Chapter 8

FROM JHERING TO RADBRUCH: ON THE LOGIC OF TRADITIONAL LEGAL CONCEPTS TO THE SOCIAL THEORIES OF LAW TO THE RENEWAL OF LEGAL IDEALISM

by Hasso Hofmann[*]

8.1. Preface

At the outset of the second half of the 19th century, the German science of Pandects was in its prime. Its leading proponent was Georg Friedrich Puchta (1798–1846), who also led the Historical School of law together with Savigny, whose successor in Berlin he became in 1842. His theory of an autonomous "scientific law" opened new possibilities of developing law through dogmatic and conceptual constructions (*Begriffsjurisprudenz* or "jurisprudence of concepts") by the judiciary and by jurisprudence. The work of his student Rudolf von Jhering (1818–1892), as multifaceted as it is inconsistent, stands for an epoch-making change in 19th century legal thought: from an autonomous construction of legal rules and institutes of law to an analysis of social reality, from the logical existence of legal concepts to the instrumental character of law in the service of individual and social interests, from the freedom of human will to the natural laws of causally determined reality, from an idealistic notion of law to its naturalistic explanation, from the ideal of justice to social eudaemonism, from the logical formalism of a "jurisprudence of concepts" to the legal sociology of the social "purposes of law," from the ideal world of law to "life."

Towards the end of the century, however, there is increasing resistance against the one-sided empirical view of law, and growing criticism of historicism and legal positivism. Neo-Hegelianism wishes to renew the overall view of legal life from the vantage point of cultural philosophy and teleology; on the other hand, the recourse to Kant provides a sharper methodological consciousness and necessitates a dualistic view of law, in accordance with the differentiation of what is and what should be, of reality and value. *Legal Philosophy* by Gustav Radbruch (1878–1949), which appeared just before the outbreak of World War I, reflects the new duality of legal thought that followed.

[*] This chapter is translated by Alexa Nieschlag.

8.2. Rudolf von Jhering's Discovery of the Purpose in Law

8.2.1. Life and Works

Rudolf von Jhering, probably the most important German jurist of the 19th century, apart from Friedrich Carl von Savigny, with the greatest international influence, was born in 1818 in Aurich in East Frisia.[1] He was born to a family with a legal tradition dating back centuries. After studying in Heidelberg, Göttingen and Munich, he submitted his doctoral thesis in 1842 on a historical Romanistic topic, *Die Besitzfähigkeit der Erbschaft* ("The Question Whether Inheritances May Possess") (Jhering 1879). Only a year later, he became a *Privatdozent* (lecturer). His first book—a collection of dogmatic works on common civil law—was published in 1844 (Jhering 1844). In its striving to permeate the concepts of sources as part of an intrinsic system, it shows the influence of Georg Friedrich Puchta (1798–1846), one of the most influential German scholars of pandects and the leading proponent of the Historical School of law apart from Savigny (cf. Stintzing and Landsberg 1880–1910, Div. 3/2, 438–61; Wilhelm 1958, 70ff.; Bohnert 1975; Haferkamp 2004). As early as 1845, Jhering was appointed professor in Basel, after which he taught at the universities of Rostock and Kiel. In 1852 he moved to Gießen, where he embarked upon his main works, an effort which soon bore first fruits. In 1868 he moved to Vienna, which he left after four years—with an Austrian hereditary title of nobility. He settled in the "quieter" city of Göttingen in order to pursue his "actual life's work": a forward-looking, realistic theory of law. He died there in 1892, famous and revered.

Jhering's main works are (cf. Losano 1970): *Der Geist des römischen Rechts auf den Stufen seiner Entwicklung* ("The Spirit of Roman Law at the Various Stages of its Development") (Part I 1852, 5th edition 1891; Part II, 1st Section 1854, 5th edition 1894; Part II, 2nd Section 1858, 5th edition 1898; Part III, 1st Section 1865, 5th edition 1906: cf. Jhering 1968) and *Der Zweck im Recht* (vol. I 1877, vol. II 1883: cf. Jhering 1923). (The English translation of the first volume was published in 1913 under the somewhat unfortunate title *Law as a Means to an End.* In the following, the author prefers to translate the term *Zweck* as "purpose.") Both works remained unfinished. Of the multitude of his further publications, the most interesting from the point of view of legal theory are: *Unsere Aufgabe* ("Our Task"), 1857; *Der Kampf um's Recht* (translated variously as *The Struggle for Law* or *The Battle for Right*), 1872 (cf. Jhering 1992a); *Vertrauliche Briefe eines Ungenannten an den Herausgeber der Preußischen (seit 1861: Deutschen) Gerichtszeitung* ("Confidential Letters of an Unnamed Writer to the Editor of the Prussian [since 1861: German] Court

[1] On life and works: Merkel 1893a; Stintzing and Landsberg 1880–1910, Div. 3/2; Wolf 1963, 622–68; Wieacker 1942, 1958, 197–212; Fikentscher 1976, 101–82; Behrends 1987.

