Articles

Inconsistencies and Consistencies in 19th Century Legal Theory[+]

By Regina Ogorek[*]

A. The Development of the Theory of the Judiciary in 19th Century Germany: A History of Progress?

Historical evaluations are expected to mark a starting point and, at the end, produce a result, which then shows a "development" from the starting point. This development need not be in a straight line. It may have made detours and suffered set-backs. Altogether, however, it connects beginning and end like a red thread; it is possible to see from this the task of the historian, picking up this thread like a careful housewife, undoing knots and loops, winding up assiduously and finally presenting a tidy ball of work.

19th century German legal theory is such a ball, at least if one is to believe its later re-enactors. At its outset there is the strict subordination of the judge to the statutory law. This concept, borne by the early capitalist need for calculable legal decisions, has remained throughout the centuries the central mainstay of legal theory, despite certain problems which the dogma of the binding force of statute law had suffered as a result of legal science turning into a *system*, up until finally, towards the end of the century, an insight into the inevitable incompleteness of the law and, with it, a new comprehension of the function of the legal system could gain acceptance. The judge, whose task it was previously to carry out with dutiful obedience that command of the law (thus as medium of interpretation), who had exclusively to take into account the legislator's intent, was now recognized as a productive creator of law. His goal of perception no longer lay in the psychological depth of a concrete law-maker in person, but had become the will of the law, an objective phenomenon created in these law-making procedures and totally distinct from the aims of those involved in that process.

[+] The following essay is based on the results of my book: RICHTERKÖNIG ODER SUBSUMTIONSAUTOMAT? ZUR JUSTIZTHEORIE IM 19 (John R. Blazek transl., 1986). For a revised version of the German original see Regina Ogorek, AUFKLÄRUNG ÜBER JUSTIZ, HALBBD. 1: ABHANDLUNGEN UND REZENSIONEN, MIT EINER EINLEITUNG VON DIETER SIMON, 157-181 (Elena Barnert ed., 2008).

[*] born 1944; studies in Münster and München; Dr. jur. and Habilitation at the University of Frankfurt/Main; Professor of Civil Law and Roman Law, University of Zürich, 1987-1994; Professor of Civil Law, History, Theory and Methodology of Law, University of Frankfurt/Main, 1994-2010. Author: Untersuchungen zur Entwicklung der Gefährdungshaftung im 19. Jahrhundert, 1975; Richterkönig oder Subsumtionsautomat? Zur Justiztheorie im 19. Jahrhundert, 1986 (reprint 2008); various articles on legal history, history of judiciary and theory/methodology of law. Co-editor of "Myops. Berichte aus der Welt des Rechts". Email: vey@jur.uni-frankfurt.de

https://doi.org/10.1017/S2071832200016722 Published online by Cambridge University Press

This course of development is seen today as a sign of progression from the then legal and judicial theory. A somewhat all too naive belief in the capabilities of legislative activity is ascribed to the apologists of the binding force of statute at the beginning of the last century. The former nurtured false hopes in the all-encompassing completeness of the statutory law; the latter had been responsible for misunderstanding the nature of the judicial process as an automatic, formal process of subsumption: the role of value-based and purposive judgments in the interpretation of the law had been underestimated. It was only at the turn of the 20th century that it became clear, at that period in time, that statutory law could not determine everything,[1] at this moment, it was also realised that "the judging of a legal issue almost always required more than mere logical deduction", i.e. subsumed conclusion.[2]

B. The Account of Tradition: From the Bound Judge to Judicial Freedom

The thread of evolution thus led to a happy ending, and the reasons, which led to this and not to any other type of development leave no room to plausibility. I shall now turn to this:

I.

The demand for strict judicial attention to the law at the turn of the 18th to the 19th century was to a certain extent the order of the day. The regional administrative reforms of the 18th century had, in contrast, led to an independent judiciary drawn from the local gentry's administration. Judges were no longer the voices of the gentry's government policies but were independent protectors of the law.

1.

It is not possible here to go in detail into that which appeared opportune from the standpoint of the absolute executive sovereign power, i.e. limiting the jurisprudence of *summa potestas* and providing it with an independent domain of decision-making. Suffice it to say that the political interdependencies even in the absolute sovereign state went against the static structure of the local landed powers. Even in the heyday of his absolute power, the local count was not an autocrat but rather was bound into the web of feudal society which held its faith in the local lord with evermore increasing privileges. It was just within this background of limitations of power through the local mobilities' privileges, that

[1] HELMUT COING, RECHTSPOLITIK UND RECHTSAUSLEGUNG IN HUNDERT JAHREN DEUTSCHER RECHTSENTWICKLUNG, FESTVORTRAG ZUR ERÖFFNUNG DES 43. DEUTSCHEN JURISTENTAGES, 9 (1960).

[2] KARL LARENZ, METHODENLEHRE UND RECHTSWISSENSCHAFT, (4th ed., 1979).

https://doi.org/10.1017/S2071832200016722 Published online by Cambridge University Press

an independent and apolitical form of justice sworn to the freedom and equality of all legal subjects was able to increase not only the legitimacy of the local lord's power but also further its political aims by laying down, in face of the local parliament's special rights, the scale of equality before the law. It is thus only in the first instance surprising that in the sphere of administration of justice – despite the unlimited claims to power of the head of state and indeed inspired and furthered by the latter through a series of far-reaching reforms – a relatively independent and (in its tendency) apolitical order of power had been built up. It appears to be a tenable view that the autonomy of the legal system, at least insofar as it related to the realm of private property, was one of the conditions of survival of territorial state power, whereas in its international context, it aided in achieving but not in maintaining state sovereignty. The use of law and justice to political ends had been an indispensable means of power-creation of an established territorial power against internal and external resistance. When, however, it became, from the landed gentry's point of view, a matter of transforming those benefits realized at the cost of the old power structure into a legitimate governing authority, the law became dysfunctional as a tool of government and the separation of law and politics became necessary. The new function of law had found its swan-song in the dogma of independence and it now became a matter of making sure that independent courts would not, in turn, assume any form of autocratic power.

It did not take long to find the means necessary for this. Where previously the judge had been a faithful servant to his lord, he had now to become a faithful servant to the law. Through the abstract general law, the absolute state had to be seen to gain a profile in state and economic policy at a cost to the local administration, and it achieved this policy in a legal form by means of a system of administration of justice bound to the law. The traditional privilege-bearers could only raise as argument against the principle of supremacy of the law that of former inequalities, a weak argument at a time in which the concepts of *freedom* and *equality* had infiltrated the societal conscience of the underprivileged like fresh dynamite.

2.

