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Research Paper

Methodology and Method in the Jurisprudence of the XIXTH Century

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ABSTRACT
Methodology is a reflection that (any) science performs on its own procedures, on the forms of thinking and means of knowledge which it employs. That reflection is performed in parallel to the practical application of science; in this case, that of jurisprudence. Thus, the methodology of jurisprudence is always that of a particular jurisprudence, that of a specific legal system. So, methodology does not only explain how to proceed, but also begs the question of value and the possible success of certain methods. This paper brings into discussion the traditional methodology and its development in the field of the nineteenth century positivism. The aim is to consider the successes and the limits of their proposals in the context of nowadays value-focused jurisprudence.

KEY WORDS
Methodology, Method, Jurisprudence, law, positivism

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I. METHODOLOGY AND METHOD IN THE JURISPRUDENCE

Legal methodology is not concerned with establishing fixed standards for applying legal norms, but rather with the procedure of a scientific-legal investigation, of a judgement or of the grounds of that judgement. Its role is to clarify the structures of thought and the forms of reasoning that are deployed when elaborating the evaluative yardsticks employed by judges in order to reach the fairest possible judgements in the field of the scope of the law and law.

The term 'method' signifies an orderly procedure of thought that is put into practice following certain steps, without there necessarily having to be any logically binding referral between them. Applied to the sciences of the spirit, the term 'method' underscores the character of dialogue, of text comprehension. A method is conceived as an orderly way of arguing certain points of view (without being a logically binding procedure). And all essential points of view should be taken into account in an orderly legal reasoning.

Indeed, jurisprudence is a science because it has developed methods that aspire to a rationally comparable knowledge of existing law. It is therefore a comprehensive science that, in a specific way, interprets the subject matter that it is given, namely, the legal norms and institutions of a positive law.

If legal science tells us what is law *hic et nunc*, this does not mean to say that it is capable of establishing principles of fairness 'per se'. These principles should be left to philosophers who can single out certain ones, but have to leave a specific case unresolved. Insofar as it has to do particularly with that application, with what is fair here and now, to wit, 'relatively fair', legal science (the dogmatic kind dealing with positive law) cannot dispense with examining the principles. Jurisprudence does not forfeit its scientific character owing to the fact that it has to make value judgements when applying rules. The particular contribution of jurisprudence is precisely the fact that it has created methods of 'value-focused thinking' and, with the help of such methods, has established the corresponding principles of what is right *hic et nunc*.

When referring to the problems of the structure and method of legal science, Theo Mayer-Maly[1] draws from the premise that only those principles free of value judgements are scientific, whereby it is necessary to

[1] Theo Mayer-Maly, Rechtswissenschaft (Munich: R. Oldenbourg Verlag, 1985).

distinguish between legal science and jurisprudence. If this is so, the essence of what has traditionally been called 'legal science' (legal dogma) does not lie in the field of science, but in that of jurisprudence, for the presence of value judgements in the majority of the concepts of legal dogma excludes uniqueness in comparison with other dogmas.

For Larenz,[2] the consideration of legal science as a science in the sense of the exact sort is not an important issue. The crucial aspect is that, owing to the 'non-applicability' of its concepts, jurisprudence has had to develop value-focused forms and methods of thinking, according to an orderly logical procedure, but which cannot facilitate an ultimate rigour or logically binding deductions. Nor does Larenz agree with Mayer-Maly's characterisation of interpretation criteria as relatively isolated maxims which, in part, contradict each other. However, Mayer-Maly himself qualifies this thesis when stating that the fact that a fixed hierarchy does not exist between criteria does not imply that they can be used discretionally.

There is a clear tension between the aspiration of judges to arrive at fair decisions and their link to the law and law imposed by the rule of law. Nonetheless, this link does not imply any irrationality in the formal logical dependence of the law. As a matter of fact, the fidelity to the law and the justice of the case are not in rigid opposition, but there are normally broad areas in which fair solutions can be arrived at within the legal framework.

The mission of jurisprudence is not only to understand linguistic expressions, but also to comprehend the normative meaning that they possess. 'To interpret' is a mediation through which the interpreter understands the meaning of a text that has given rise to problems. The conclusion arrived at is not logically binding, but a choice between different possibilities of interpretation, motivated by sufficient reasons.

It is precisely for this reason that jurisprudence is a science, for it problematises legal texts, that is, it examines them in relation to different possibilities of interpretation. Legal texts can be problematised in this way because they are written in a normal language, combined with specialised jargon, whose terms leave room for being freely interpreted. It would therefore be a mistake to consider that legal texts only need to be interpreted when they contain obscurities; rather, all legal texts are, in principle, susceptible to being interpreted. And how they should be interpreted is one of the fundamental questions of methodology. At any rate, the answer would be different, depending on whether a law, court ruling or legal business were involved.