Magazine"). Jhering published these satires again in 1884 in a book titled *Scherz und Ernst in der Jurisprudenz* ("Jest and Earnestness in Jurisprudence": cf. Jhering 1924), expanding the collection by a number of essays, including the famous persiflage of *Begriffsjurisprudenz* (jurisprudence of concepts): *Im juristischen Begriffshimmel* ("In the Heaven of Legal Concepts"). Furthermore, two lectures Jhering delivered in Vienna, which were published posthumously, are of importance: *Ist die Jurisprudenz eine Wissenschaft?* ("Is Jurisprudence a Science?"), his first lecture in Vienna in 1868 (cf. Jhering 1998); *Über die Entstehung des Rechtsgefühls* ("On the Formation of the Sense of Justice"), 1884 (cf. Jhering 1965 and 1986).

Der Geist des römischen Rechts and a number of other works by Jhering were published since 1880 in French, and *Der Geist* was also translated to Italian and Spanish.[2] *Der Zweck im Recht*, on the other hand, found particular resonance in the Anglo-Saxon world: *Law as a Means to an End*, 1913 (a translation of only the first volume, based on the third and fourth edition dated 1905), reprinted in 1969. With over 50 translations, *Der Kampf ums Recht* is presumably the most widely-read scientific text of all times ever written by a German jurist.

8.2.2. "Constructive Jurisprudence" according to the "Method of Natural History"

For a young scholar of Roman law entering the scientific arena in 1842, the obvious route was to follow the traditions of the Historical School and pandectism, as established by Savigny and even more by Puchta. Thus, Jhering tried to identify abstract elements in legal history and to develop a unified theory of common law based on a systematic construction of concepts. Herein, Puchta was his guarantor. While he occasionally referred to the *dogmatist* Savigny, he increasingly criticized the *historian* Savigny. With such criticism begins his early main work on the spirit of Roman law, whose first volume is dedicated to Puchta. Jhering sharply criticized the contradiction between the belief that law arose from the spirit of the people and the practice of law as a science (Jhering 1968, I, 5, 3ff.; cf. also 18ff.). He positioned his "theory of development" against the spirit of the people and its emancipation. He claims that in three historical steps—which Jhering characteristically calls "systems"[3] and identifies as the original law of the epoch of kings, the national *ius strictum* of the Republic and the *ius gentium* of the universal and cosmopolitan imperial law—Roman law had overcome the "purely Roman" and "transient" elements and had allowed its "constituting spiritual factors" to emerge as general "higher principles of law" (Jhering 1968, I, 16, 83f.). Thus,

[2] Index of translations in Losano 1970, 281–94. Cfr. *infra* Section 8.2.7.3 and 8.3.1, as well as Gibert 1970; Jørgensen 1970; Schmidt 1970; Bonazzi 1977.

[3] On Jhering's concept of system: cf. Coing 1969, 157ff., 162ff., 164.

the legal issue was not "Roman or Germanic," but the question was one of law itself (cf. Wilhelm 1970, 228ff.). With this orientation towards a "natural school of law" (Jhering 1968, I, 23), Jhering turns his back on romanticism and consciously renews the fundamental question of natural law without reverting to the law of reason or to German idealism; for he gives no criteria for this general validity and formulates no principle or goal of this development. To him, unlike the Historical School, development does not mean organic growth from within or a striving for a particular goal; instead it means historical progress, driven by mental elements ("spirit"), towards the universal principles of our concept of justice: "What appears to us as natural and reasonable from the point of view of our times [is] the product of a long and laborious process" (Jhering 1968, I, 102, cf. 45). At the end of the first volume of his early work, Jhering gives grandiose national "egoism," the "essence of the Roman spirit," which instrumentalized law, as the reason for the development of Roman law in its first phase (ibid., 318ff., 328). The second part of the work turns to the republic in the first section, and lists as its "basic drives": the law's drive for autonomy, the drive for equality as well as the drive for power and freedom as the "desires of the Roman spirit." Thereafter, he begins to examine "legal technique" as the means employed to realize those goals.