The group which was by nature involved as part of the local lord's legalisation strategy was thus the middle class (bourgeoisie), i.e. that heterogeneous section of society, civil servants, merchants, tradesmen, intellectuals who had emerged as a wide middle social spectrum between lords and peasants, having developed their own spheres of interest. Because of their origins, these citizens had been deprived of privileges acquired by birth in the old feudal society and were more interested in their removal. Thus, from the point of view of the middle class, the policy of the local gentry to foster a bargaining position for the state by legal abolition of class-related privileges was one to be supported. Where

administrative conservatism spoke of "government by despotism"[3] which through its common laws encouraged the despicable trend towards egalitarianism,[4] the bourgeoisie hailed this legal concept which no longer related to class and situation but rested on the legal equality of all citizens. The claim of the landed gentry fought by all classes as a product of the "horrible hypothesis of absolute sovereign rights"[5] to regulate relations in society by laws without having to consider traditional legal and social structures is seen to be coined by bourgeois theory into a *sovereign duty*. "Regulation by common law", it is said, relating this to the history of the welfare state "is characteristic of the fact that a state intends to do its best for the common good".[6] Whereas under the *doctrine of public good* of enlightened despotism, the state had to ensure that *salus publica* reigned,[7] it now has to fulfill the legal guarantee under whose protection the bourgeoisie could conclude contracts and acquire property on its own without superior tutelage, and altogether become as happy as it could possibly be.[8]

Seen through the eyes of the bourgeoisie, the principle of legal sovereignty thus promised not only the removal of traditional social barriers but also security from "sovereign arbitrary pleasure".[9] The conglomerate interest had *per se* to be directed at in fact achieving strict compliance with the statutory law. Just as it was indispensable for the landed gentry to see to it that its social policy, as moulded by the form of law, would not be modified at the hands of the now independent judiciary, the need for bourgeois legal theory arose to secure the law from being wrongly applied. The strict subjection of the judge to the law was thus also – from this point of view – an indispensable condition for success in the achievement of society's goals.

II.

The decision that judges be bound by the written law did not in itself mean that the way had been paved for attaining this goal. It was only believed for a short time that the

[3] JUSTUS FRIEDRICH RUNDE, DIE ERHALTUNG DER ÖFFENTLICHEN VERFASSUNG IN DEN ENTSCHÄDIGUNGSLANDEN, 10 (1805).

[4] JUSTUS MÖSER, PATRIOTISCHE PHANTASIEN, THEIL 2, 18 (1778).

[5] RUNDE, *supra* note 4.

[6] JOHANN ADAM BERGK in an editorial note to Cesare Beccaria, ABHANDLUNG ÜBER VERBRECHEN UND STRAFEN, THEIL 1, 72 (1798).

[7] OGOREK, *supra* note 1, particularly note 97, and the other references to be found in the index.

[8] LEOPOLD FRIEDRICH FREDERSDORFF, SYSTEM DES RECHTS DER NATUR AUF BÜRGERLICHE GESELLSCHAFTEN, GESETZGEBUNG UND DAS VÖLKERRECHT ANGEWANDT, 165 (1790).

[9] OGOREK, *supra* note 1.

https://doi.org/10.1017/S2071832200016722 Published online by Cambridge University Press

problem could be solved through the exclusion of statutory interpretation and judicial obligation, and in cases of doubt as to interpretation, by seeking the authentic interpretation of the legislator.[10] Nor was it only a problem that this concept was immediately confronted with limitations in resources; it remained for the court to decide whether a legal issue required clarification. In this way, possibilities of control, which it had been thought to check institutionally, were opened up to them, and experience soon showed that the courts resorted particularly to this possibility of inquiry whenever it seemed opportune to depart from the responsibilities of decision-making. The principle of supremacy of the law thus basically became the opposite, whenever, as one critic of the rules of interpretation put it, "at any moment an authentic decision is that which is consistent with the wishes of those in power".[11] Thus other means had to be sought to keep the judge within the ambits of the law without depriving him of his judicial capacity.

III.

Traditionally, and with justification, explanations of the way this problem was treated are sought in contemporary schools of thought on interpretation and sources of law. Those theories which were concerned with the method of application of the law or with the conditions under which a legal provision as such was created, can provide information as to how 19th century legal theory investigated the functions of legal administration. It comes as no surprise, in light of the foregoing account of background interests, when research reveals that legal hermeneutics were primarily bound towards the goal of limiting the judge's leeway in interpretation,[12] and that the school of legal sources (only temporarily disconcerted in its approach to systems) in the end continued in its direct course towards legal positivism.[13] In its understandable desire to bind the judge to the statute, the prevailing school of thought of that time had limited the tools of interpretation to *grammar* and *logic* and had been bound to the judicial syllogism. That doctrine seeks to reduce judicial activity to the linkage of the general premise (statute) and specific premise (case) and views judgments as a mechanical-logical consequence of such formal procedure.[14] This doctrine of legal interpretation ultimately contributed its share to the marginalisation of judicial activity, in that it created the dogma of completeness of the legal system and derived from that the view that every judicial decision is provided for and,

[10] HEINZ HÜBNER, KODIFIKATION UND ENTSCHEIDUNGSFREIHEIT DES RICHTERS IN DER GESCHICHTE DES PRIVATRECHTS, 21 (1980); OGOREK, *supra* note 1, references to be found under the entry "Auslegung, authentische".

[11] CHRISTIAN DANIEL ERHARD, VERSUCH EINER CRITIK DES ALLGEMEINEN GESETZBUCHES FÜR DIE PREUßISCHEN STAATEN, 254 (1792).

[12] Most recently again JAN SCHRÖDER, GESETZESAUSLEGUNG UND GESETZESUMGEBUNG (1985).

[13] See*, e.g.*, GUSTAV BOEHMER, GRUNDLAGEN DER BÜRGERLICHEN RECHTSORDNUNG, 2. BUCH., 1. ABT., 1956 (1951).

[14] See the references in OGOREK, *supra* note 1, 6.

https://doi.org/10.1017/S2071832200016722 Published online by Cambridge University Press

if the correct procedure is followed, can be easily determined.[15] The Weberian "formal rationality" of the legal system thus optimally matched the economic needs of the bourgeoisie, whose entrepreneurs (tradesmen, merchants, manufacturers) were only then ready to avail themselves in an innovative fashion of their newly acquired bargaining freedoms when the responses of the law and statutory guarantees remained unaffected by the judge.

The change then came, as indicated at the outset of this paper, towards the end of the century. The structure of the once homogeneous middle class society continued to diversify in the wake of fast progressing industrialisation. Entrepreneurs' associations, guilds, and agricultural organisations might have confronted the legal order with their varying socio-political interests and demanded both protection and assistance in realizing these interests. The political legislator did not wish to, or could not make allowances for these diverging interests, with the result that groups disappointed by official legislative policy began looking around for other saviours for their cause. The idea of an apolitical application of the law by means of strict logical operation of case-law thus finally started to crack. Within the doctrines of interpretation, this had found its downfall in so-called objective interpretation, which restricted the judge in his far-reaching discussion through the discovery of teleology of the law.[16] The teaching of legal sources did not shut itself off from new needs. Julius van Kirchmann, the "late" Jhering, Oskar Bülow (and after him the schools of free law and the jurisprudence of interests), paved the way for the inevitable and revolutionary conviction that neither the legislator nor the legal system could draft law for all eventualities and that it must rather be understood as a constantly changing product of social reality. This must not only be understood by the judge in the course of a process of recognition (*kognitive Verfahren*), but is also partly consciously shaped by him as well. This point was first made clear in 1885 when Oskar Bülow announced that not only the law but rather "the law and the judiciary" create "the law for the people".[17]

C. Flaws of the Account of Tradition

This suffices as to the process of development as seen today. The evidence for the evolution of legal decision-making from mechanical imputing to productive law creation have been repeated so often that a further exposé will not be given here. Nevertheless the following remarks should be an incentive to re-think the explanatory power of the

[15] GERECHTIGKEITSWISSENSCHAFT, AUSGEWÄHLTE SCHRIFTEN ZUR FREIRECHTSLEHRE, 8 (A. Kaufmann and A. S. Foulkes eds., 1965).