The process of understanding is not linear, like a logical chain of conclusions. In the main, at the beginning of the process there is an assumption of meaning that it usually visible at first glance; the interpreter delves into the text with a 'pre-understanding' of its language and the matter at hand. Thanks to that pre-understanding, the interpreter can form an assumption of meaning. This is the way in which judges form a conviction of fairness.[3] All considered, some authors hold that this is incompatible with a connection to the law and to law applied by judges.[4]

The uniqueness of legal science and jurisprudence lies in the fact that they have to deal almost exclusively with evaluations. Judges constantly perform mediations that do not have the character of logically binding conclusions, but which are objective and can be demonstrable[5]. In sum, jurisprudence, in both its theoretical (dogma) and practical (law enforcement) dimensions, encompasses a thinking that, by and large, is value-focused. All in all, it is important not to lose sight of the fact that the evaluative nature of law enforcement takes second place when the assumption of the applicable rule has been conceptually established so that the proven fact only has to be subsumed to the assumption.[6]

A value-focused thinking in dogma is possible when the latter operates typologically and not conceptually. This gives rise to the need to elaborate classic cases and evaluative points of view of those types. It also involves the quest for sustaining legal principles and their exact scope of application. These principles are general assessment guidelines in relation to the idea of law, which still have not been converted into immediately applicable legal norms, but can offer grounds for justifying them.

[2] Karl Larenz, Metodología de la Ciencia del Derecho (Barcelona: Ariel Derecho, 1994), pp. 26-27 and 511-514.

[3] Josef Esser, Vorverständnis und Methodenwahl in der Rechtsfindung (Frankfurt am Main: Taschenbuch Verlag, 1972), p. 7.

[4] Karl Larenz, Festschrift für Ernst Rudolf Huber (Göttingen: Otto Schwartz Verlag, 1973), p. 291.

[5] Stig Jørgensen, Recht und Gesellschaft (Göttingen: Vandenhoeck & Ruprecht, 1970), p. 8.

[6] Karl Larenz, Metodología de la Ciencia del Derecho (Barcelona: Ariel Derecho, 1994), p. 205.

Theoretical jurisprudence not only plays an important role in the development of court jurisprudence. One of its most important tasks is precisely to discover legal problems that hitherto have not had a solution in existing law, which serves to guide a change in court jurisprudence and legislation. Indeed, the task of jurisprudence in the preparation of legislation is fundamental. Firstly, it reveals the legal character of those problems that may arise. In addition, it puts forward proposals that adapt to existing laws and offers legislators alternatives.

Value judgements cannot be compared, in the sense of personal stance taking, with value-focused thinking whose presence precisely reaffirms rationality in the analysis of the majority of problems in human life. Jurisprudence has created methods of value-focused thinking that can be equated with the methods of other sciences that, in principle, are completely free of value judgements.

The reason to which reference is often made to deny the cognitive value of jurisprudence is the transience of its object: positive law. This was the main argument deployed by Kirchmann.[7] It has since been shown that this reason can by no means be employed for all problems, for many of them are repeated over time, their form being the only aspect that varies. Jurisprudence strives to understand the specific legal ideas and guiding principles that underpin such answers to these same problems arising over time or seeks answers to any new problems that may arise.

II. TRADITIONAL METHODOLOGY AND ITS DEVELOPMENT IN THE FIELD OF NINETEENTH-CENTURY POSITIVISM: FROM SAVIGNY TO KELSEN

Traditional methodology is based on the doctrine that holds that the application of law is not essentially any different than the subsumption of a fact to the assumption of a legal norm. Thus, the resolution of a case is, in a way, programmed by the law. In this respect, judges are intellectuals who act methodically: their obligation is to apply the law and, as to the rest, they are exonerated from ethical demands as regards fair rulings.[8]

Savigny,[9] the founder of the historical school of law, distinguished between a historical and philosophical (systematic) interpretative elaboration of law, noting that the mission of interpretation was to reconstruct the idea expressed by the law, inasmuch as it was cognoscible on the basis of the law. The interpreter had to place himself in the shoes of the legislator and, in this way, allow his verdict to ensue artificially. For this purpose, interpretation had to contain three elements: logical, grammatical and historical. To which Savigny then added a fourth element: systematic. They were not four ways of interpreting, but different activities that should be performed together to arrive at an interpretation.

Right from the start, it was typical of Savigny to call for a combination of the historical and systematic methods. The former considers the genesis of each law precisely in a specific historical situation. The latter attempts to understand the totality of the legal norms and institutions underpinning them as a coherent whole. But while in his early writings Savigny understood the legal system exclusively as a system of legal norms that had a logical link between them (special rules should be considered as deriving from general rules), his mature works were more grounded in the organic connection of legal institutions which existed in the general consciousness. Particular legal norms, the mature Savigny opined, were only subsequently deduced by abstraction from legal institutions. In this way, the close link was broken literally pursuant to the law that he defended as a young man, for the sake of a greater consideration of the purpose of the law and the connection of meaning stemming from the full contemplation of the legal institution.

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[7] In Larenz, Metodología, p. 26, where the author cites Kirchmann's well-known phrase, 'Three correcting words of the legislator and whole libraries become waste paper.'

