to ‘economic theory’ (‘Wirtschaftslehre’), which, however, was to be pursued by a jurist in the same way as anatomy was to be pursued by a medic.³⁸ Secondly, the reference from one normative judgement to another ran the risk of becoming circular by back-reference. This is because the *bonus vir*’s judgement on whether a promise is binding is itself normative. What criteria should he use as a guide? The experienced man will only trust in what he can trust in. This, in turn, may depend on the law. Schlossmann did not address that problem, and this is a possible criticism against his approach: in borderline cases which are difficult to decide, the perspective can be trapped in a circular movement between *bonus vir* and legal order without finding a solution. Because Schlossmann accepted the judgment of the *bonus vir* without questioning his method and result, he could perhaps be accused of a tendency to settle for an arbitrary content of the law – similar to how a

34 Schlossmann, n. 2 above, 339: ‘Unter welchen Voraussetzungen muss jemand die Nichterfüllung einer durch das Versprechen oder das sonstige Verhalten eines Anderen in ihm erregten berechtigten Erwartung als Vermögensverletzung empfinden?’.

35 Schlossmann, n. 2 above, 341: ‘nur eine Analyse unseres Rechtsbewusstseins und unserer wirtschaftlichen Begriffe und Affektionen, und die Wissenschaft des Vermögensrechtes mithin eine auf eine specielle Seite unserer Seelenthätigkeit gerichtete Psychologie’.

36 Schlossmann, n. 2 above, 342.

37 See n. 35 above for the quotation of Schlossmann, n. 2 above, 341.

38 Schlossmann, n. 2 above, 341–342 n. 2.

legal nihilist may lose himself in the arbitrariness of positive legal provisions. Yet, Schlossmann claimed to be searching for justice, which he wanted to find in the ‘awareness of law’ (*Rechtsbewusstsein*), relying on scientific methods as was typical for his time. From my point of view, that does not seem nihilistic – even if there are certain affinities, to which Tommaso Dalla Massara has fortunately now drawn the attention which they well deserve.

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