[16] See SCHRÖDER, *supra* note 13, 32.

[17] This estimation of Bülow still relies on common sense, see LARENZ, *supra* note 3. The quoted sentence is found in OSKAR BÜLOW, GESETZ UND RICHTERAMT, 48 (1885). On Bülow's judge's law theory (and its later revocation) see OGOREK, *supra* note 1, 257 and 269.

https://doi.org/10.1017/S2071832200016722 Published online by Cambridge University Press

traditional reconstruction of theory. Several primary considerations shall be dealt with first:

I.

The doctrine of the binding force of statutory law had derived its plausibility from the background of the territorial movement towards codification. The 19th century civil law was only to a very minor extent of particularistic origin. Its major part was derived from common tradition (this applied even for *Länder* – regions – which, like Prussia, already had codes) and thus was based on a source one and a half thousand years old. It remains, however, a dark secret of historical research into legal theory how one was to elicit a theory of the binding force of the law over the judge from the proclamations of the Roman jurists in the Digest, or from the laws of the Roman emperors.

II.

The historical actors' lack of knowledge of method appears no less strange. Upon first examination, it is not apparent why it escaped their powers of discernment that the complete statute represented a utopia, the closed legal system a model based upon certain premises, and the objective logical-mechanical application of the law an epistemological impossibility.

According to the general view, the 19th century with its fundamental scientific conception of the law, brought legal dogmatics to now almost unattainable heights. It is astonishing that the academics who accomplished this should have had so limited an understanding of the impossibility of logical-formal norm interpretation and application. The narrow-mindedness of our predecessors becomes a true enigma if one examines the reasons which apparently later led to the rejection of the "absurd fiction" (A. Menger) of the theory of completeness.[18] Alongside the general hint that the diversification in life styles would go beyond the imagination of the most gifted legislator, it is simply indicated that there are countless differences of opinion among lawyers, considerable variation in case-law and scholarship, boundless dependencies between legal opinion and the political stances of those who formulate it. In sum, there are numerous phenomena, which contradict any assumption of a complete and scientifically precise closed legal system.[19] There is so little doubt as to this conclusion that it appears improbable that it should have escaped the notice of earlier scholars. The bareness of the statutory law, variable court practice, the

[18] See KARL BINDUNG, STRAFRECHTLICHE UND STRAFPROZESSUALE ABHANDLUNGEN, VOL. 1, 34 (1915).

[19] Prototypical for this is Klaus Adomeit, *Methodenlehre und Juristenausbildung*, ZEITSCHRIFT FÜR RECHTSPOLITIK 176 (1970).

https://doi.org/10.1017/S2071832200016722 Published online by Cambridge University Press

doubtfulness of *communis opinio doctorum*, and the partiality in the administration of law constituted at the latest by the 18th century part of the standard repertoire of legal critique. Even under the aegis of the Pandectists a sense of an assured juridical order within the meaning of *ius certum* was not to be gained. Indeed, the knowledge that there were loop-holes in the legal order sparked off the restless effort towards statute and system, and undoubtedly these efforts were accompanied by far-reaching hopes for a gain in legal certainty. Whether this justifies the claim that statutory law or legal order were viewed as complete solutions, leading to a value-free logical schematic interpretation in the application of the law, seems at least doubtful and merits closer attention.

D. The Theory of Legal Interpretation as a Bridge Between the Binding Force of Statute Law and Judicial Adaption

If one turns to the theory of interpretation (*Interpretationslehre*) in the last century, it is quite apparent that it was of varying interest to legal theory at that time.

At the turn of the 19th century legal theory reached a level of maturity never again to be attained, producing a host of monograph-length treatments. Already in the second decade, however, the theme of interpretation seems to have lost its fascination. Soon thereafter it disappeared in the systematic network of text-books and compendia. It was only again at the end of the century that treatises on this subject began again to be published, but its former importance was not re-attained.[20]

This mere statistical observation can be seen in relation to the fate of the movement towards *codification*. The movement towards legality – equally inspired by *natural law* and *enlightenment,* demanded by the concepts of order in the sovereign state and filled with the citizens' feeling of freedom and equality – had at the turn of the century (after the speedy passing of the "legislative referée") turned attention to the legal conditions of the application of the law, and in this context, judicial interpretation of statutes. The immediately following disillusionment – depicted in the symptomatic Thibaut/Savigny debate – of the too far-reaching dreams of positivism meant that public interest in the school of statutory interpretation was lost for a long time – until the last thirty years, when it began to revive again in relation to new legislative projects.

I.

There would be little justification, however, for trying to derive from the developments pictured above the idea of the binding force of statutory law. It can only be said that at the

[20] OGOREK, *supra* note 1, 39.

https://doi.org/10.1017/S2071832200016722 Published online by Cambridge University Press

beginning of the century there was a clear recognition that the judge was so bound. This applies in the first instance to the sphere of criminal law, where, given the experience of arbitrary criminal proceedings based on the outdated *Constitutio Criminalis Carolina* (1532), the need for rationality in the law was particularly urgent.[21] There were also strict positivist concepts of interpretation in the civil law. Thus, Franz Schoemann pled for a strict interpretation of the text by the judge in his lengthy treatise of 1806, which earned great respect from his contemporaries. According to his aim of achieving "the greatest security possible for his subjects",[22] he seeks to bind the judge to the simple word, to "the bare development of the legal text, just as it is objectively pronounced".[23] Thus he too was a convinced apologist of the sovereignty of the law.

Schoemann was, however, the exception rather than the rule. Other authors, who at the same time were working on the theory of strict law, declared a much greater readiness to make a politico-legal comparison in favour of the judge bound by statute as against the chances of success of simple word analysis of the existing state of statutory law. State laws which were transposable and generally acceptable were all too rare a commodity to wager upon. Positive law was the idea behind the norm for which the people of that time sought – leaving aside the not so small group of those who did not pursue this line for reasons of self-interest. Daily experience taught, however, that there was far more justification on the positivist level in complaining about outmoded and despotic norms than regretting that they were not strictly applied. Thus the attraction of the historical school of law, according to whom "positive" did not *per se* mean statute (and certainly not national statute), rested to a large extent on the fact that the bourgeois hopes for a policy of legislation in the spirit of liberalism were not honoured by the government; attention thus had to be drawn to other possibilities of arbitrary law creation than those provided by the legislator.

II.

Even at the apex of the enlightened natural-law based codification movement, the national government concepts of positivism began to show signs of weariness. The substance for reform turned out to be too thin to provide enough nutrition for the life of the law. The critics who, for whatever reason, had not shared the same legislative dreams, began to render their counter-arguments. The principle of justice without discretion took priority over that of supremacy of the law, especially in the perception of the formerly privileged

[21] See *e.g.* HUGO HÄLSCHNER, GESCHICHTE DES BRANDENBURGISCH-PREUßISCHEN STRAFRECHTS, 165 (1855); ROBERT VON HIPPEL, DEUTSCHES STRAFRECHT, VOL. 1, ALLGEMEINE GRUNDLAGEN, 238 (1925); OGOREK, *supra* note 1, 41.

[22] FRANZ SCHOEMANN, HANDBUCH DES CIVILRECHTS, 84 (1806); on Schoemann and his theory of interpretation oriented on the literal wording (Wortlaut) see OGOREK, *supra* note 1, 49.