[8] One of the main critiques of traditional methodology was performed by Martin Kriele, Theorie der Rechtsgewinnung (Berlin: Duncker & Humblot, 1976).

[9] Savigny's legal methodology is set out in the Methodologie Winter 1802 (Methodologie1802/1803) (early writings), noted down by Jakob Grimm and published by Wesenberg in 1951. Another ample presentation of his methodology can be found in his El sistema del Derecho Romano actual (Madrid: Góngora y cía., 1879). For a more recent Spanish translation, see Friedrich Karl von Savigny, Metodología jurídica (Buenos Aires: Depalma, 1979).

Savigny's influence was perceived above all in his historical perspective and in the idea of a system with the meaning of a scientific system formed by legal concepts; this idea marked the advent of the so-called 'jurisprudence of concepts', for which credit should not be given to Savigny, or only with reservations.[10]

After the death of Savigny, the heirs to the historical school elaborated a dogmatic system whose main purpose, in the so-called 'Pandectistics' developed by German jurists in the nineteenth century, was the systemisation of law, the creation of a scientific system of law chiefly on the basis of Roman civil law. The idea of that system involved the development of a unit in an array that was thus known as a connection of meaning. According to the rules of formal logic, the conceptual system was similar to a pyramid. The ideal of the logical system was fully achieved when a very general concept occupied the tip, to which it was possible to subsume all other concepts; from the base, this concept was reached by eliminating all that was special.

It was Puchta who, insofar as legal science at the time had embarked on the path of the logical system, in the sense of a 'pyramid of concepts' built according to the rules of formal logic, decided that it should evolve towards a 'formal jurisprudence of concepts'. In this regard, the mission of legal science was to identify legal norms in their organic connection (not that of legal institutions, as Savigny defended), influencing and deriving from each other, in order to reach, on a scale of particular rules, the level of their principle and, likewise, to descend from this principle to its last derivatives.[11]

Two things are necessary so as to understand Puchta's theory and to classify a jurisprudence of formal concepts historically and spiritually. Firstly, the deductive construction of the system that depends and has an influence *on* the presupposition of a fundamental concept, with a specific content. This, in turn, does not derive from positive law, but has been previously given to the formal science of positive law by the philosophy of law.

Secondly, it is important to stress that the influence of Puchta's (idealist) philosophy was precisely restricted to determining the content of its fundamental concepts. The way in which it shaped all other concepts, viz., the logical-deductive procedure, did not derive from idealist philosophy, not even that of Hegel, but from eighteenth-century rationalism, especially Christian Wolff's form of thinking.[12]

Having abandoned the relationship of legal norms, underscored by Savigny, along with that of the legal institutions underpinning them, in the interest of the abstract formation of concepts, and having substituted all other methods with the logical-deductive procedure of the jurisprudence of concepts, Puchta paved the way for the legal formalism that would predominate for over a century and over which an opposing current, introduced, as will be seen below, by Ihering, was incapable of prevailing. This formalism signified, as Wieacker stresses, legal science's definitive distancing from the social, political and moral reality of law.[13]

It was with his early thinking that Ihering made his most important contribution to the theory of a formal jurisprudence of concepts. But, thenceforth, those features that would be decisive in his subsequent thought began to be visible: the neglect of the ethical categories of idealist philosophy to which Savigny and Puchta had clung and the shift towards the form of thinking of the natural sciences at the time.

The systematic task of legal science to which Ihering[14] attributed a higher rank, in comparison with its historical and interpretative aspects, consisted, according to him, in breaking down particular legal norms and institutions pertaining to them into their logical elements and in cleanly distilling them, before using them to reconstruct, by combination, both existing and new legal norms.

Basic legal concepts do not exist in the same way as legal norms (because of their validity), but only have, as with all the propositions obtained from them by deductive conclusion, a theoretical enunciative value;

[10] Whose purpose, as Kriele (Theorie, p. 71) remarked, was rather the organic development of law.

[11] Georg Friedrich Puchta and Adolf Friedrich Rudorff, Cursus der Institutionen I, 35, (Barcelona: Nabu Press, 2012), p. 36.

[12] See Franz Wieacker, Privatrechtsgeschichte der Neuzeit (Göttingen: Vandenhoeck & Ruprecht, 1967), pp. 373ff.

[13] Wieacker, Privatrechtsgeschichte, p. 401.