This topic is continued in the second section of the work's second part, where it provides the framework for an almost 80-page digression on "technique," i.e., the general method employed by jurists (Jhering 1968, II/2, 312–89). With this "chapter of genius" (Radbruch), Jhering expands what was a methodological sketch in the first volume (Jhering 1968, I, 37–41) to a theory, claiming general validity for it (Jhering 1968, II/2, 311f.). According to it, the first and foremost task of legal technique is "the quantitative and qualitative simplification of law," achieved through the analysis of extant legal material, i.e., its reduction to its simple "basic components," so to speak the "alphabet of law," furthermore through the "logical concentration" of the material to certain principles, and finally its systematization. In this manner, the "legal material," consisting of individual legal rules, is to be elevated to a "higher state of aggregation" (Jhering 1968, I, 37; II/2, 361). It is no coincidence that Jhering uses this description of a state of matter borrowed from the natural sciences. Even in Part 1, where the process of "logical concentration" is not described as a statement of principles or a definition of legal institutes or "legal bodies," but rather as an extraction of "legal concepts," the latter are characterized as a "precipitation of legal rules," as the "precipitation of legal rules to legal concepts," i.e., in quasi medical or chemical terms, as the deposit of a sediment (Jhering 1968, I, 37, 39). Thus, it is not surprising that Jhering calls the formation of a legal system the "ultimate consequence of the scientific method," thereby colliding rather unfortunately with the successful theoretical models of science and technology of his time. After all, he views his "natural-historical" contemplation of law as a *Naturwissenschaft auf geistigem*

Gebiet (a "natural science in the realm of the intellect") (Jhering 1968, II/2, 361, 396).

At the core of "structuring of legal material according to methods of natural history," according to Jhering, is the "legal construction," i.e., the logical and systematic ordering of terms, principles and institutions of law (Jhering 1968, II/2, 370ff.; cf. Wilhelm 1958, 112ff.; Hommes 1970; Ogorek 1986, 221 ff.). In the history of science, this concept of a "higher jurisprudence" (Jhering 1968, II/2, 358) found an especially strong and lasting echo. The reason lies in the theory that the combination of the various elements of law would lead to the possibility of "a self-propagation of law" (Jhering 1968, I, 40). Because of this generative power, Jhering calls the "system" a "source of new material that can never run dry" (Jhering 1968, II/2, 386). The first part of *The Spirit* had still illustrated this idea with a daring image: "Concepts are productive, they mate and create new concepts" (Jhering 1968, I, 40). In his programmatic introductory essay *Unsere Aufgabe* ("Our Task") in the *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* ("Annals of the Dogmatics of Today's Roman and German Private Law") (Jhering 1857)—this journal was founded and edited by Jhering together with Carl Friedrich von Gerber[4], a proponent of German private law (and later constitutional law) equally committed to the idea of legal construction—Jhering presented a summary of his theory of the formation of legal concepts in three levels. First, he repeats the distinction between "lower jurisprudence," which deals with the interpretation of legal rules, norms and principles in the traditional manner, and "higher jurisprudence," which derives legal concepts by abstraction and makes them the object of constructions. Thus, they change shape and assume the form of "legal bodies," "legal beings," even "living creatures." Thereafter, the task is to subject these legal bodies to an "examination in terms of natural history," examining their origins, characteristics, metamorphoses, combinations and conflicts, and finally to establish a systematic order by classifying them. Accordingly, this order appears as the result of "natural-historic research" on the given material as well as an "artistic creation" due to a "legal sense of art." To the unusually imaginative and musically sophisticated author, the processing of Roman and common law by jurisprudence signified the "creation of a world from purely intellectual matter" (Jhering 1857, 12).

But then, a break occurs: merely a few years later, he ridiculed his impractical "jurisprudence of concepts" in anonymous satirical letters to the "Prussian," later "German Court Journal" (cf. Jhering 1924, 7, 80, 193, 338f., 347, 369ff.). In Part 3 of *The Spirit*, whose first (and only) section was published in 1865, Jhering distances himself decidedly from his former theory. He now

[4] On Carl Friedrich von Gerber (1823–1891) and his friendship and collaboration with Jhering cf. Stintzing and Landsberg 1880–1910, Div. 3/2, 778–88, 800–7, 825–33.

calls Puchta's "seductive influence" an "idolism of logic" and seeks to find the "ultimate sources of Roman legal concepts in psychological and practical, ethical and historic reasons," because "the conviction of the immediate logical existence of a concept has not given life to a single one of them" (Jhering 1968, III, 320, 325). To his friend, the pandectist Bernhard Windscheid[5], he wrote: "In the face of the demands of life, no supposed logic of law can be maintained, and for practical purposes it makes absolutely no difference whether a lawyer is able to construct these demands or not" (Ehrenberg 1913, 176). It is obvious that the continuation and completion of the work, entailing the examination of the third level of development, the universalization of Roman law, using the logical constructions of the "natural-historical method" had thus become impossible. Therefore, Jhering's *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* remained unfinished. However, its first volumes were continuously reprinted.