[23] SCHOEMANN, *id.*, 86.

https://doi.org/10.1017/S2071832200016722 Published online by Cambridge University Press

group. The legal teachings of J. Möser,[24] Fr. Runde,[25] J.G. Schlosser[26] and A. Müller[27] signify the attempt to confront the positive statute law, tainted by government tyranny, with an even more independent judge. They endowed him with custom and usage (Möser), the nature of the thing (Runde), or the natural acceptability (Schlosser) and made him aware of his function in reaching a settlement (*not* a decision) (Müller).

Among the bourgeoisie as well, the examination lens was more sharply focused on the freedom-curtailing effects of an all-too extensive programme of legislation. The concept of binding force of statute law which was in principle adhered to, was now differentiated in several ways. It was now pointed out that all legal regulations inevitably fail to be complete or entire, and the conclusion was drawn that the legislator, in his wisdom, would content himself with the creation of general principles and leave the remainder to the application of the law.[28]

As a means of ensuring the new understandings, resort was made to epistemology. J. H. Zirkler's "Revision of the most important Principles of the Civil Law" of 1807 ("Revision der wichtigsten Grundsätze des Zivilrechts"),[29] reads like a critical West German thesis of the seventies; at that stage we were beginning to (re-)discover the problem of inherent comprehension (*Vorverständnisproblematik*), the variable relations between issue and norm and that of semantic leeway. In this work, he uses methodological discoveries as an incentive for granting the conceivably free judge, responsible only towards his own sphere of expertise, the role of bearing society's development. Most of his critics did not go so far but began to search for other means of effecting certain corrections to national statutory law. Nothing was more appropriate in this situation than re-consideration of what had been passed on from Rome.

[24] See MOSER, *supra* note 5; OGOREK, *supra* note 1, 67.

[25] See RUNDE, *supra* note 4; OGOREK, *supra* note 1, 69.

[26] JOHANN GEORG SCHLOSSER, BRIEFE ÜBER DIE GESETZGEBUNG (1789) (reprint 1970); OGOREK, *supra* note 1, 71.

[27] ADAM HEINRICH MÜLLER, DIE ELEMENTE DER STAATSKUNST (1809); OGOREK, *supra* note 1, 74.

[28] "Nur das Allgemeine läßt sich als Wegweiser angeben, und dann kommt die gesunde Vernunft" (Only the general can be pointed to as a guide, and then comes healthy common sense) FREDERSDORFF, *supra* note 9, 420, see also 166, 169, 462. Further references, which prove – contrary to current ideas – the insight possessed by the theorists of that time into the necessary incompleteness of every legal rule, in OGOREK, *supra* note 1, 46, 58, 63, 141, 186, 219, 259, 315.

[29] The collection, which Johann Heinrich Zirkler published under the title mentioned in the text appeared in Gießen and Wetzlar.

III.

The *common Roman law*, which was temporarily pushed from the centre of attention, no longer appeared to the new awakening interest as a system of rules with its "remarkably correct" evaluation of human needs for freedom and action (Hufeland).[30] Its intensive care in *usus modernus* had also brought forth a developed *ars interpretandi*, whose tradition it suddenly seemed productive to follow. The condition under which access to the received rules did not remain blocked by constitutional obstacles, was a theory of application which presented the necessary free approach to the old rules as a faithful application of the norms, thereby ensuring that the judges' functions of interpretation could not be taken for interference in the matrices of political authority. This school of interpretation was found in the *interpretatio logica*, which was supposed to be a method of discovering the real intention of the legislator.

It was J.H. Boehmer[31] who, in the 18th century, worked as a pioneer in the establishment of logical interpretations as a category of interpretation for the bourgeois future. He extracted from the many differing traditional classifications a clear structure of principle, with his formulation that all interpretation was "*vel grammatica vel logica*". Moreover, he insisted that all interpretation be bound to the aim of conveying the *sensus verus legislatoris*. By doing this he served the needs of practicability and of conformity with the Constitution, without denying the complexity of the interpretative process. In contrast to what was generally understood by the modern meaning of *formal* logic, logical interpretation was to be reconstruction of the intention of the statute by consideration of *systematic, historical, political* and *other pertinent arguments*, with the help of which (probable) evidence could be extracted as to the meaning of a text. Thus, according to our current understanding, *interpretatio logica* had nothing to do with logic, and its aim (*voluntas legislatoris*) had hardly anything to do with the real intent of the legislator. Nevertheless, the connection between rationality and constitutional fidelity proved to be a programme of interpretation which could be achieved, and the development of which would lead to the main school of interpretation in the 19th century.

---

[30] GOTTLIEB HUFELAND. ÜBER DEN EIGENTHÜMLICHEN GEIST DES RÖMISCHEN RECHTS IM ALLGEMEINEN UND IM EINZELNEN MIT VERGLEICHUNGEN NEUER GESETZGEBUNGEN, THEIL 1, 24 (1815). Regarding the goal of the state "Erleichterung der Industrie, Freyheit und Unfehlbarkeit der ursprünglich beabsichtigten Würkung in bürgerlichen Geschäften" (Semler) ("relief of industry, the freedom and infallibity of the originally intended effect in civil society"); see OGOREK, *supra* note 1, 104.

[31] Justus Henning Boehmer, *Vorrede zu Barnabas Brissons Dictionarium Juridicum* in: EXERCITATIONES AD PANDECTAS, VOL. 1, 22 (1745); see OGOREK, *supra* note 1, 108 on the significance of the reduction of interpretive topoi to a "vel logica vel grammatica".

https://doi.org/10.1017/S2071832200016722 Published online by Cambridge University Press

IV.

A particularly significant example of the general trend towards maintaining the security-guaranteeing function of the statute through "logical" interpretation, without turning the judge into the mechanical applier thereof, is the school of interpretation of A.F.J. Thibaut, which appeared at the same time as Schoemann's grammatical-philosophical concept.[32] Its aim was to provide the interpreters of law with a common rule (Thibaut was speaking here only of received Roman law and not particular law), with which they could meet both the necessities of adaptation and the needs for legal security of that time. On this basis a hermeneutic developed which placed the judge totally in the service of certainty of application: on the basis of the statute he must delve into the spirit of the law and in this way discover the legislator's intent and the reasons behind the statute. In so doing, he had to take into account both speculations based on natural law as well as considerations of equity. It was not a question of the jurist acquiring *historical, political, mathematical, philosophical* and *economic* knowledge as a means of de-coding the statute. It was more a question of his finding his principia cognoscendi in the subject under interpretation. Extension and restriction were only to be applied under specific conditions, analogy and the rule *cessante ratione legis*, *cessat lex ipsa* were inapplicable in the vast majority of cases.[33]

These instructions, hostile to discretion, highlight only one side of Thibaut's theory of interpretation. After the necessity for legal certainty has been emphatically demonstrated and embodied in the relevant methodological rules it is then emphasized that it is not the mechanical application of the law, but rather the *intellectual* application which guides the construction of the theory. Completely different maxims are now associated with this point of view, which culminate finally in the assertion that the judge should "improve on the mistakes in the statute" under specific conditions.[34]

Thibaut thus wishes both: legal certainty and appropriateness in judicial decision. It was more apparent to him than his critics that this aim can only be achieved when certain deductions are made in both directions. The latter are today still concerned with proving that "logic" does not provide a sufficient process for applying the law, a view which Thibaut would certainly not have contradicted.