[14] Rudolf von Ihering, Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklun, Vol I (Leipzig: Bretkopf und Härtel, 1852), p. 30; Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklun Vol II (Leipzig: Bretkopf und Härtel, 1858), pp. 359ff.

this can be evaluated as much as one wants, but nothing can be inferred from it as to the validity of these propositions as mandatory rules. These are precisely the aspects on which Ihering focused his subsequent critique of the jurisprudence of concepts, followed by that of the jurisprudence of interests.[15]

Notwithstanding the fact that the majority of nineteenth-century jurists did not accept Ihering's pseudoscientific-natural theory, the formal conceptual form of thinking and the desire for a closed system of concepts, like that proposed by Putcha, were still taken as valid premises. Bernhard Windscheid would follow in Putcha's footsteps, although with a shift towards psychologism. To his mind, the law was not only the categorical verdict of the legislator, not only a *factum*, but the wisdom of the preceding centuries; what had been declared as law in the law, what the legal community had previously recognised as law. Thus, Windscheid stated, law was, under all historical conditions, something rational and, therefore, susceptible not only to a historical but also systematic scientific elaboration.[16]

Although Windscheid maintained the fundamental conception of Savigny and Puchta, insofar as he considered law as something historical and, at the same time, rational, he now did not understand it objectively or subjectively. In other words, he did not consider rationality as an idea of law, as a meaning implicit in legal institutions, as a set of basic legal principles that, however much they may themselves be historically variable, as an internal force of the (objective) spirit, broadly determined from the start by the legal thought of a cultural age, but as the rational will of the legislator. It was a rationalist legal positivism, palliated by a trust in the reasoning with which Windscheid expressed it in the belief that law, in its essential aspects, could be equated with the law, albeit understanding this not as an expression of mere judgement, but as the will of the legislator (not only historical but also idealised).

As to the interpretation of the law, Windscheid held that it was necessary to determine the meaning that the legislator had given to the words employed by him. Although interpretation was based on discovering the will of the legislator, Windscheid left a small interpretative loophole according to objective appropriateness.[17]

In Windscheid's opinion, it was the aspects shared by the conceptual elements repeated in legal norms that established the internal consistency of a legal system. From the discovery of simple basic concepts and the reduction of all compound concepts to them emerged the pretence of a logical need, albeit to the detriment of ethical-ideological and sociological relationships of meaning.

As has been seen, historicism and rationalism were the predominant elements not only of Windscheid's thought, in particular, but also of nineteenth-century legal science, in general. This signifies that all law was considered to be the result of historical evolution and, therefore, positive. Nonetheless, positive law per se was regarded as a rational order that, as such, was susceptible to conceptual comprehension and systemisation. The *lex*, especially private Roman law, was considered to be more *ratio scripta* than *voluntas*. Belief in the internal rationality of positive law drew a distinction between this position of pseudoscientific-natural positivism and the sociological kind. For these, individual law was solely an empirical fact which, as such, was causally-scientifically explained by the conditions existing at the moment of its genesis, but which could not, however, be explained as the expression of a particular legal reasoning.

The objective theory of interpretation was proposed practically at the same time in 1885 and 1886 by three of the most prominent legal scholars of the period: Binding, Wach and Kohler.[18] This theory not only stated that, once promulgated, a law could adopt for others a meaning which had not occurred to the legislator, but also declared that the legally conclusive was not the meaning that the author had in mind, but the objective

[15] Franz Wieacker and Christian Wollschläger (eds), Iherings Erbe. Göttinger Symposion zur 150. Wiederkherdes Geburtages vor Rudolf von Ihering (Göttingen: Vandenhoeck & Ruprecht, 1970). In particular, the observations made by Losano (p. 140) and Hommes (p. 101).

[16] Erik Wolf, Grose Rechtsdenker der deutschen Geistesgesghighte (Tübingen: Mohr Siebeck, 1963).

[17] Bernhard Windscheid, Lehrbuch Des Pandektenrechts (Frankfurt am Main: Literarische Anstalt Rütten & Loening, 1891), reprinted in Berthold Singer, International Law (Farmington Hills, MI: Gale, 2013), pp. 51-52.

[18] Karl Binding, Handbuch des Strafrechts, Vol. I (Leipzig: Duncker & Humblot, 1885) pp. 450ff; Adolf Wach, Handbuch des deutschen Zivilprocessrechts, Vol. I (Leipzig: Duncker & Humblot, 1885) pp. 254ff; Josef Kohler, Grünhuts Zeitschrift, Vol. 13 (Düsseldorf: Universidad H. Heine, 1886) pp. 1ff.

meaning, implicit in the law, which had to be determined irrespective of that. For the law was more rational than its authors and, once put into effect, it responded, in a way, to itself. Thus, it should only be interpreted on the basis of itself, of its own connection of meaning.

The aforementioned authors understood the rationality of the law—which resulted in the incipient neglect of a jurisprudence of formal concepts—not only in a formal sense, like a logical connection of concepts, but also in a material sense, as the rationality of purposes, namely, as implicit teleology. According to Kohler, the internal consistency of a legal system was based on the validity of general legal principles, which he understood as maxims of order and not only as the abstract synthesis of concepts. Interpretation had to rework the law in order that the principles that it contained should come to light. However, these principles were not always easy to detect and, as a result, interpretation had to sometimes focus on the law's ultimate purpose, which jurists could discover by investigating the social situations for which it had been formulated, and by identifying the best solution, according to the idea at the time. Wach and Binding, who both formulated the objective theory of interpretation, would express this in similar terms.