8.2.3. The Crisis—The Struggle for Right

Obviously, the legal universe Jhering had embraced so far had been shattered. In 1865, he writes to Windscheid that he [has] "experienced a strange transformation of his entire intellectual views during the past 2–3 years" (ibid., 176, 356). Later on, he even speaks of his "time of suffering," of a "time of a profoundly troubled soul." According to his own testimony (Jhering 1924, 338)[6], the "change" was brought about by a concrete legal case which illustrated the discrepancy between dogmatic deduction and real-life legal practice. From then on, new leading lights flashed before him with increasing regularity: practicability, expedience, the requirements of legal relations, especially of the economy, interests, rights as "legally protected interests," the sense of justice, psychological motives, the law-giver's intentions, reality. Initially, a new theory of law did not emerge. Jhering's first lecture in Vienna on October 16, 1868 gives no indication of this shattering, and therefore bears no trace of any fundamental re-orientation. For that, however, the outer circumstances—it was the first lecture of a course on institutions—would hardly have been appropriate. In a clear allusion to the famous lecture given by the Berlin prosecutor Julius von Kirchmann on the worthlessness of jurisprudence as a science (1848), Jhering discussed the question, "Is Jurisprudence a Science?" (Jhering 1998).[7] The reasons for his positive answer remain within

[5] On Bernhard Windscheid (1817–1892), whose main work, the three-volume textbook on pandect law (1861–1870) enjoyed an impeccable reputation, especially among practitioners of law, cf. Wolf 1963, 591–621.

[6] On this famous Damascus experience on New Year's Eve 1859 see Behrends 1987, 252ff.

[7] About the reasons and circumstances of his move to Vienna and his return to Germany, cf. Hofmeister 1995, 9–30.

the framework of opinions voiced in *The Spirit.* The character of jurisprudence as a science, he claims here, is based on a "scientific consciousness in legal matters" incorporating the philosophy (i.e., for Jhering: ethics) of law, the history of law, as well as dogmatic reflection (Jhering 1998, 92).[8] At the end, Jhering calls the centerpiece, dogmatics, "the scientific description of all experiences and facts which include the current high and final point of our knowledge and experience of law, organized for practical use." This indicates the greatest possible distance from what Jhering regarded as the greatest danger, worse than external dependence on ever-changing laws: the danger of becoming internally dependent on the "meager, dead letter of the law," of turning into "an unfeeling part of the machinery of law, lacking all will" (Jhering 1998, 52ff.).

A totally different topic, "part of the psychology of law," was the subject of the spirited lecture entitled *Der Kampf um's Recht* ("The Struggle for Right") that Jhering delivered in a totally new tone four years later at the Legal Society of Vienna, as his farewell from that city (Jhering 1992a, V).[9] The author explicitly distances himself from his earlier opinions and quotes his definition of subjective rights as "legally protected interests" from the last volume of *The Spirit*.[10] As if it went without saying, the term "law" has now become a "practical" one, a "concept of purpose," a concept of "power," of "force" and not of logic. The basis for this is the idea that rights and law only exist, are only valid when they are realized, i.e., enforced against the resistance of injustice—and not just once and for all, but in an eternal process of waxing and waning: "The idea of law is an eternal process of becoming" (Jhering 1992a, 16). In it, the subjects of law, i.e., people and states as well as private individuals, struggle for their moral self-assertion. Therefore, the struggle for objective public law is the obligation of bodies of state and government, while the struggle for concrete subjective rights is the moral obligation of individuals towards themselves—"the obligation of moral self-preservation"—but at the same time, it is also an obligation towards the community (ibid., 51ff.). For in any morally challenging lawsuit, i.e., one not just pursued for monetary reasons, law itself is endangered. Law and jurisprudence of his time, however, had succumbed to "base materialism," according to Jhering (ibid., 80ff.).

All this has very little to do with Darwin's "struggle for life," in spite of the obvious similarities between the titles *Der Kampf ums Recht* and *Der Kampf ums Dasein* (literally, "The Struggle for Life"), the latter being the title under which Darwin's work *The Origin of Species* had become popular since its first

[8] This division of legal disciplines goes back to Gustav Hugo's differentiation of the three aspects of law: the practical, the philosophical and the historical one: Hugo 1817, 32ff.

[9] About the legal and political situation in Austria in 1872 cf. Hofmeister 1995, 22ff. This clarifies that the lecture was also a declaration of solidarity with those applying the law.

[10] Jhering 1968, III, 44; Jhering 1992a, 44. The following characterizations: ibid., 7, 9, 17.

http://www.springer.com/978-90-481-2963-8

A Treatise of Legal Philosophy and General Jurisprudence
Vol. 9: A History of the Philosophy of Law in the Civil Law World, 1600-1900; Vol. 10: The Philosophers' Philosophy of Law from the Seventeenth Century to Our Days.
Editor-in-chief: Pattaro, E. - Canale, D.; Grossi, P.; Hofmann, H.; Riley, P. (Eds.)
2009, XXXVII, 752 p. In 2 volumes, not available separately., Hardcover
ISBN: 978-90-481-2963-8