[32] ANTON FRIEDRICH JUSTUS THIBAUT, THEORIE DER LOGISCHEN AUSLEGUNG DES RÖMISCHEN RECHTS (2nd. ed. 1806, reprint 1966).

[33] For details see OGOREK, *supra* note 1, 126.

[34] THIBAUT, *supra* note 33, 93.

https://doi.org/10.1017/S2071832200016722 Published online by Cambridge University Press

V.

The view of the limited competences of programmes of across-the-board legislation and binding application – as seen from practical experience and supported by critics of the theory of cognition – had shown, similar to the re-discovered attraction of Roman civil law, the need for a legal hermeneutics which made the judge flexible as regards imperfect legal sources but did not let him develop into a master over statute and law. Faced with this task of counteracting blind mechanical application on the one hand, and unfettered judicial power on the other, the theories begin to reject their extreme positions in the course of the coming decade and to house these in a wide spectrum of middle-of-the-road opinions. Despite differing emphases there is general consensus that the judge should have neither too much nor too little discretion. The *interpretatio logica*, the method of discovering the purpose of the statute, provides a roof of legitimation under which almost all views on interpretation can be housed. Along with grammatical interpretation, it becomes the leading category of 19th century legal hermeneutics.

The well-tuned semantics of interpretation – grammar for wording, logic for meaning – outlived the gradual move from royal to parliamentary legislation, but not completely untouched, however. The question of meaning had applied itself to the *voluntas legislatoris* in the first half of the century and thus the question of the legislator's intention stepped back from the fore along with the alterations on the legislative level. The new aim of interpretation is the *will of the statute*, a totally "objective" quality distinct from the motives of those involved in the legislative process. In today's teachings on method, this change in direction is described as a move from the subjective to the objective theory of interpretation and explained as a qualitative leap, which provided the interpreters with great autonomy vis-à-vis the statutory basis. In fact, however, the method of interpretation has not altered. Even the question as to *voluntas legislatoris* had contained points of view which led away from the concrete historical legislative situation into the objective sphere of *ratio juris*. The significance and need for explanation of the described change can be seen in the fact that it was possible, at the end of the century, to address that which the question about the legislator's will had formerly concealed. It was important for the teachings of interpretation to make the abstract statute (in the case of Roman law, the rules unquestionably required adjustment) productive for those constellations of problems which would arise, without at the same time renouncing the principle of judgements bound by statute. The development of statute from the sovereign command to parliamentary decision and the related de-personalisation of the legislator was the constitutional pre-requisite to the *legislator's intent* being disregarded and to the *statute* itself being declared the authority in interpretation. The objective theory of interpretation makes allowances for changing needs in presentation, without establishing new methods of judicial decision-making.

https://doi.org/10.1017/S2071832200016722 Published online by Cambridge University Press

E. The Theory of Legal Sources as a Functional Response to the Relation Between Law and State

The question of how judicial decisions were to be related to the doctrine concerning the sources of law was more pointed than in the theory of interpretation. After all, however, it was foremost concerned with providing the meaning of that text under examination. Its objects of research were ultimately the reasons behind the existence of legal regulations and thus the problem of qualification of judicial dicta had to be examined. This applied all the more so when judicial decisions appeared not as statutory application or custom but rather as consequences of the system which was moving all the more into the centre of juridical attention. Whether the judiciary also in this case merely reproduced the law or whether it interfered in the realm of objective norms and itself made law, was part of the genuine centre of inquiry of the school of legal sources. The answers which were given to these questions were at the same time the discipline's responses to the questions of the share of judicial power in the state.

I.

The problem was solved relatively elegantly by reference to judicial *customary law (Richterliches Gewohnheitsrecht*). Its origins lay in the conscience of the people and a judicial decree was insofar *cognition of the law* but not the *source of law creation*.[35] Here reference was emphatically made to the cultural and not the political anchoring of the "spirit of the people" (*Volksgeist*), as a means of removing the political dynamite from the *Volksgeist* as law producer and freeing the theory of customs from the odium of democratic intrigues. Savigny, by no means an apolitical thinker, remarked in regard to the theory of customary law touching upon the state's legal monopoly: "Such a dangerous undertaking requires a particularly careful form of justification".[36] Puchta, to a certain extent the spiritual father of that theory of the creation of law, bemoaned innocently that "custom" had been "viewed as law deriving from the lower classes and thus a mistake, which in itself is capable of overthrowing the complete theory of our sources of law".[37] The silent power of "natural Volksgeist" was to be distinguished from the inconsiderable legal will of the "people in the political sense", and it is in this (and not in the equally silent but the more easily provable concurrence of the legislator) that Puchta and Savigny (and following on them the entire historical school of law) saw the foundation of custom.

[35] GEORG FRIEDRICH PUCHTA, DAS GEWOHNHEITSRECHT, THEIL 1, 166 (1828, reprint 1965).

[36] FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS, VOL. 1, 24 (1840).

[37] PUCHTA, *supra* note 36, 137.

https://doi.org/10.1017/S2071832200016722 Published online by Cambridge University Press

This legitimation was consistent with the historical school's understanding of law and government. Whoever saw law as a matter of private persons and thus regarded government intervention in this sphere as an anomaly, could only see creation of law by government as secondary and had to look for the original source of legal norms where they were being competently exercised. On the other hand, whoever saw statute and judicial decree as "declarations of intent of the law" by the sovereign, as Oscar Bülow did later, had to discount the "force of legal production of the disorganised mass of people" (Bülow's phrase for custom[38]) as destructive. The change in evaluation of custom as a source of law documents the assigning of law to the private or public sphere. Under the aegis of the historical school, hostile to the interventionist theory, a dignity unknown before was now attached to custom as a law-creating factor. However, to the extent that, in the last third of the century, the "strong" state began to take an interest in the effective resort to law in an individual case, custom lost its importance and the way became clear for (governmental) creation of law through judicial decree.

II.

There was still, however, a long way to go and it is interesting to note with what constructive fantasy the school of legal sources went to work on positively answering the question of the normative quality of judicial pronouncements, without at the same time propounding judicial competence beyond that supported by the constitution.

The relevant debate was thereafter secured by being labelled under the traditional heading of "court practice" (*Gerichtsgebrauch*). It was later referred to as *juridical law* or *academic law*, until towards the end of the century the term *judge-made law* (*Richterrecht*) became established as a term of the school of legal sources. This shift in terminology, which is not to be understood as a straight development in terminology but much rather a gradual and by no means inevitable rupture of a traditional semantic category, incorporating new characteristics, denotes a severance of the ways which were broken down by the theory of legal sources. Previously "custom" was the prototypical characteristic which made *usus fori* appear as a *sub-category* of customary law and was allowed to share in its function of legal certainty (*Rechtssicherheit*) and legitimation (*tacitus consensus*). Now the starting point shifted from the external characteristic of repetition to the internal one of competence. This could either have been a political competence, viewing lawyers in the first instance as representatives of state legal power, or could be interpreted as technical competence (*Sachkompetenz*), shifting the body of lawyers to the fore as *professional managers* with professional knowledge. It is obvious that "academic law" includes an emphasis on this latter point, in that it demands for the

[38] OSKAR BÜLOW, HEITERE UND ERNSTE BETRACHTUNGEN ÜBER DIE RECHTSWISSENSCHAFT. BEITRÄGE ZUR THEORIE DES GESETZES- UND GEWOHNHEITSRECHTS, 187 (1901); see OGOREK, *supra* note 1, 173.

https://doi.org/10.1017/S2071832200016722 Published online by Cambridge University Press

growth of the law, which is neither statute nor custom, compliance with a certain (i.e. academic) procedure in addition to the professionality of its practitioners.