In contrast to Ihering and the proponents of the jurisprudence of interests, these authors had yet to observe any basic antithesis between taking into consideration the purposes of legal norms and the methods of the jurisprudence of concepts. Ihering and the jurisprudence of interests understood that those that should be taken into account were the empirical purposes of the legislator or the social forces behind him, that is, 'real' interests or 'causal' factors. For Binding and Kohler, on the contrary, they were the objective purposes of law, namely, those required by the internal rationality of law. They presumed that the legal concepts discovered by science were in accordance with those objective purposes of law. Thus, the critique of the purely formal logical way of thinking of the jurisprudence of concepts was reserved for the fledgling empirical approach that Ihering introduced. This approach developed in a spiritual realm totally different from nineteenth-century legal science—generally rationalist with a baggage of historicism—which, owing to the fact that it considered, or at least tried to understand, positive law as a rational body, still possessed some natural legal thought. This new spiritual approach that strove to eliminate all trace of natural law was positivism.[19]

Positivism developed under the immediate influence of the positivist social philosophy of Auguste Comte, the English philosophers (Bentham and J. S. Mill) and the natural sciences, in particular Darwin's theory of evolution. By and large, there was a return to ancient empiricism, Locke's associationist psychology and, in legal science, also Thomasius' utilitarian ethics.[20]

Positivism was characterised chiefly by its aspirations to banish not only metaphysics, but also the issue of values or validity as a whole, from science, for being unable to offer any answers, and to restrict it exclusively to facts and their empirically observable legality.

According to the positivist conception, only perceptible facts, together with the legality that they expressed, were accessible to scientific knowledge, disregarding logic and mathematics. Positivist law theories coincided in understanding law exclusively as positive law and rejected as unscientific issues relating to any supra-positive legal principles, a natural law and the idea of a law with an a priori material sense of all law. Drawing from these premises, law could be considered as being a psychological fact, since it was not to be found in external reality but in the human conscience. Alternatively, it could be classified among the facts of social existence, as it referred to human social behaviour. The first consideration gave rise to a psychological theory of law, while the second led to a theory of sociological law. An attempt to remedy the problems that these theories posed for legal science, by neglecting, in a way, the very science of law for the benefit of other sciences like psychology and sociology, would be made with the premises of a pure theory of law, whose main exponent was Hans Kelsen.[21]

For Bierling,[22] the principal proponent of the psychological theory of law, the procedure that led to the general discovery of law was a reduction based on the empirical material (of particular positive laws) and which redirected the special towards the general which was repeated in it; whatever only belonged to each positive law

[19] Larenz, Metodología, p. 56.

[20] Karl Larenz, Reich und Recht in der deutschen Philosophie, Vol. I (Stuttgart: Kohlhammer,1943), pp. 202ff.

[21] On the problems posed by these theories, see Philipp Heck, Das Problem der Rechtsgewinnung (Bad Homburg: Gehlen, 1968), p. 1.

[22] Ernst Rudolf Bierling, Juristische Prinzipienlehre, Vol. I, Neudruck des gesamten Werkes (Tübingen: Mohr Siebeck, 1961), pp. 3-30. The complete work contains five volumes published between 1894-1917.

had to be eliminated. However, Bierling was not content with a mere psychological consideration, as he accepted an indirect recognition of the form, namely, of the absolutely necessary logical consequence of another recognition that, ultimately, should necessarily be a direct recognition of legal norms.

The concept of law discovered in this way was as follows: 'Law, in the juridical sense, is whatever those coexisting in any community mutually recognise as a norm and rule of that coexistence.'[23, 24] The essential elements were, therefore, the norm and mutual recognition. Likewise, legal relationships only existed insofar as they were recognised by the obligor.

At the same time that Bierling was putting forward his methodological premises, a new methodical approach to legal science was being developed, which received the name of the jurisprudence of interests. The first jurisprudence of interests emerged from the shift that Ihering, in his maturity, made towards a pragmatic jurisprudence. Its main proponent was Philipp Heck, for whom the essence of the dispute over the method was related to the influence of law on life, such as that of the court settlement of a case.[25] This clearly differed from the previous approach—the jurisprudence of concepts—which restricted judges to the logical subsumption of the existing situation to legal concepts, the primacy of logic for legal-scientific work thus being necessary. The jurisprudence of interests aspired to a primacy of investigation and evaluation of life. Heck defended the method of the jurisprudence of interests only for practical legal science, which he equated with what was traditionally called the dogma of law. Its sole mission was to facilitate the work of judges, preparing an adequate solution to a case by investigating the law and life relationships. However, it was of no use for reaching a second purely theoretical goal.

The jurisprudence of interests considered law as the protection of interests. This meant that legal precepts were not only aimed at delimiting interests, but that they themselves were the product of interests. Laws were the result of material, national, religious and ethical interests which clashed with each other and vied for recognition.[26]

The essence of the jurisprudence of interests, Heck claimed, lay in this notion. He used it to establish his basic methodological postulate, which involved determining the historical accuracy and real interests that had led to a law and taking into account the known interests for resolving a case. For this reason, for Heck—and Ihering—the legislator as a person took second place to social forces, called 'interests' here.

The conception according to which particular interests were responsible for legal norms, owing to the legislator's ideas of 'ought' which became rules, was called the genetic theory of interests by Heck.[27] In view of the foregoing, Heck rejected all the objective theories of interpretation and proposed the historical investigation of interests as a method of interpretation. The positivist concept of science which, perhaps unwittingly, it employed as a basis, only recognised, outside pure logic and mathematics, the causal sciences. A fact was scientifically known when it was reduced to its physical, historical or biological causes. For Heck, the interpretation of the law was fundamentally an explanation of the causes.

Another of the consequences of Heck's postulate was the rejection of the conception of the law according to which it had a resolution for all imaginable cases, ascertainable by means of subsumption to the given norms. In other words, the idea that the law was free of lacunas ought to be rejected. Heck also criticised the method of the jurisprudence of concepts, that is, the procedure for deriving new legal norms not expressed in the law from general legal concepts by logical conclusion. In the event of a legal lacuna, Heck called for performing not a formal logical derivation from a higher concept, but an evaluative formation of the precept. He stressed that the concept of lacuna already had a normative and critical meaning. Such a concept expressed that something, whose existence was desired or expected, was missing. The confirmation of a lacuna was now the result of a critical and evaluative consideration.

As to his notion of a normative system, Heck recuperated the idea of a system of norms as one of general resolutions of conflicts, which he envisaged with the logical form of a system of classificatory concepts.

[23] Bierling, Juristische, cited in Larenz, Metodología, p. 60.

[24] All translations are mine, unless otherwise stated.

[25] Heck, Das Problem, p. 1.

[26] Philipp Heck, "Gesetzesauslegung und Interessenjurisprudenz", Archiv für die civilische Praxis (AcP) 112 (1914), p. 17.

[27] Philipp Heck, Begriffsbildung und Interessenjurisprudenz (Tübingen: Mohr Siebeck, 1932), p. 73.

In all conflict resolutions, he remarked, the full content of a legal system could intervene. Problems arose as sets of problems and resolutions as groups of resolutions.

The jurisprudence of interests was highly successful and managed to replace the method of subsumption to rigid legal concepts—only logically-formally established—with that of the deliberative judgement of a complex fact and an evaluation of the interests that came into play, according to the standards of evaluation inherent to a legal system. Court jurisprudence became gradually more open to life events and methodologically freer and more aware.[28]

Eighteenth- and nineteenth-century rationalism was opposed by another parallel and inferior current: irrationalism, particularly in the form of voluntarism. In the nineteenth century, its proponents were Schopenhauer, Nietzsche and Bergson. In legal science, this current asserted itself in the twentieth century with the so-called 'judicial freedom of decision' doctrine formulated by Eugen Ehrlich.

Versus a purely schematic application of a legal precept to a fact of life, the free-law movement considered that emphasis should be placed on the free creation of law. This was not understood as a court ruling according to the decision of the judge called upon to resolve the case, but one based on legal tradition which aspired—as Ehrlich would say—to 'impartial law in the sense of Stammler'.[29] So, all court rulings were creative tasks guided by knowledge. The shift towards subjectivism overlying the free-law doctrine was short-lived, but led to the publication of a number of controversial articles by authors like Ernst Fuchs[30] who suggested the existence of a free law, equivalent to state law, created by the juridical judgement of the members of the legal community, legal jurisprudence and legal science; a law that was, as with all law, the product of will.

From the viewpoint of legal science, the jurisprudence of interests outperformed the free-law doctrine, for, barring a number of exceptions, it held that the legal creation of law was guided by rational considerations. Instead of formal logical deduction, the jurisprudence of interests did not resort to will or sentiment, but to the investigation of the interests and their judgement according to the pattern of evaluation underlying the law. It thus gave judges a greater scope of decision, but not the freedom to produce a resolution guided only by sentiment.

Drawing from the same premises as Heck, namely, the positivist concept of science, in the 1920s there was a shift towards the sociology of law, led by Eugen Ehrlich. This resulted in new theories that investigated the social facts on which law was based, without immediately taking into account the practical application of their findings by legal jurisprudence. Consequently, that which had been commonly conceived as legal science, that is, legal dogma, ceased to be regarded as a science to be considered as a technology serving practical purposes. In contrast, practical jurisprudence was merely regarded as 'the art of making law serviceable for the special needs of legal life'[31] and, therefore, something very different from legal science. This was the sociological conception of law proposed by Ehrlich.

Sociological legal science provided practical jurisprudence with a basis for dealing with the rules of decision applicable by courts and civil servants. Be that as it may, law as the real system of a society—as contended by Ehrlich—did not consist of rules of decision, but rules according to which men effectively behaved in everyday life. These rules of behaviour, the authentic 'legal norms', did not principally stem from the courts or laws, but from the original facts of law: uses, relationships of domination and ownership and the declaration of will in its most important forms (statute, contract and living will), forms immediately created by society.[32]

Legal science's need for methodological self-reflection, versus the assumptions of legal sociology was brilliantly expressed by Hans Kelsen. The Austrian jurist described his pure theory of law as a theory of positive law and, in this sense, as a general theory of law, which did not interpret special legal norms, whether they be national or international, but, precisely on the basis of a general theory of positive law, put forward a theory of

[28] Larenz, Metodología, p. 81.