The growth in "judge-made" law towards the end of the 19th century, which moved away from the official capacity of the decision-maker, is today celebrated by an ahistorical school of method (working with historical arguments) as the break-through of theoretical insight into the realm of judicial discretion. It is, however, in relation thereto no more than a triumph of the political variety of juristic law over the academic law of conceptual jurisprudence. To this extent it marks the break-down of the legal system under the pretext of eliminating monopoly of experts from the political system of law in order to administer this "internally", i.e. in the professional and academic sphere. With this, the dice were thrown against apolitical judges. After a century of effort to create an ideological but also institutional de-nationalisation of legal administration, the judge's decision was advanced to a "legal declaration of state power" (*Rechtswillenserklärung der Staatsgewalt*). This took place through the intellectual leadership of Oskar Bülow (for which he is still praised today) – and politics regained its judges.

III.

Puchta, with his scientific juridical law (*wissenschaftliches Juristenrecht*) had been able to avoid exactly this connection between the legal and the political. He too had seen that the problem was the constitutional grant to the judiciary to *apply* and not *create* law. If he did not wish to deny the normative quality of judge-made law against all the evidence, and wanted at the same time to maintain the independence (*Staatsfreiheit*) of the administration of justice, an independent source of validity for judge-made law had to be found, a source which fitted nonetheless into the system of political competences.

By means of his *scientific juridical law* (*wissenschaftliches Juristenrecht*), Puchta captured these opposing premises within an internally consistent model of the sources of law. The production of law was not only a matter for the government (otherwise the government itself could not be based on law) and the academic and practising jurist participated much more in it in two ways. On the one hand he *recognised* the national convictions concerning justice and law and formulated them as customary law. This was, however, only a reproductive and not a productive activity. Alongside this he derived new legal principles from existing ones. If he applied a rigorous procedure, it would reveal through this inquiry the inherent authority of legal principle, i.e. its *truth* founded on scientific grounds. In other words: a scientifically extracted conclusion acquires inherent authority and thus the quality of being a legal source (*Rechtsquellenqualität*) as its premises. In this way, the process of law creation was freed from state sanction and judge-made law nevertheless placed on a foundation beyond criticism (it was scientifically sound). This emphasis on the rational structure of law does not imply, as often presumed, the separation of legal content from its social context on account of an apolitical approach. It is rather the

contents which are carried forward in the final phase of deduction to the conclusions and which provide the latter with "inherent authority". The legitimation which comes from *Puchta's* process of derivation is thus result-oriented and not formal. Its political background is the author's liberal-conservative *stance*, in which visions of freedom hostile to intervention and concrete visions of order blend harmoniously.

IV.

Puchta's validity claim for legal science has only gained acceptance in an odd and contradictory manner. On the one hand, the productive energy of jurists, whose existence is seen as based on Puchta's authority, becomes a self-understood category of legal theory. On the other hand, his substantiation is only followed in part, and in fact entirely adopted by no one. This is not surprising among those who have sought their saviour in the constitutional statute and see its authority endangered by a scientific jurisprudence (*Recht der Wissenschaft*) which cannot be influenced (Welcker[39], Wächter[40]). Those who because of historical experience had maintained a mistrust of too free a power in the hand of jurists (Beseler[41], Reyscher[42]) could only accept in part the irrevocable truth of scientific jurisprudence. Others (Mittermaier[43], Pfeiffer[44]) fought on the frontline for legal control of all state power and were glad to seek refuge in references to the *dependence* of judicial activity *on statutory law*. Even they had to exercise restraint in the face of judge-made law *independent of statute*. But even such authors who wholly accepted Puchta's teachings will have somewhere indicated that the purely scientific legitimation of the new source of law had left behind a hint of uneasiness which they sought to take care of with certain additional qualifications. Thus Savigny, who had mentioned a scientific jurisprudence before Puchta (1814[45]) declares that it is essentially identical to customary law. Stahl is helped by the view that although science is creative it leans on that which is already

[39] KARL THEODOR WELCKER, DIE UNIVERSAL- UND DIE JURISTISCH-POLITISCHE ENCYCLOPÄDIE UND METHODOLOGIE, 569 (1829).

[40] CARL GEORG WÄCHTER, HANDBUCH DES IM KÖNIGREICHE WÜRTTEMBERG GELTENDEN PRIVATRECHTS, VOL. 1, 353, 636, 667 (1839), VOL. 2, 47 (1842).

[41] GEORG BESELER, VOLKSRECHT UND JURISTENRECHT, see *e.g.* 304, 351 (1843); see OGOREK, *supra* note 1, 243.

[42] Reyscher dealt critically with the question of law production by jurists in many individual publications, see details on this in JOACHIM RÜCKERT, AUGUST LUDWIG REYSCHERS LEBEN UND RECHTSTHEORIE 1802-1880 (1974).

[43] CARL JOSEPH ANTON MITTERMAIER, GRUNDSÄTZE DES GEMEINEN DEUTSCHEN PRIVATRECHTS, 117 (5th ed., 1837).

[44] BURKHARD WILHELM PFEIFFER, PRACTISCHE AUSFÜHRUNGEN AUS ALLEN THEILEN DER RECHTSWISSENSCHAFT, especially VOL. 3, 197 (1831).

[45] In his famous polemic against a civil law codification: FRIEDRICH CARL VON SAVIGNY, VOM BERUF UNSERER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT (1814); see OGOREK, *supra* note 1, 214.

https://doi.org/10.1017/S2071832200016722 Published online by Cambridge University Press

given.[46] And Thöl[47], who followed Puchta most faithfully, continues from the point where Puchta speaks of the consequential derivation from prior *existing legal principles* by insisting on a deduction from *existing legal texts*.

Where, on the other hand, it is not a matter of the *reasons behind* scientific jurisprudence but rather merely of reference to its existence, Puchta is followed light-footedly. His jurist's law serves as the generally accepted answer to the question of who in the nation-state is to undertake the adaptation of the law to social needs. Practice shows its claim to free departure from prior decisions under the modest attire of scientific examination.

The universal suitability of the model of law creation by jurists can be seen particularly clearly in the work of Rudolph von Jhering. Although this reveals a clear caesura on account of the author's conversion from conceptual jurisprudence to a legal sociology, the turning away from a conception of legal entities (*Rechtskörper*) which grow outwards from inside, and the turning towards the interests, needs and aims of society according to which the function of law is arranged, brought with it no adaptation of the teachings on the growth of law with regard to participation by jurists.[48] In the early Jhering, jurists deduce with help of the natural-historical method, in the late Jhering they proceed on the basis of observations of societal relations. Its sphere of action was no longer the system, but life, and its instrument of management no longer construction, but social need. Yet it was only the *content* of law which altered with this change in the law. The actors who discovered this remained, on the other hand, unchanged.

V.