[29] Eugen Ehrlich, Freie Rechtsfindung und freie Rechtswissenschaft (Amsterdam: Scientia Verlag, 1987), pp. 5-28.

[30] For a selection of his writings, see Ernst Fuchs, Gerechtigkeitswissenschaft (Heidelberg: C. F. Müller, 1965).

[31] Eugen Ehrlich, Grundlegung der Soziologie des Rechts, (Munich and Leipzig: Duncker und Humblot, 1929), p. 198.

[32] Ibid., pp. 155ff.

legal interpretation. Thus, the pure theory of law differed clearly from what had been traditionally called 'legal dogma', whose intention was to determine the special content and systematic connection of a specific positive law and to facilitate its application. In contrast, the pure theory of law did not deal with content, but with the logical structure of legal norms, while examining the meaning, possibility and constraints of a general (rather than particular) legal decision and its class and how it had been arrived at.[33]

Kelsen's basic thesis was that there was a complete disparity between 'is' and 'ought'. 'Ought' could not be reduced to the 'desire' of whatever was established by the rule—for 'desire' was a psychic and factual phenomenon which therefore belonged to the realm of 'is'—or the behaviour of whoever 'ought'. It was not actually psychic, but the sense of an act with which a behaviour was established or permitted and, above all, authorised.

According to Kelsen, the distinction between 'is' and 'ought' could not be further explained; it was immediately given to our conscience. 'Nobody can assert that from the statement that something is, follows a statement that something ought to be, or vice versa.'[34] Legal science had to do with norms, that is, with an ought, also including here 'permit' and 'can'.

As they were established, norms of positive law were underpinned by acts, that is, phenomena external to human behaviour, which did not carry their meaning—like legal acts—but received it from the fact that a norm was applied to them as an interpretative schema. For example, that a specific exchange in correspondence signified the conclusion of a contract was only so because this fact fell into the category of certain legal provisions of the civil code.

The pure theory of law had to do with the logical peculiarity and the methodological independence of legal science. In particular, Kelsen was opposed to the union between legal science and ethics or any other type of legal metaphysics. Norms of morality were norms, as with those of positive law: they were produced by convention and consciously. But while law was a coactive system, morality was not. In addition, Kelsen claimed that it was impossible to determine what should be considered as good or bad, fair or unfair in all circumstances, whereby law could not be distinguished from other coactive systems (for instance, the internal system of a band of thieves) for the fact of being a fair system. Therefore, the pure theory of law dispensed with evaluating positive law; as a science, it should only comprehend positive law in its essence and understand it by analysing its structure. According to Kelsen, a legal norm was not valid because it had a specific content, but because it had been created in a particular way; ultimately legitimised by an assumed basic norm.

The most important objection that can made to the pure theory of law is that Kelsen was unable to maintain constantly the complete disparity between 'is' and 'ought' on which it was based. An 'ought', he stressed, could only constantly refer to another 'ought', a norm to another norm of a higher level, from the only one that resulted in the specific legal meaning of an event. The unity of all the norms of positive law was based on the fact that all of them could refer to a sole norm as the ultimate grounds for their validity: the basic norm of the respective legal system. This basic norm was not established, but was necessarily assumed by legal science in order to be able to interpret a legal system as the content of norms giving shape to it: in fact, 'ought' indirectly resulted from the theoretical-cognitive postulate of the basic norm, from 'is' which, as such, was, for Kelsen, far removed from the meaning and value of factuality.

His concept of 'ought' has also been the target of criticism. Initially, Kelsen[35] referred to 'ought' as a norm linking its recipients, thus obliging them. It therefore employed expressions relating to ethics or the doctrine of obligations. But he refused to understand 'ought' in this way. First and foremost, for Kelsen it was not a question of the fairness or unfairness of the content of a norm, but whether or not it was legitimised by the basic norm. Secondly, in legal norms Kelsen saw authorisations rather than precepts (or prohibitions): norms that authorised an individual to impose a coactive act on another, like, for example, a penalty. In this way, he subjected the concept of 'ought' to a radical change of meaning by freeing it from ethics.

[33] Larenz, Metodología, p. 92. Hans Kelsen's main work is Reine Rechtslehre (Tübingen: Mohr Siebeck, 2008), published in English under the title, Pure Theory of Law (Berkley and Los Angeles: University of California, 1967).

[34] Kelsen, Pure, p. 6.

[35] On the critique of Kelsen's notion of 'ought', see Hans Ludwig Schreiber, Der Begriff Der Rechtspflicht: Quellenstudien Zu Seiner Geschichte (Berlin: Walter de Gruyter, 1966), p. 144.

As to the doctrine of interpretation, Kelsen only recognised that literal interpretation had a cognitive value. According to him, only a thought that was capable of basing each one of its steps either on logical (or mathematical) evidence or on unavoidable facts could be called science. But legal interpretation is not of that kind. While it is claimed that value judgements (as they inevitably occur in legal science and court jurisprudence) cannot be provided by acts of knowledge, while a distinction is not drawn between the logic of factual sciences and the teleology of explanatory sciences of meaning or interpretative sciences, legal science can only be accepted as the scientific-causal investigation of the facts that serve as a basis for a legal norm (like the sociology of law) or as a doctrine about the logical forms of legal relationships (like the pure theory of law). In this way, what the jurist considers to be his particular mission—the interpretation of legal norms and institutions and the development of law in accordance with the meaning required by objective coherence (by means of analogy or the development of a legal principle)—can be a technique or art of applying law that should be performed following certain rules, but cannot pretend to possess the status of science.[36]

BIBLIOGRAPHY

[1]. Adolf Wach, Handbuch des deutschen Zivilprocessrechts, Vol. I (Leipzig: Duncker & Humblot, 1885)
[2]. Bernhard Windscheid, Lehrbuch Des Pandektenrechts (Frankfurt am Main: Literarische Anstalt Rütten & Loening, 1891), reprinted in Berthold Singer, International Law (Farmington Hills, MI: Gale, 2013).
[3]. Erik Wolf, Grose Rechtsdenker der deutschen Geistesgeshighte (Tübingen: Mohr Siebeck, 1963).
[4]. Ernst Rudolf Bierling, Juristische Prinzipienlehre, Vol. I, Neudruck des gesamten Werkes (Tübingen: Mohr Siebeck, 1961) The complete work contains five volumes published between 1894-1917.
[5]. Eugen Ehrlich, Grundlegung der Soziologie des Rechts, (Munich and Leipzig: Duncker und Humblot, 1929).
[6]. Franz Wieacker, Privatrechtsgeschichte der Neuzeit (Göttingen: Vandenhoeck & Ruprecht, 1967.
[7]. Franz Wieacker and Christian Wollschläger (eds), Iherings Erbe. Göttinger Symposion zur 150. Wiederkherdes Geburtages vor Rudolf von Ihering (Göttingen: Vandenhoeck & Ruprecht, 1970).
[8]. Georg Friedrich Puchta and Adolf Friedrich Rudorff, Cursus der Institutionen I, 35, (Barcelona: Nabu Press, 2012).
[9]. Hans Kelsen's main work is Reine Rechtslehre (Tübingen: Mohr Siebeck, 2008), published in English under the title, Pure Theory of Law (Berkley and Los Angeles: University of California, 1967).
[10]. Hans Ludwig Schreiber, Der Begriff Der Rechtspflicht: Quellenstudien Zu Seiner Geschichte (Berlin: Walter de Gruyter, 1966).
[11]. Josef Esser, Vorverständnis und Methodenwahl in der Rechtsfindung (Frankfurt am Main: Taschenbuch Verlag, 1972).
[12]. Josef Kohler, Grünhuts Zeitschrift, Vol. 13 (Düsseldorf: Universidad H. Heine, 1886).
[13]. Karl Larenz, Reich und Recht in der deutschen Philosophie, Vol. I (Stuttgart: Kohlhammer, 1943).
[14]. Karl Larenz, Festschrift für Ernst Rudolf Huber (Göttingen: Otto Schwartz Verlag, 1973).
[15]. Karl Larenz, Metodología de la Ciencia del Derecho (Barcelona: Ariel Derecho, 1994).
[16]. Karl Binding, Handbuch des Strafrechts, Vol. I (Leipzig: Duncker & Humblot, 1885).
[17]. Martin Kriele, Theorie der Rechtsgewinnung (Berlin: Duncker & Humblot, 1976).
[18]. Philipp Heck, Das Problem der Rechtsgewinnung (Bad Homburg: Gehlen, 1968).
[19]. Philipp Heck, "Gesetzesauslegung und Interessenjurisprudenz", Archiv für die civilische Praxis (AcP) 112 (1914).
[20]. Philipp Heck, Begriffsbildung und Interessenjurisprudenz (Tübingen: Mohr Siebeck, 1932).
[21]. Rudolf von Ihering, Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklun, Vol I (Leipzig: Bretkopf und Härtel, 1852); Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklun Vol II (Leipzig: Bretkopf und Härtel, 1858),
[22]. -Savigny's legal methodology is set out in the Methodologie Winter 1802 (Methodologie1802/1803) (early writings), noted down by Jakob Grimm and published by Wesenberg in 1951. Another ample presentation of his methodology can be found in El sistema del Derecho Romano actual (Madrid: Góngora y cía., 1879). For a more recent Spanish translation, see Friedrich Karl von Savigny, Metodología jurídica (Buenos Aires: Depalma, 1979).
[23]. Stig Jørgensen, Recht und Gesellschaft (Göttingen: Vandenhoeck & Ruprecht, 1970).
[24]. Theo Mayer-Maly, Rechtswissenschaft (Munich: R. Oldenbourg Verlag, 1985).

[36] Larenz, Metodología, p. 103.