Scientific jurisprudence, legitimized by the truth of its reasoning, was at approximately the same time accompanied by another model of explanation which interpreted the judicial decision as the institutional realization of the state's will to generate law. J. Fr. M. Kierulff, its earliest and in all probability most eminent purporter, no longer wishes to leave the achievement of the "best" to the silently operating powers of a mysterious spirit of the people, but rather to involve the jurist actively and productively in the shaping of the legal doctrines of a particular state at a particular time.[49] Law constitutes for him the "satisfaction of a felt need" by the state, and the jurists, and in particular the judges, are

[46] FRIEDRICH JULIUS STAHL, DIE PHILOSOPHIE DES RECHTS, VOL. 2, 2. SEC., 201 (5th ed. 1878).

[47] HEINRICH THÖL, EINLEITUNG IN DAS DEUTSCHE PRIVATRECHT, 141 (1851); see OGOREK, *supra* note 1, 217.

[48] On the various periods of Jhering and their indifference vis-à-vis his ideas on the emergence of law see OGOREK, *supra* note 1, 221.

[49] JOHANN FRIEDRICH MARTIN KIERULFF, THEORIE DES GEMEINEN CIVILRECHTS, xxii (1839); see OGOREK, *supra* note 1, 232 on Kierulff's theory of the right of judgment (Urteilsrecht).

https://doi.org/10.1017/S2071832200016722 Published online by Cambridge University Press

the actors predestined to fulfill that need. The state is de-personified; law as the will of the state is therefore general and objective and does not need any other justification than its mere existence. The quality of the *law* is indifferent towards its contents; there may be an *immoral*, but no *unjust law*. Legitimation is therefore, in contrast to scientific jurisprudence, only linked to the *external* fact of the existence of judicial decisions.

Measured by the yardstick of what is, and not of what should be, statutes are denied to have any legal quality *as such*. They only exist as an *abstract possibility* of realisation of the law. Only once it has been achieved through a process does the potential change into law, the realized will of the state.[50]

The reduction of law to the realized will of the state forms the basis of other jurists' conceptions of law as well, although they differ fundamentally from Kierulff's theory as well as from each other. For example, the ultra-conservative Maurenbrecher sees the basis of validity of judge-made law in the office of its producers, which he at the same time considers sufficient legitimization for the judge to participate in shaping the sociological and political relations of the state.[51] From a totally different – namely liberal-democratic – point of view, G. Beseler diagnosed the existence of judge-made law and pled emphatically against contra-factual denial of this phenomenon.[52] When he attributes the existence of jurist's law to the power of the jurists, then he does this – differently from Maurenbrecher – not in praise, but with a clear critical intent. His aim is to prove the inadequacy of existing law and to offer as a corrective a law of the people drawn from real life.

Only the diagnosis, however, and not the cure suggested by Beseler's overall approach has been accepted. Jurist's law as the consequence of jurist's power becomes the affirmative explanatory model in the years to follow. Against the background of a changed political theory[53], which tried to adapt the failed hopes of a revolutionary liberalism to the reality of a strong state, legal theory effectuated the inevitable compromise with political power as well. The specific contribution of the law is more and more seen not as a protection from, but a connection with, the state. R. Stinzing discovered in 1876 the necessary reciprocity between law and power.[54] With reference to judicial activity this explains that it is no longer the substantive quality of a decision that counts but the validity of its capacity to settle quarrels, which itself is guaranteed through power: "The forces of order find their fulfillment in fraternity with power". (Stintzing)

---

[50] KIERULFF, *id.*, 188. Similarly STAHL, *supra* note 47, 204, 207.

[51] ROMEO MAURENBRECHER, LEHRBUCH DES HEUTIGEN GEMEINEN DEUTSCHEN RECHTS, 54, 57 (2nd ed. 1840).

[52] See on this BESELER, *supra* note 42, 299.

[53] See OGOREK, *supra* note 1, 246.

[54] RODERICH STINTZING, MACHT UND RECHT (1876); see OGOREK, *supra* note 1, 247.

https://doi.org/10.1017/S2071832200016722 Published online by Cambridge University Press

In coming to terms with political reality, for the vast majority of its professional representatives the law also lost its fear of social reality. In the same year in which Jhering published his "Purpose in the Law" (Zweck im Recht, 1877), P. Müller calls upon the judge to emancipate himself, with the necessary flexibility, from often one-sided legislation and to look for his "case-norm' within society's needs.[55] This demand to consider societal needs did not, however, constitute a plea for more social (distributive) justice, but the "need" was on the contrary seen in undermining the respective legislative moves of local parliaments (*Landständische Parlamente*). As in earlier conceptions of judge-made law, the aim was to secure vested rights, not to use the judiciary for social change.

VI.

The notion of the scientific character of the hermeneutical method transposed the jurist's law from the area of *unlawful* inventions into the realm of necessity and rightness. The theories of "real existing" jurist's law made the *factual* existence of an extra statutory generation of law the central point of their considerations, and thus crossed the bridge to the prevailing conditions of power within society. These theories received their normative aspect mainly from Oskar Bülow. On the basis of procedural considerations on the problem of res judicata, he made the judicial creation of law, hitherto identified as unavoidable, now seem desirable and appropriate for the role assigned the judge by the state. Bülow's originality therefore does not consist in pointing out the phenomenon of *judge-made law* and even less in the methodological "discovery", often attributed to him, that applying the law involves more than reaching a logically determined interpretative conclusion. His contribution resides rather in the fact that he amalgamated these insights which had been transposed through the whole century into a theory of judge-made law geared to the particular situation of his time. Moreover, the political conformity of his theory did away with the former obstacles to its acceptance. The judicial decision becomes the declaration of the *legal will of the state*. The judge becomes the bearer of state power, not in the sense of the theory of separation of powers as an institutionalised guarantee of the balance of power, but as an independent though integrated organ of enforcement of the unitary power of the state. Differing from the views offered by liberalistic legal theory over decades, the conceptions of judge-made law based on Bulow's model no longer regard the state monopoly of power as a potential threat to the private legal sphere. Moreover, the civil liberties were to be enhanced *within* the state and with its help, and to be secured over and above transgressions by the fourth estate.

[55] PAUL MÜLLER, DIE ELEMENTE DER RECHTSBILDUNG (1877); see OGOREK, *supra* note 1, 252.

https://doi.org/10.1017/S2071832200016722 Published online by Cambridge University Press

VII.

Bülow's concept of a creative and innovative judicial power had been further developed by the Free Law Movement into a power to decree law independent of statute. But Bülow himself, with a changed understanding of the state and horrified by the radicalism of his successors, published a last article one year before his death in which he declared war on all legal theories hostile to statutory law and advocated an absolute fidelity of the judge to the statute. The Free Law Movement had at that time however already been relegated to a side-track of legal development by the civil law jurists who were united by the success of codification. The Free Law Movement continued to strive for a good while, but drifted more and more away from the centre of legal academic activity.

No radical tendencies could be attributed to the pandectist approach within the last third of the 19th century. It neither denied the judge the authority to develop the law nor totally accorded him that power. It rather supported the statutory law in principle, but took into account all the arguments put forward in the preceding debates on judge-made law and deployed them towards limiting the binding force of statutory law.

F. The Controversy of the Competences of the Judiciary and the Administration

Beside the theories on interpretation and sources of law, there was a third systematic heading under which learned doctrines of the 19th century disputed the function and boundaries of the judicial office. This discussion focused on the question whether or not the judge's competence included oversight with respect to *violations of private rights* by the *government* or by *administrative agencies*. The fundamental question was whether the courts should exercise a monitoring function vis-à-vis the executive.

The so-called *theory of the judicial state (Justizstaatstheorie*) supported a very wide judicial competence within this dispute. According to the motto "in protection of civil liberties ... as much as possible within the sphere of the machinery of justice" (Wächter),[56] they linked the competence of courts to the notion of a violation of private rights. They contended that everybody – including the state in particular – who infringes a legal position attributable to a private person is called to justify his proceedings before the law and therefore before the judiciary.[57] This aim of establishing a tighter control over state administration through the courts was opposed by the executive's intention to secure its fields of activity against any external interventions. The arguments of the purporters of the judicial state theory therefore operate on two levels. On the one hand, they try to extend the jurisdiction of the judiciary to as many subject matters as possible, on the other hand

[56] See WÄCHTER, *supra* note 41, Vol. 1, 88.

[57] On the justice state theory see OGOREK, *supra* note 1, 283.

https://doi.org/10.1017/S2071832200016722 Published online by Cambridge University Press

they are keen to demonstrate that broad judicial competence does not involve any infringement of administrative interests.

Invasions into the administrative sphere by the judiciary, it is assured, are not anything to be afraid of as the courts were not allowed to take into account any administrative considerations in their decisions. The facts of the case had to be assessed solely with respect to the infringement of private rights and to be determined according to the relevant statute. Concern as to side effects, extra-legal causes of the dispute, public good, purposes, politics, future perspectives – all these aspects were to be removed from the judge's assessment. His task was to be limited to subsuming the particular case under the statutory norm. Just this, however, was questioned by the opponents of judicial oversight of state administration (judicial review). With the claim for omni-competence the courts were made into a "government within the government". The judge became the real sovereign. Furthermore, a decrease in efficiency was to be expected because court officials were neither through their training nor methods able to assess administrative subject matters with the necessary speed and flexibility. The need for control could be catered to by forums of recourse within the administration. It was incompatible with the interests of the state to have its policies (which are geared to actual goals and needs) subjected to the static approach of the law. It was even less acceptable that state politics be replaced by judicial politics. The courts should therefore concern themselves with private disputes. If the state or its administrative organs were involved the courts were to stay out of the matter.

These worries had to be overcome from the point of view of supporters of the judicial state theory. They did this by sketching the picture of the *apolitical judge*, who only operates logically-mechanically and deductively: a being without power and will, whose main virtues consists in his functional invisibility. It is this picture of the judge, which survived through the period of Civil Law Reception and encouraged commentators of a later stage to reproach the judicial theory of the past century with a fundamental misapprehension of judicial activity. The main aim of the judicial state theory to separate politics and the machinery of justice in the most rigid manner so as to keep civil rights away from the dangerous area of state interests, is thereby utterly misunderstood. Those authors were occupied with nothing less than depicting judicial activity on the methodological level as "purely formal", as a "logical function" or as a "non-volitive act of recognition". Only through the *political* attempt to keep the civic machinery of justice clear of all state demands did the judicial decree become a powerless and objective "declaration of the law". Bourgeois liberals like Feuerbach, Wächter, Mittermaier, Jordan, Klüber, Bähr, who in other contexts had quite a thorough knowledge of the creative element within judicial decision-making, thus became supporters of the "bouche de la loi" doctrine within the framework of the debate on competence.

https://doi.org/10.1017/S2071832200016722 Published online by Cambridge University Press

G. Conclusion: Images of the Judiciary as Legal Policy Arguments

The foregoing discussion has sought to examine, through various spheres of legal discourse, the image of the judiciary in the 19th century. It has emerged that any single consistent answer, independent of the context of discussion, would be a wrong one. According to whoever argued in favour of whatever aim in whatever context, their opinions as to the function of law and the description of judicial activity varied (often within the works of the same author) from that of an unproductive application of norms to creative development of the law, and the other way around. Thus the logical-mechanical view of judicial activity as the part of legal doctrine which was concerned with the rules of statutory interpretation could possibly be traced back as a marginal phenomenon at the beginning of the century, and in any event as a late product of the codification movement. Legal hermeneutics, on the other hand, in a manner quite similar to the theory of the sources of law, in its further development offered a whole series of theoretical "repositories" for judicial creation of the law. The main focus for the evaluation of free interpretation was the category of logical interpretation (*logische Auslegung*), a procedure of indicating the contextual meaning in which the judge, on the basis of varying criteria, reconstructed the legislator's will through conjecture. At least with the *Pandectists*, who were concerned with sources of Roman law, logical interpretation of the law was interpretation imputed into rather than extracted out of the text. The logical interpreter was, in the view of his critics, one "who did not take inconsiderable liberties with the text." (Savigny). Nevertheless, precisely this "logical" function of judicial decision-making found its place as synonym for unthinking compliance with a command. The term "logic" had become altered outside of the context of legal interpretation, becoming ever more reduced to formal derived logic. This localised all purpose and value-linked considerations into the process of premise-finding and limited itself to drawing correct conclusions from given hypotheses. Logic thereby grew poorer but also more stringent, and the logical process of decision-making became criticisable only from the standpoint of mistakes in reasoning, not affecting power.

Within this context, the reference to the purely logical function of judicial decisions comprises the notion of its lack of political dangerousness. It is no coincidence that the figure of the apolitical judge, the logical executor of given norms, does not appear in the theories of interpretation or sources of law but rather in the sphere of theory of the state, where political spheres of competence are at stake. In the debate on jurisdiction of the judiciary and administrative entities the judge developed into a powerless and will-less being, an apolitical logical-mechanical application machine (*Subsumtionsautomat*): he was *en quelque façon nulle*. The more powers were promoted for him, the more clearly defined his control function became vis-à-vis government, and the more imperceptible he became as an independent power. Around the middle of the century, when the so-called theory of the judicial state (*Justizstaatslehre*) demanded total control of government actions by the courts (this being at one stage actually admitted), the judge did not appear in this debate

https://doi.org/10.1017/S2071832200016722 Published online by Cambridge University Press

as the exerciser of power. In his place sat a technician whose judgment was the product of pure cognition, a logical-mechanical performance.

The other side of the same coin is illustrated by the concepts of judge-made law of the theory of the sources of law in the second half of the century. Just as the picture of the apolitical (i.e. politically undangerous) judge acting in his logical-mechanical manner was the result of a policy of limiting what was seen as hostile state power, so was judge-made law (that is, the view that judges too produced generally binding objective principles) the result of an attempt to come to terms with exactly this government power. He who saw a judgment as a "legal declaration of state power" (Oskar Bülow) had no reason to insist on the autonomy of law. Judge-made law was state law, and the apolitical administration of justice a dysfunctional category.

Methodological analysis has not proved applicable to any of the pictures of the judiciary. Neither was the "logical function" of the debate on competence the consequences of an over-taut model of imputation, nor did the discovery of judicial power in creating law result in dependencies on either prior knowledge or evaluation in judicial decision-making. Insofar as arguments were concerned at all with methodology, this was in support of an already existent conception of the judiciary and not in creation of a new one.

The result is thus that 19th century judicial theory cannot claim to have produced any evolutionary models nor to have made any great advances in knowledge. Today's reconstructions of theory could gain in explanatory precision if they departed from their visions of "beginning" and "end" of a developmental process (as described at the beginning of this paper) and, freed from pressures to fulfill their own prophecy, applied themselves to the complexity of history.